॥ आ नो भद्राः क्रतवो यन्तु विश्वतः ॥
"Let noble thoughts come to us from every side."
Rig Veda

COMPILATION OF
LANDMARK JUDGMENTS
OF
HIGH COURTS OF INDIA
ON
FAMILY MATTERS

When centuries old obstructions are removed, age old shackles are either burnt or lost their force, the chains get rusted, and the human endowments and virtues are not indifferently treated and emphasis is laid on "free identity" and not on "annexed identity", and the women of today can gracefully and boldly assert their legal rights and refuse to be tied down to the obscurant conservatism, and further determined to ostracize the "principle of commodity", and the "barter system" to devoutly engage themselves in learning, criticizing and professing certain principles with committed sensibility and participating in all pertinent and concerned issues, there is no warrant or justification or need to pave the innovative multi-avenues which the law does not countenance or give its stamp of approval. Chivalry, a perverse sense of human egotism, and clutching of feudal megalomaniac ideas or for that matter, any kind of condescending attitude have no room. They are bound to be sent to the ancient woods, and in the new horizon people should proclaim their own ideas and authority. They should be able to say that they are the persons of modern age and they have the ideas of today's "Bharat". Any other idea floated or any song sung in the invocation of male chauvinism is the proposition of an alien, a total stranger – an outsider. That is the truth in essentiality.

Hon'ble Mr. Justice Dipak Misra
Shamima Farooqui V. Shahid Khan, (2015) 5 Supreme Court Cases 705

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COMPILATION OF LANDMARK JUDGMENTS OF HIGH COURTS OF INDIA ON FAMILY MATTERS

"A Family Court Judge has to be a learned man in Law, in Psychology, in History, in family and in perception."

Justice Dipak Misra

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"Do not take a marriage for granted. There has to be an effort, there has to be an endeavour, there has to be a constant attempt to sustain it. The moment people take marriage for granted, there is a disaster."

Justice Dipak Misra

Marriage is an institution to save us from the tyranny of sex and also for the progression of the human race. This is the status of the Institution of marriage. The Institution cannot be degraded. The Institution cannot be denounced and it is the duty and obligation of every generation to try and to sustain the Institution. The Institutions are not maintained, the Institutions are sustained. The marriage being an Institution, it is to be sustained.

Justice Dipak Misra

PREFACE

JUSTICE D.N. PATEL
Judge, High Court of Jharkhand &
Executive Chairman, Jharkhand State Legal Services Authority

"Only such a householder who practices restraint in taking care of his family shall acquire family happiness and achieve higher social status."

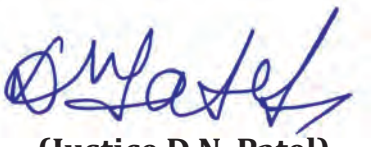
RIG VEDA

Almost everything of lasting value in society has its root in the family. Family disputes have many dimensions: maintenance and alimony, custody of children, visitation rights, marriage & divorce and stridhan. These disputes have potentiality to ruin the innocence of child and esteem of man and woman.

The dispute in family is not uncommon but the speed with which family disputes are reaching courts is a matter of concern. The responsibility of a Family Court Judge is much more than that of other judges. A Family Court judge is not expected to merely record evidence, hear argument and pass judgement. The approach of Family Court judge should be conciliatory.

Hon'ble Mr. Justice Dipak Misra, Judge, Supreme Court of India has said in Voluntary Health Association of Punjab Vs. Union of India [(2013) 4 SCC 1 para 31] that "the innocence of a child and the creative intelligence of a woman can never ever be brushed aside or marginalised. They play a seminal role in the society. Civilisation of a country is known by how it respects its women."

In family disputes the worst sufferer are children and the women and the matters concerning their future are highly sensitive. They should be dealt with equal amount of sensitivity by all stake holders. The family is the foundation of society and a dispute in family has its impact on the society also. A Family Court Judge should be aware of human behaviour. Likewise, the role of Mediators and Counsellors is also important. Therefore, this is an effort to compile the landmark judgements of High Courts of India on almost all subjects of family courts for guiding and assisting all the stake holders. The sensitisation of all the stake holders of family court matters is the need of the hour.



(Justice D.N. Patel)

जाड्यं धियो हरति सिञ्चति वाचि सत्यम्
मानोन्नतिं दिशति पापमपाकरोति।
चेतः प्रसादयति दिक्षु तनोषि कीर्त्तिम्
सत्संगतिः कथय किं न करोति पुंसाम्।।

"Tell me, what is there that cannot be achieved for a human being through the company of great and noble persons (satsanga) ? Such company removes the stagnation of the intellect.. Constant interaction with the great men fills our tongue with truth.... gradually the capacity and tendency to speak untruth vanishes. Being present in the presence of such enlightened souls enhances our own self respect and stature. Getting in constant touch with such seers washes away all our sins. Satsang invigorated our mind beyond words. Such friendships enhances our fame also in all direction. Tell what more is necessary for an honest and upright person ?"

Bharthruhari Neethisathakam

"A Family Court Judge has a role of a mediator, a role of a conciliator and a role of a settler."

Justice Dipak Misra

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SMT. VEENA PANDA VERSUS DEVENDRA KISHORE PANDA

Allahabad High Court

(Before Hon'ble Mr. Justice N Mehrotra & Hon'ble Mr. Justice A K Singh, JJ.)

Smt. Veena Panda

vs

Devendra Kishore Panda

Decided on 22 February, 2006

...as long as matrimonial ties subsists between the parties, the wife is entitled to live in the matrimonial house or in a separate building. The wife should not be relegated to a lower standard of living than that the husband enjoys. She should be given maintenance according to status of her husband. While considering the question of ''maintenance pendente lite' under Section 24 of the Hindu Marriage Act its definition as given in Hindu Adoption and Maintenance Act should be adopted and some significant points should necessarily be taken into account such as (i) position and

status of the parties, (ii) reasonable wants of the claimant towards food, clothing, shelter and medical attendance etc., (iii) income of the respondent, (iv) income, if any, of the claimant, (v) number of persons the respondent is obliged to maintain. As regards quantum of maintenance it may be from 1/3rd to 50% of the income of the respondent but no rigid formula can be fixed. It may differ from case to case. The contributions towards General Provident Fund and payment towards instalments of loan etc. should not be permitted to be deducted to work out the carry home salary. The maintenance should not be refused on the ground that the wife can pull on for some time by selling her ornaments etc.

JUDGMENT

Alok Kumar Singh, J.

1. Smt. Veena Panda alias Seema Panda has preferred two first appeals (1) First Appeal No. 88 of 2005 Under Section 19 Family Court read with Section 28 of the Hindu Marriage Act, against the order dated 16.09.2005 passed by the Principal Judge, Family Court, Lucknow in Misc. Case No. 38-C/2004 under Section 24 of the Hindu Marriage Act connected with Suit No. 196 of 2004 (Smt.Veena Panda v. Devendra Kishore Panda) under Section 9 of the Hindu Marriage Act for restitution of conjugal rights and (2) First Appeal No. 87 of 2005 against the same common order dated 16.09.2005 passed by the Principal Judge, Family Court, Lucknow in Misc. Case No. 189-C/2004 under Section 24 of the Hindu Marriage Act connected with Regular Suit No. 407 of 2004 Devendra Kishore Panda v. Smt. Veena Panda, under Section 10 of the Hindu Marriage Act, for judicial separation. Both the appeals between the same parties dealing with pendente lite maintenance and litigation expenses are being taken up together for convenience.

2. The facts, wrapped in brevity, are that on 11.02.2004 the appellant, Smt. Veena Panda (wife) filed a case (Suit No. 196 of 2004) under Section 9 of the Hindu Marriage Act for restitution of conjugal rights against her husband, Sri Devendra Kishore Panda (respondent) and also moved an application on 11.02.2004 for pendentelite maintenance and litigation expenses under Section 24 of the Hindu Marriage Act seeking Rs. 15,000/- per month as maintenance and Rs. 11,000/- for litigation expenses. On the other hand the respondent-husband, Sri Devendra Kishore Panda, filed a case (Suit No. 407 of 2004) on 02.04.2004

against his wife (appellant) under Section 10 of the Hindu Marriage Act for judicial separation. In this case also the wife (appellant) filed similar application on 16.07.2004 for pendente lite maintenance and litigation expenses of similar amount. Both these applications for pendente lite maintenance and litigation expenses were decided by the learned Principal Judge, Family Court, Lucknow by passing the single impugned order dated 16.09.2005 rejecting the prayer for pendente lite maintenance while allowing Rs. 2500/-each as litigation expenses in respect of both the cases. Feeling aggrieved by this order the aforesaid first appeals have been preferred by Smt. Veena Panda against her husband, Devendra Kishore Panda.

3. After hearing both the parties the learned Principal Judge, Family Court found that Smt. Veena Panda was admittedly living with her husband [an IPS Officer now voluntarily retired w.e.f. 28.11.2005] in official residence No. 5/2 Senior Police Officers Colony, Vibhuti Khan, Gomti Nagar, Lucknow.

4. The following details of salary as on January, 2005 were furnished by Sri D.K.Panda himself in the lower court during the course of arguments, which are also acceptable to Smt. Veena Panda as per paragraph 4 of her affidavit dated 15.02.2005 filed in lower court:

(1) Basic pay : 22400

(2) DA : 13511

(3) CCA : 150

(4) Other allowances : 375

TOTAL : 37544/

The learned Judge Family court worked out permissible deductions as under:

(1) GPF : 2500

(2) G.I.S. : 120

(3) H.Rent : 600

(4) Use of car : 500

(5) Income Tax : 7500

(In proportion of income tax payable on the total income) Thus total carry home salary as on January, 2005 was worked out to be Rs. 37544.00 - 11220.00 = 26324.00 per month.

5. But he found that the wife was not entitled for any pendente lite maintenance because admittedly she has been living in the aforesaid house with her husband and her all the basic needs are being fulfilled. She was not dependent on anybody for her basic needs. Therefore, the prayer for pendente lite maintenance was rejected. However, keeping in view the monthly income of the husband the learned Judge awarded litigation expenses of Rs. 2500/- each in both the cases pending between the parties.

6. Heard learned Counsel for the parties and perused the record. After the arguments of the learned Counsel for both the parties were concluded on 23.01.2006 the respondent, Sri Devendra Kishore Panda, made a request for hearing him in person. He was permitted to argue in person but his arguments remained incomplete and for that purpose 7th February, 2006 was fixed. On 7th February, 2006 the respondent did not appear and the case was adjourned to 14.02.2006. On 14.02.2006 the case was got adjourned and 21.02.2006 was fixed. On 21.02.2006 respondent again did not appear in person and therefore a last opportunity was given to him fixing 22.02.2006 making it clear that if the respondent desires to argue in person he may do so on 22.02.2006 and the case will not be adjourned on any ground. The respondent

did not avail the last opportunity extended to him to hear in person although the arguments of his counsel had already been concluded, and on 22.02.2006 the respondent again did not appear. In these circumstances judgment was reserved.

7. The following case laws have been relied upon by the learned Counsel for appellant:

I. Baby Rashmi Mehra v. Sunil Mehra . In this case it was held that no rigid formula about percentage of income can be fixed for giving maintenance. The quantum depends upon the status and income of the parties. The leading case of privy council, Ekradeshwari v. Homeshwar reported in AIR 1929 privy council 128 was also referred to in this case wherein it was observed that maintenance depends upon a gathering together of all the facts and the situation, amount of free estate, the past life of the married parties and the family and survey of the members, on reasonable view of change of circumstances, possibly required in future, regard having of course be given to the scale and mode of living and the age, habits and wants and class of life of the parties. Our Hon'ble Supreme Court in the case of Kulbhushan v. Raj Kumari expressed its agreement with the aforesaid observation of the privy council. In this case it was also observed by the single Judge of Delhi High Court that in one case the maintenance may be 25% while in another it may be 50% or even less or more. The quantum depends upon the position of status of the parties including financial position of the defendant and the reasonable demands of the claimant or any other factor. There can be no quarrel with the principle laid down in these cases.

II. Dev Dutt Singh v. Rajani Gandhi 1984 (1) DMC Delhi 212. In this case it was held that if the husband is living in his own house the wife is also entitled to accommodation in the same house or in a separate building. There can be no dispute in respect of this principle also.

III. Dinesh Giju Bhai Mehta v. Smt Usha Dinesh Mehta 1979-M L R 209 Bombay- (DB). In this case the Division Bench of the Bombay High Court held that rule 1/5 of net income of husband is unreasonable because wife and husband are equally partners.

IV. Kalaben Kalabhai Desai v. Alabhai Karamshibhai Desai 2000(2) Femi Juris 337. The Hon'ble Single Judge held in this case that normal rules applied is to award 1/3rd of income of husband to wife and child from the date of application under Section 24 of the Hindu Marriage Act.

V. S.S. Bindra v. Tarvindra Karu . In this case the learned single Judge opined that net income of the husband may be divided equally between family members with one extra portion/share being allotted to earning spouse.

VI. Chandrikaben Chhanalal Patel v. Rameshchandra Chandilal Patel 1986 (1) DMC Gujarat 232. The learned Single Judge observed that contribution towards provident fund or payment of installments towards loan cannot be deducted from the total earning while fixing maintenance under Section 125 CrPC.

VII. Dharmi Chandra v. Smt Sobha Devi . It was held that general rule is that wife should not be relegated to a lower standard of living than that which the husband enjoys.

VIII. Shivani Chattopadhyaya v. Siddnath Chattopadhyaya 2001 AII CJ (S.C) 174. In this case the Hon'ble Supreme Court while determining the interim maintenance under Section 125 CrPC for wife and child granted 6000/- Rupees as interim maintenance. In this case the husband was D.I.G. and there was dispute in respect of his entire income.

IX. Rekha Deepak Malhotra v. Deepak Jagmohan Malhotra . In this case allegations were made by wife against adulterous husband and of cruelty which was not condoled by wife. The plea that wife left matrimonial home voluntarily was not found tenable and, therefore, wife was held to be entitled for maintenance. Keeping in view the provisions of Section 18 of the Hindu Adoption and

Maintenance Act in respect of quantum it was held that it should aid the wife to live in a similar style as she enjoyed in the matrimonial home.

X. Smt. Renu Jain v. Mahabir Prasad Jain AIR 1987 Delhi 43. In this case it was laid down that the wife and child are entitled to live according to the status of the husband.

XI. Smt. Tarun Batra v. S.R. Batra . According to the facts of this case on further deterioration of relations and on becoming difficult to stay in matrimonial house the wife shifted to her parent's residence. Subsequently she was denied entry to her matrimonial house by the respondents which was not found proper because she has a right to stay in her matrimonial house. More so when her husband applied for divorce, the respondents cannot deny her access to her matrimonial home or interfere in her possession thereof.

XII. Basudeb Dey Sarkar v. Smt. Chhaya Dey Sarkar . In this case also it was held that where matrimonial dispute is pending between the spouses, the wife is not a licensee or trespasser. Her right to reside there continues till it is terminated in matrimonial proceedings.

XIII. Smt. Gurmeet Kaur v. Gur Raj Singh . In this case the learned Additional District Judge, Amritsar declined maintenance to wife and minor son observing that it would quietly nudge her towards taking a less harsh view of her husband's behaviour towards her. It was held by the learned single Judge that it amounted to refusal of maintenance pendente lite and expenses of litigation to the wife and her minor child to pressurise the wife to reconcile her differences with her husband and, therefore, it has to be branded as a patent misuse of the provisions of Section 24 of the Hindu Marriage Act.

XIV. Radhikabai v. Sadhu Awatrai AIR 1970 Madhya Pradesh 14. In this case the Division Bench held that merely because a potential capacity to earn something is found in the wife, the Court cannot refuse to grant her maintenance. It was further held that Section 24 of the Hindu Marriage Act does not envisage that customary ornaments may be taken into account for the purpose of income nor can the Court refuse maintenance on the ground that wife can pull on for some time by selling her ornaments.

XV. Pratima Singh v. Dr. Abhimanyu Singh Parihar 1986 (1) DMC 301 M.P. In this case the Hon'ble single Judge modified the order passed by the trial court and awarded the pendente lite maintenance at the rate of 50% of the income of the husband, after deducting the amount for uncertainties.

XVI. Savita Aggarwal v. R.C. Aggarwal 1991(1) DMC 18 (P&H). According to ratio of this case even if the entire salary is deposited as contribution towards General Provident Fund etc. that will not deprive the petitioner of her right to get maintenance pendente lite.

XVII. Smt. Krishna Kumari v. IV ADJ Hamirpur AIR 1989 Allahabad 198. The Hon'ble single Judge of our own High Court in this case has held that the appellate court must be slow and cautious in granting demand in the case under Section 24, 28 of the Hindu Marriage Act. In this particular case the order of trial court was not found to be callous or capricious. Therefore, it was held that the appellate court in such cases must not interfere in the order of the trial court.

XVIII. Harmindra Kaur v. Sukhwinder Kaur 2002(2) Femi Juris CC 292 Delhi. This case law also deals with maintenance to wife and child under Section 125 Cr.P.C. The income of the husband was found to be Rs. 12,000/- per month and considering the equal status of the wife who was to live with the child the amounts of Rs. 4800/- for wife and Rs. 2400/- for the child were awarded by dividing the income of the husband in 5 units, two units each for adults and one unit for the child.

XIX. Ruma Chakraborty v. Sudha Rani Banerjee 2005 (36) A I C 398 (SC). The Hon'ble apex Court while dealing with the matter in Hindu Adoption and Maintenance Act held that the intention of

the legislature by including clothing, residence etc. was to provide for real maintenance and not a bare or starving maintenance.

XX. Pradeep Kumar Kapoor v. Ms. Shailja Kapoor . While defining ''maintenance' and ''support' under Section 24 of the Hindu Marriage Act it was laid down that the definition of ''maintenance' as given in Hindu Adoption and Maintenance Act should be adopted. It was held that in deciding the application under Section 24 of the Act the Court has to act in accordance with sound judicial principles and cannot act in an arbitrary manner to the prejudice of either of the parties.

8. The following principles were found to be relevant for the purpose:

(1) Position and status of the parties.

(2) Reasonable wants of the claimant towards food, clothing, shelter, medical attendance with treatment, education and the like.

(3) Income of the claimant.

(4) Income of the opposite party.

(5) Number of persons the opposite party is obliged to maintain.

9. As a corollary the following point was also added:-In arriving at the income of a party only involuntary deductions like income tax, provident fund contribution etc. are to be excluded. In this case law the following case laws were also considered:

(i) Ashit Mukherjee v. Smt. Susmita Mukherjee

(ii) L.R. Rajendran v. Gajalakshmi AIR 1985 Madras 195

(iii) Rajambal v. Murugappan

(iv) Dev Dutt Singh v. Rajni Gandhi AIR 1984 Delhi 320

(v) Preeti v. Ravind Kr. Sharma

(vi) Baboolal v. Prem Lata XXI.Shakti Pershad v. Ratna Pershad 2003 (1) HLR 491. In this case it was held that the wife is entitled to maintenance according to the status of her husband.

10. The gamut of all the aforesaid case laws is that as long as matrimonial ties subsists between the parties, the wife is entitled to live in the matrimonial house or in a separate building. The wife should not be relegated to a lower standard of living than that the husband enjoys. She should be given maintenance according to status of her husband. While considering the question of ''maintenance pendente lite' under Section 24 of the Hindu Marriage Act its definition as given in Hindu Adoption and Maintenance Act should be adopted and some significant points should necessarily be taken into account such as (i) position and status of the parties, (ii) reasonable wants of the claimant towards food, clothing, shelter and medical attendance etc., (iii) income of the respondent, (iv) income, if any, of the claimant, (v) number of persons the respondent is obliged to maintain. As regards quantum of maintenance it may be from 1/3rd to 50% of the income of the respondent but no rigid formula can be fixed. It may differ from case to case. The contributions towards General Provident Fund and payment towards instalments of loan etc. should not be permitted to be deducted to work out the carry home salary. The maintenance should not be refused on the ground that the wife can pull on for some time by selling her ornaments etc.

11. Now we propose to consider the point of ''maintenance pendente lite and expenses of proceedings'. The relevant provision envisaged in Section 24 of the Hindu Marriage Act are extracted hereinbelow:

24. Maintenance pendente lite and expenses of proceedings.- Where in any proceeding under the Act 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 proceedings, it may, on the application

of the wife or the husband, order the respondent to pay to the petitioner 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.

12. In the case before us the appellant-wife does not appear to have an independent income sufficient for her support and to meet the necessary expenses of the proceedings. There is neither any plea nor any evidence on record to that effect. The only contention is about her potential capacity to earn some thing as pointed out by the learned Counsel for the respondent, but that cannot be a ground for refusing to grant her maintenance as was held in the case of Radhikabai (supra). Similarly she cannot be refused maintenance on the ground that she can pull on for some time by selling her ornaments etc. towards which the respondent has indicated in his reply as further pointed out by learned Counsel for the respondent. On the same analogy fixed deposits of approximately 1.5 lac rupees in the name of wife, as emphasized by the learned Counsel for the respondent and the respondent in person, also cannot be an impediment in granting maintenance.

In this case the maintenance pendente lite has been refused by the learned Judge, Family Court, Lucknow simply on the ground that she has been admittedly living with her husband in the official residence and it has not been said by the wife that due to alleged behaviour of her husband she has become dependent on any body else. It is true that the appellant-wife has been living with her husband in 5/2 Senior Police Officers Colony, Vibhuti Khand, Gomti Nagar, Lucknow which is allotted to the respondent. But presuming that she is living there with all amenities also and therefore refusing to grant maintenance on this ground cannot be said to be justified. It transpires from the record that there are allegations and counter allegations against each other. The husband has filed a suit for judicial separation while the wife has filed separate suit for restitution of conjugal rights. Both the parties are not willing to live with each other and even reconciliation proceedings could not materialize. The allegations which both the parties are levelling against each other are such that probably it is not possible for them to live together and lead the normal life as husband and wife. According to wife for the last few years her husband, in the garb of religion, has been trying to adopt wrong path. He admittedly claims himself to be an incarnation of Radha, wears ear rings, nose ring, Payal and applies polish on his nails. In a female attire he performs Raas Lila with ladies etc. inside the residential house and also elsewhere. Several times he tried to oust her from that residence by beating her and by creating such type of activities. At times he also tried to assert the authority of a police officer so that she may leave that house. But in the absence of any alternative, she was compelled to continue to live with her husband in the same house. It is needless to say that either of the spouse has a right to live with dignity. It has also been specifically contended by the appellant in the lower court that her husband has snatched away all the amenities such as electricity, telephone, car, servants, food and clothing etc. which were available to her due to the status and service of her husband. It was also specifically contended that due to this reason her sons were helping her out but she did not want to part with her right to have maintenance from her husband. It is not disputed that the spouse has two sons. While the elder son is a senior IRS officer working in Bombay and living there with his family the younger one is unmarried but serving in Bangalore with a reputed company. The learned Counsel for the respondent as also the respondent in person laid much emphasis that the younger son who is unmarried and serving in Bangalore and is getting a handsome salary is very close to his mother and he has also undertaken to bear all the expenses of his mother (appellant) as per E-Mail sent by him. But on this ground a wife cannot be deprived from getting maintenance from her husband under Section 24 of the Hindu Marriage Act.

Therefore, we find that the learned lower court was not justified in presuming that since the wife was admittedly living with the husband in the same house, she was also getting all amenities and every item of basic needs. As already mentioned the appellant has also said that her sons are also giving their help to her. Therefore, it was also not proper to observe, as mentioned in the impugned order, that she has not even said that due to alleged mal treatment and behaviour of her husband, she has become dependent on some

body else. Therefore, the finding of the learned lower court on this point cannot be sustained. Section 24 of the Hindu Marriage Act does not lay down any condition precedent for awarding maintenance. The only ingredient is that the husband or the wife, as the case may be, should not have independent income sufficient for his or her support and necessary expenses of the proceedings. We have already found that the appellant-wife has no such independent income sufficient for her support and expenses of the proceedings. Finally, therefore, we find that the appellant-wife is entitled for maintenance pendente lite and the expenses of the proceedings.

13. Now we have to look into the quantum of the maintenance and expenses of the proceedings. In this regard the appellant's own income and the income of the respondent have to be taken into consideration and thereafter an amount which may appear to be reasonable has to be awarded. It is needless to say that maintenance pendente lite has been claimed in both the cases by the same appellant-wife and, therefore, only one maintenance pendente lite has to be awarded. There is no quarrel with the proposition that such maintenance should normally be awarded from the date of application. Out of the two separate applications the application dated 11.02.2004 is the earlier one.

Therefore maintenance has to be granted with effect from 11.02.2004. Coming again on the point of quantum we have already discussed hereinabove that the appellant-wife has no income and her potential capacity to earn some thing is not relevant for the purpose of the relevant section. As regards income of the respondent-husband there does not appear to be any dispute in respect of the details of the salary as on January, 2005, as mentioned in the impugned order and also in paragraph 4 (at page 3) of this judgment. Thus the salary of the respondent as on January, 2005 (immediately before the date of application given on 11.02.2004) was admittedly Rs. 37544/-. The following were the permissible deductions, excluding contribution towards General Provident Fund which being not involuntary are not permissible deduction as was held in the case of Savita Aggarwal (supra):

Group Insurance Scheme (GIS) Rs. 120.00

House Rent: Rs. 600.00

Personal Use of Car: Rs. 500.00

Income Tax: Rs. 7500.00

(in proportion of income tax payable on the total income).

Total permissible deductions= Rs. 8720.00

14. Thus total carry home salary of the respondent as on January, 2005 can be said to be Rs. 37544.00 - 8720.00 = Rs. 28824.00. Having regard to the fact that the appellant-wife is entitled to maintenance according to the status of her husband, who has been Inspector General of Police in the present case, a reasonable amount has to be fixed as maintenance. The respondent is not obliged to maintain any body else because, as mentioned above, his both the sons are admittedly well settled and they are earning sufficiently. The appellant has reasonable wants towards food, clothing, medical attendance etc. As regards shelter it is admitted fact that she has been living in 5/2 Senior Police Officers Colony, Vibhuti Khand, Gomti Nagar, Lucknow which is allotted to her husband and she is still continuing to live in that house as has been indicated during the course of arguments on behalf of the respondent. Now the respondent stands voluntarily retired with effect from 28.11.2005 and, therefore, the appellant may have to vacate that house in near future, but the position as it stands today is that while fixing quantum of maintenance presently the need of house has to be excluded. It may be mentioned that the Hon'ble Division Bench comprising Hon'ble Mr. Justice U.K. Dhaon and Hon'ble Mr. Justice S.S. Chauhan had fixed Rs. 7000/- per month as interim maintenance vide order dated 10.11.2005 passed in these appeals. Keeping in view all the facts and circumstances and the discussion made hereinabove, it stands to reason to award 1/3rd of the aforesaid amount of salary of respondent which comes to Rs. 9608.00 (28824 ? 3)

i.e. Rs. 9600/- in round figure till the date of retirement. After his voluntary retirement with effect from 28.11.2005 the respondent will be getting pension instead of salary which normally comes to half of the amount of working salary. A proposed calculation chart of pension after commutation has been filed by the respondent himself but it has been indicated on his behalf that due to non-vacation of government residence by the appellant the required no objection certificate is not being issued due to which he is not getting pension as yet. It has also been argued on behalf of the respondent that after the date of his retirement his income will be reduced to almost half of the salary. This argument has substance. As per the pay certificate filed by the respondent himself as annexure-2 to his affidavit dated 17.10.2005 his salary was Rs. 38231.00 (without any deductions). If we take it in the round figure of Rs. 40,000/- then its half amount would be Rs. 20,000/- (without commutation). Therefore with effect from 28.11.2005 the amount of maintenance pendente lite should be fixed at Rs. 6666.00 (20,000?3) i.e. Rs. 6700/- in round figure

15. So far as litigation expenses for both the cases are concerned, although in Family Courts the lawyers were not permitted to participate but during the course of time the position has changed. The cost of stationary, typing charges etc. are also increasing day by day. Therefore, the amount of Rs. 2500/- each deserves to be enhanced to Rs. 6000/- in each case as litigation expenses to be paid by the respondent.

16. Accordingly both the appeals are partly allowed and the impugned order dated 16.09.2005 passed by the Principal Judge, Family Court, Lucknow is modified to the extent that the respondent shall pay an amount of Rs. 9600.00 per month as maintenance pendente lite to the appellant with effect from 11.02.2004 (the date of first application) and an amount of Rs. 6700.00 per month as maintenance pendente lite with effect from 28.11.2005 (the date of voluntary retirement of the respondent). The respondent shall also pay a sum of Rs. 6000.00 as litigation expenses in each case.

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KISHORE KUMAR TRIVEDI VERSUS KIRAN, D/O SHRI BHIKARI LAI SHUKLA

Allahabad High Court

2007 SCC OnLine All 1600 : (2007) 5 All LJ 92 : (2007) 56 AIC 646 (All) : (2008) 1 AIR Bom R (NOC 8) 3 : 2007 AIHC 2865 : (2009) 106 RD 372

(Before Hon'ble Mr. Justice Amitava Lala & Hon'ble Mr. Justice Pankaj Mithal, JJ.)

Kishore Kumar Trivedi
Versus
Kiran, D/o Shri Bhikari Lai Shukla

First Appeal No. 398 of 2006
Decided on April 5, 2007

While sustaining her marriage and preserving her marital status, the wife is entitled to claim maintenance from her husband. On the other hand, under the Hindu Marriage Act; in contrast, her claim for maintenance pendente lite is durated (sic) on the pendency of a litigation, of the kind envisaged under Section 9 to 14 of the Hindu Marriage Act, and her claim to permanent maintenanceor alimony is based on the supposition that either her marital status has been strained or affected by passing a decree for restitution of conjugal rights or judicial separation in favour or against her, or her marriage stands dissolved by a decree of nullity or divorce, with or without her consent. Thus, when her marital status is to be affected or disrupted the Court does so by passing a decree for or against her. On or at the time of the happening of that event, the Court being in seisin of the matter, invokes its ancillary or incidental power to grantpermanent alimony". "Not only that, the Court retains the jurisdiction at subsequent stages to fulfil this incidental or ancillary obligation when moved by an application on that behalf by a party entitled to relief. The Court further retains the power to change or alter the order in view of the changed circumstances. Thus the whole exercise is within the gammit (sic gamut) of a diseased or a broken marriage.And in order to avoid conflict of perceptions the legislature while codifying the Hindu Marriage Act preserved the right of permanent maintenance in favour of the husband or the wife, as the case may be, dependent on the Court passing a decree of the kind as envisaged under Sections 9 to 14 of the Act. In other words without the marital status being affected or disrupted by the matrimonial Courtunder the Hindu Marriage Act the claim of permanent alimony was not to be valid as ancillary or incidental to such affection or disruption.

Hence from the analysis of the aforesaid judgment it is crystal clear that when marital status is affected or disrupted by a decree under one law, the respondent cannot get ancillary or incidental relief by way of subsequent suit or proceeding under different law. However, it is still open to the respondent to proceed with her claim of maintenance in other forum. Hence the appeal is allowed. Order of theCourt below stands set aside.

The Judgment of the Court was delivered by

AMITAVA LALA, J.:— Since the point for consideration is a question of law, the appeal is heard on the informal papers by the consent of the parties.

2. This appeal is primarily arising out of the decrefe for maintenance passed by the Additional Principal Judge, Family Court, Kanpur City on 7th December 2005 under Section 18 the Hindu Adoption and Maintenance Act, 1956 (hereinafter referred to as the Act) in Suit No. 575 of 1999. Learned counsel appearing for the appellant contended before this Court that the order which has been passed by theCourt below is contrary to the settled position of law. A decree for divorce dated 4th September 1998 passed by Joint Civil Judge, Senior Division, Thane, Maharashtra in Marriage Petition No. 234 of 1997 is pre-existing. After passing decree for divorce by the appropriate Court of law a suit or proceeding under Section, of the Act cannot be maintainable.

3. We find that upon considering certain judgments particularly (1982) 1 SCC 525: AIR 1982 SC 818 (Babu Lal v. Hazari Lai Kishori Lal) and AIR 1998 Allahabad 346 : (1998 All LJ 2398), (Zilla Panchayat, Bijnor v. Vllth Addl. Distt. Judge, Bijnor) the Courtbelow held that although decree for divorce was passed by an appropriate Court of Law but when a restoration application is pending therein, the same will tantamount to pendency of that suit for the purpose of having maintenance, by the wife under Section 18 of the Act, 1956.

4. In this context, certain dates are relevant to be recorded hereunder. The date of Marriage is 16th February 1997. The date of decree for divorce is 4th September 1999. The application for setting aside the ex-parte decree under Order IX Rule 13 was made along with an application under Section 5 of the Limitation Act on 26th July, 2000. The same was also dismissed on 27th April 2006. A further application for recalling of such order of dismissal of the application was made on 30th October 2006 also along with an application under Section 5 of the Limitation Act, which is still pending.

5. Against this background, we have gone through the judgments which have been relied upon by the Court below. In paragraph 17 of the Supreme Courtjudgment reported in Babu Lal ((1982) 1 SCC 525 : AIR 1982 SC 818) (supra), it has been held that the term 'proceeding' is a very comprehensive term and generally speaking means a prescribed, course of action for enforcing a legal right. We have seen therein that the discussion was made in connection with an application for execution. By analysis of the judgment also in accordance with settled law one aspect is very clear that an application for execution is a process of continuity for the purposes of enforceability of decree and as such, during the pendency of such type of application, it cannot be said that the proceeding is not pending.

6. Learned Single Judge held in Zilla Panchayat, Bijnor : (1998 All LJ 2398) (supra) that the appeal must be deemed to be pending during the pendency of application for restoration. Although it has only persuasive value but since the learned Judge referred Supreme Court judgment therein, we feel discussion is needed.

7. According to us, there is gulf difference between restoration and setting aside. There is also gulf difference between restoration of original proceeding andrestoration of the restoration application that too out of time prescribed by law. In case of restoration procedure laid down under Order IX Rule 9 will appear but in case setting aside ex-parte decree procedure under Order IX Rule 13 of the Code of Civil Procedure will apply. In case of restoration normally no right can be said to be accrued by any party because decision is yet to be taken up. But in a case of ex-parte decree a valid right has already been accrued in favour of one which can only be upset by a valid application. Either an appeal or an execution is continuance of process but not the application of setting aside decree that too out of time. However, in such type of matters one aspect is common i.e sufficient cause for non appearance. Such stage will come provided the delay is condoned. Unless the delay is condoned an application cannot be said to be valid application in the eye of law. Factually, the application had been made after about 10 months after passing the decree which was dismissed after about six years from making it. The application which is allegedly pending is nothing but an application for restoration of an application for setting aside that too out of time. Now the first stage would be condonation of delay of the restoration application. The second stage would be restoration of the application for setting aside the ex-parte decree. The third stage would be condonation of delay in making application for setting aside the decree. Thereafter only the application for setting aside ex-parte

decree will survive. Presently it is an absurd situation to say that an application for setting aside ex-parte decree is pending. In AIR 1927 Lahore 200 (Hari Singh v. Muhammad Said) theCourt relying upon earlier decision reported in AIR 1926 Lahore 379 (Piroj Shah & Company v. Qarib Shah) held that the proceedings consequent to an application for setting aside the ex-parte decree are not merely a branch of the suit which is terminated when the ex-parte decree is passed and the suit does not revive, if at all, until after the proceedings in the application are terminated successfully. It is not an application for re-hearing. It is not proceeding in the suit but distinct proceeding. Ultimately this question arose before the Supreme Court and it was held in (1993) 3 SCC 406 : (1993 AIR SCW 3548), (Chand Dhawan (Smt) v. Jawaharlal Dhawan) as follows:

"So while sustaining her marriage and preserving her marital status, the wife is entitled to claim maintenance from her husband. On the other hand, under the Hindu Marriage Act; in contrast, her claim for maintenance pendente lite is durated (sic) on the pendency of a litigation, of the kind envisaged under Section 9 to 14 of the Hindu Marriage Act, and her claim to permanent maintenanceor alimony is based on the supposition that either her marital status has been strained or affected by passing a decree for restitution of conjugal rights or judicial separation in favour or against her, or her marriage stands dissolved by a decree of nullity or divorce, with or without her consent. Thus, when her marital status is to be affected or disrupted the Court does so by passing a decree for or against her. On or at the time of the happening of that event, the Court being in seisin of the matter, invokes its ancillary or incidental power to grantpermanent alimony".

"Not only that, the Court retains the jurisdiction at subsequent stages to fulfil this incidental or ancillary obligation when moved by an application on that behalf by a party entitled to relief. The Court further retains the power to change or alter the order in view of the changed circumstances. Thus the whole exercise is within the gammit (sic gamut) of a diseased or a broken marriage.And in order to avoid conflict of perceptions the legislature while codifying the Hindu Marriage Act preserved the right of permanent maintenance in favour of the husband or the wife, as the case may be, dependent on the Court passing a decree of the kind as envisaged under Sections 9 to 14 of the Act. In other words without the marital status being affected or disrupted by the matrimonial Courtunder the Hindu Marriage Act the claim of permanent alimony was not to be valid as ancillary or incidental to such affection or disruption.

8. In para 25 of the aforesaid judgment the observation was made as under:

"We have thus, in this light, no hesitation in coming to the view that when byCourt intervention under the Hindu Marriage Act, affection or disruption to the marital status has, come by, at that time. It also retains the power subsequently to be invoked on application by a party entitled to relief. And such order, in all events, remains within the jurisdiction of that Court, to be altered or modified as future situation may warrant. In contrast, without affectation or disruption of the marital status, a Hindu wife sustaining that status can live in separation from her husband, and whether she is living in that state or not, her claim tomaintenance stands preserved in codification under Section 18(1) of the Hindu Adoptions and Maintenance Act. The Court is not at liberty to grant relief ofmaintenance simpliciter obtainable under one Act in proceedings under the other. As is evident, both the statutes are codified as such and are clear ontheir subjects and by liberality of interpretation interchangeability cannot be permitted so as to destroy the distinction on the subject of maintenance."

9. Hence from the analysis of the aforesaid judgment it is crystal clear that when marital status is affected or disrupted by a decree under one law, the respondent cannot get ancillary or incidental relief by way of subsequent suit or proceeding under different law. However, it is still open to the respondent to proceed with her claim of maintenance in other forum. Hence the appeal is allowed. Order of theCourt below stands set aside. No order is passed as to costs. However, the respondent is not debarred from claiming alimony before appropriate forum in accordance with law if otherwise available and if so advised.

10. Appeal allowed.

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SMT. POORNIMA MISRA VERSUS SUNIL MISRA

2010 SCC OnLine All 78 : (2010) 79 ALR 701 : (2010) 3 All LJ 555 : 2010 AIHC 3108

Allahabad High Court

(Before Hon'ble Mr. Justice Rajiv Sharma & Hon'ble Mr. Justice Dr. Satish Chandra, JJ.)

Smt. Poornima Misra ..... Appellant

v.

Sunil Misra ..... Respondent

First Appeal No. 11 of 2009 Connected with First Appeal No. 10 of 2009
Decided on January 18, 2010

....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.

The Judgment of the Court was delivered by

1. Heard learned Counsel for the parties.

2. These appeals have been preferred by the appellant against the order dated 6.1.2009 whereby the application filed by the appellant under Section 9 of the Hindu Marriage Act [in short it has been referred to as 'Act'] was rejected and the Suit of the respondent-plaintiff under Section 13 of the Act was decreed.

3. In short, the facts, as comes out from the record, are that the marriage of Smt. Poornima Misra was solemnized with Sunil Misra (respondent) on 29.1.2001 according to Hindu Vedic Rites at Lucknow. After the marriage, the wife performed all marital obligation as wife and gave due respect to the in-laws. In the marriage, the appellant's father gave valuable gifts and jewellery including one Maruti Car. But their in-laws were demanding more dowry and started ill-treating the appellant.On account of the maltreatment of in-laws, the appellant was compelled to leave her matrimonial house. When the appellant was living with her parents, the husband filed a Suit under Section 9 of the Act for restitution of conjugal rights. After expiry of one year, the said Suit was withdrawn and a petition for divorce under Section 13 of the Act on the ground of cruelty, was moved. In this petition, the respondent also averred that the appellant pressurized the respondent to live separately from her parents and started neglecting the parents. The appellant also terminated the pregnancy to get herself free from the marital obligation. The application for divorce was contested by the appellant and the allegations were denied. The appellant-Poornima Misra moved an application for maintenance under Section 24 of the Actand also filed an application for restitution of conjugal rights under Section 9 of the Act. Both the petitions were contested by the respondent-husband by leading documentary evidence, such as, F.I.R, statement of witnesses and charge-sheet. The appellant in support of her assertions also adduced oral and documentary evidence.

4. The Family Court, after analyzing the materials on record, the statement of witnesses and numerous case laws, passed the detailed order rejecting the application under Section 9 of the Act and granted the decree of divorce. Hence these appeals.

5. At the time of entertaining the appeal, this Court stayed the operation of the impugned judgments dated 6.1.2009, but provided that the parties shall appear in person so that the dispute may be settled amicably. From the order sheet, it comes that the parties did appear before the Court, but amicable settlement of the dispute failed.

6. On number of occasions, the parties appeared and on one date, as there was no possibility of amicable settlement, the Court suggested the respondent to give Rs. 10 lakhs as permanent alimony to settle the dispute. The husband was ready to pay Rs. 7 lakhs and the Counsel for the appellant prayed for time for settlement, which was allowed. When the case again came up, the appellant showed reluctance and the Counsel stated that as the appellant is ready to live with her husband, as such, she is not interested in accepting the permanent alimony andinsisted for deciding the case on merits.

7. Learned Counsel for the appellant has contended that the Family Courtcommitted an error in allowing the Suit of respondent under Section 13 of the Actand rejecting the application of the appellant under Section 9 of the Act without recording any specific finding of cruelty by the appellant and also overlooked that irretrievable breakdown of a marriage is not a ground of divorce. The trial against the respondent under Section 498-A I.P.C is still pending and they have yet not been acquitted. He further submitted that the appellant has not left the matrimonial house on her own wish or consent but the members of the family of the respondents forced her to leave the matrimonial house. The appellant is still ready to live with the respondent-husband. The Court below also erred and failed to appreciate that the sanctity of the marriage cannot be left at the wish of one annoying spouse. In order to show that the impugned order is erroneous, reliance has been placed upon the cases of Smt. Beena v. Suresh Vir Tomer, [1995 (25) ALR 277] and Savitri Pandey v. Prem Chandra Pandey, [(2002) 2 SCC 73].

8. He further submitted that the wife has been made to suffer great agony andpain as the members of the family of the respondents had not only ill-treated her but also manhandled which resulted in miscarriage of pregnancy. Despite all these conducts and misbehaviour of the respondent, the appellant is ready to forgive all these things and wants to live with her husband.

9. On behalf of the respondent, it has been submitted that the Family Court has passed the just and reasonable order after appreciating the materials on record. The Family Court rightly rejected the application under Section 9 of the Act andallowed the application under Section 13 of the Act as it was satisfied that the respondent has been able to establish cruelty by the appellant. He further submitted that the parties to the appeal are living separately for the last nine years and there is no chance of reconciliation and the marriage has broken down irretrievably. He further submitted that on account of false report lodged by the appellant, the respondent and his father were remained in jail for twelve days which lowered their image in the society.

10. In order to establish that it is virtually impossible for the parties to live together and the decree of divorce is the only recourse left and to justify that the order of the Family Court is perfectly legal, reliance has been placed upon the cases of Smt. Meena Singh v. Mithlesh Kumar Singh, [(2009 (3) ALJ 303], Satish Sitole v.Ganga (Smt.); [(2008) 7 SCC 734], Smt. Mayadevi v. Jagdish Prasad, [2007 AIR SCW 1803], Sujata Uday Patil v. Uday Madhukar Pathil, [2007 AIR SCW 896], Naveen Kohliv. Neelu Kholi, [(2006) 4 SCC 558], Durga Prasanna Tripathi v. Arundhati Tripathi, [(2005) 7 SCC 353], Jayachandra v. Aneel Kaur, [(2005) 2 SCC 22 : AIR 2005 SC 534],Poonam Gupta v. Ghanshyam Gupta, [AIR 2003 (All) 51]; G.V.N Kameshwar Rao v. G. Jabilli, [(2002) 2 SCC 296], Praveen Mehta v. Inderjit Mehta, [11 (2002) DMC 205 (SC)]and Smt. Kalpana Srivastava v. Surendra nath, [AIR 1985 (All) 253].

11. In Smt. Meena Singh v. Mithlesh Kumar Singh (supra), the appeal was preferred by the wife against the decree of divorce granted on the ground of mental cruelty. The Division Bench of this Court while confirming the decree of divorce granted permanent alimony and observed as under:—

"11. In view of the aforesaid decisions, to end the miseries of the parties andto allow them to henceforth live a happy and peaceful life by bringing to an end the litigation appear to be a more sound, reasonable and practical decision. The parties are living separately for many years and there is no possibility of their uniting. Thus, for all practical purposes the marriage is completely dead. In view of the above and the allegations/counter-allegations levelled against each other with regard to their character the element of cruelty on part of both of them is also inherent. …"

12. In G.V.N Kameshwar Rao v. G. Jabilli (supra), the Apex Court observed that the mental cruelty faced by the appellant is to be assessed having regard to his status in life and his educational background and the environment in which he lived.

13. The Apex Court in the case of Satish Sitole v. Ganga (supra) ruled and laid down that the living of parties to a marriage separately for a long time, making acrimonious allegations against each other amounts to cruelty and continuance of such marriage is further act of cruelty.

14. The expression of 'cruelty' in detail has been considered in Smt. Mayadevi v.Jagdish Prasad (supra) by the Hon'ble Supreme Court. In paragraph 9 of the judgment, the Supreme Court observed as under:—

"…. The concept, a proof of 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 complaint spouse because of the acts or omissions of the other. Cruelty may be physical or corporal 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."

15. The Apex Court in another case, namely, Sujata Uday Patil v. Uday Madhukar Patil (supra) again examined the cruelty and the kind of degree of cruelty which may amount to a matrimonial offence. The Supreme Court observed that the cruelty may be inferred from the facts and matrimonial relation of the parties andinteraction in their daily life disclosed by the evidence and inference on the said point can only be drawn after all the facts have been taken into consideration. Where there is proof of a deliberate course of conduct on the part of one, intended to hurtand humiliate the other spouse, and such a conduct is persisted, cruelty can easily be inferred.

16. In para 72 of the judgment of the case of Naveen Kohli v. Neelu Kohli (supra), the Apex Court observed that the legislature must consider irretrievable breakdown of marriage as a ground for grant of divorce under the Hindu Marriage Act. The ApexCourt referred the 71st report of Law Commission of India wherein it was 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 there has arisen a situation in which the marriage cannot be worked. The marriage has all the external appearances of marriage, but none of the 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 facade, when the emotional and other bounds which are the essence of marriage have disappeared.

17. Following the principle of 'live and let live' and the precedent laid down by the Apex Court, it is desirable and expedient in the interest of justice to uphold the decree of divorce passed by the Family Court below and to dismiss the appeal.

18. Matrimonial disputes have to be decided by Courts in a pragmatic manner keeping in view the ground realities. For this purpose a host of facts have to be taken into consideration and the most important being

whether the marriage can be saved and the husband and wife can live together happily and maintain a proper atmosphere at home for the upbringing of their offsprings.

19. 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.

20. In the instant case, the appellant could have suffered traumatic experience because of the police complaints on account of which he and his father had to remain in jail as a consequence whereof there was loss of reputation and prestige in the society. Just after the marriage, the appellant started complaining against the parents and brother Arun Kumar Misra, who was mentally retarded with the sole object to get separate living from parents. Not accepting the wish of the appellant, he earned annoyance and the wife left the matrimonial house without any information. In the application for divorce, the husband has stated that on21.4.2001, he received a telephonic call from her mother-in-law that the appellant is ill and is admitted in Vivekanand Polyclinic. When the respondent alongwith his father went there, they came to know that pregnancy of the first child has been terminated. It is in this background that the respondent filed an application for divorce on the ground of cruelty alleging that because of the acts of cruelty onseveral occasions including the false criminal report perpetuated by the appellant, the respondent-husband was under apprehension that it would not be desirableand safe to stay with the appellant and to continue their marital relationship.

21. The trial Court has examined the circumstances and the background in order to reach the conclusion, whether the conduct complained of amounts to cruelty in the matrimonial law. The instances of the circumstances and the cruelty highlighted by the trial Court clearly proves that the husband was subjected to mental cruelty. At page 32 of the judgment, the Family Court observed as under:—

''उल्लेखनीय है कि अन्य पक्ष के द्वारा दाखिल किये गये अभिलेखीय साक्ष्य एवं पत्रावली का सम्पूर्ण रूप से विश्लेषण एवं मूल्यांकन करने से यह स्पष्ट होता है कि अपवादिनी ने यह संकल्प ले लिया है कि वह वादी के जीवन को भी नारकीय जीवन बनाने के लिये ही वेदना में जीवन व्यतीत करेगी। इस प्रकार के अडिग तथा कठोर दृष्टिकोण से इस वाद के तथ्यों तथा प्रसंग में यह सन्देह होना स्वाभाविक है कि प्रतिवादिनी वादी के साथ मानसिक क्रूरता का व्यवहार करने पर अड़ी हुई है, जबकि यह स्पष्ट हो जाता है कि पक्षकार के मध्य विवाह अप्रतिष्ठाप्य रूप से भंग हो गया है एवं उनके साथ रहने या पुनः एक होने की कोई सम्भावना नहीं है।''

22. The foundation of a sound marriage is tolerance, adjustment and respecting one another. Tolerance to each other's fault to a certain bearable extent has to be inherent in every marriage. Petty quibbles, trifling differences should not be exaggerated and magnified to destroy what is said to have been made in heaven. All quarrels must be weighed from that point of view in determining what constitutes cruelty in each particular case and as noted above, always keeping in view the physical and mental conditions of the parties, their character and social status. A too technical and hyper-sensitive approach would be counter-productive to the institution of marriage. The Courts do not have to deal with ideal husband and ideal wives. It has to deal with particular man and women before it. The ideal couple or a mere ideal one will probably have no occasion to go to Matrimonial Court.

23. In the instant case, the Family Court has examined in detail the conduct of the appellant. On one hand, she stated that she is not pursuing the criminal case under Section 498-A I.P.C and on the other hand, she had got her statement recorded before the Court. She also filed criminal revision, lodged criminal case under Section 406 I.P.C against the respondent and his father. The father of the appellant had also

filed a complaint case under Section 420 I.P.C against the respondent and his father. Not only this, the complaints were also made to the authorities of Sahara India, where the respondent was working. On account of various complaints, the respondent had to resign from the Sahara India. The FamilyCourt has examined all these facts and passed a detailed speaking order before coming to the conclusion that the marriage bond has been broken down beyond the hope of repair and the marriage is only for the namesake.

24. In view of the fact that the parties are living separately for more than nine years and a large number of criminal and civil proceedings have been initiated against the respondent and some proceedings have been initiated by the respondent against the appellant, the Family Court rightly came to the conclusion that the matrimonial bond between the parties is beyond repair. The marriage between the parties is only in name.

25. 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 seriously made an endeavour to reconcile the parties and we wanted to put a quietus to all litigations between the parties and not to leave any room for future litigations by granting Rs. 7 lakhs as permanent alimony, but it was refused by the appellant. Therefore, it appears that the appellant does not want divorce by mutual consent.

26. From the analysis and evaluation of the entire evidence, it is clear that the appellant has resolved to live in agony only to make life a miserable hell for the respondent as well. This type of adamant and callous attitude, in the context of the facts of this case, leaves no manner of doubt in our minds that the appellant is bent upon treating the respondent with mental cruelty. The marriage has been wrecked beyond the hope of salvage and there is no chance of their coming together. Therefore, the case law relied upon by the appellant and the assertion that the respondent shall not be allowed to take advance of his own faults and the decree for dissolution of the marriage shall be denied to the respondent is of no help to the appellant.

27. In these circumstances, we are of the view that when 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 abound to be a source of greater misery for the parties.

28. For the reasons aforesaid, the decree of divorce passed by the Family Courtis upheld. Both the appeals are hereby dismissed. In the facts and circumstances of the case, the parties shall bear their own costs.

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DEENBANDHU VERSUS KANWAR LAL

2015 SCC OnLine Chh 64 : AIR 2015 Chh 136 : (2015) 153 AIC 594

Chhattisgarh High Court

(Before Hon'ble Mr. Justice Sanjay K. Agrawal, J.)

1. Deenbandhu, S/o Brijlal, aged about 45 years, R/o Tikrapara, Tahsil and Police Station Charama, District North Bastar Kanker (C.G), Address Shiksha Karmi, District Dhamtari (C.G) 2. Kanwar Lal, S/o Brijlal, Caste Kalar, aged about 40 years, R/o Tikrapara, Tahsiland Police Station Charama, District North Bastar Kanker (C.G), Address Police Karmi, District North Bastar Kanker (C.G) ….. Applicants

v.

Smt. Birajho Bai, widow of Brijlal, Caste Kalar, aged about 70 years, R/o Village Halba, Tahsil and Police Station Charama, District Noprth Bastar Kanker (C.G) ….. Non-applicant

For Applicants: Mr. D.N Prajapati, Advocate.

For Respondent: Mr. Ashok Patil, Advocate.

Amicus Curiae: Mr. Sourabh Dangi, Advocate.

Criminal Revision No. 123 of 2015
Decided on July 15, 2015

Criminal Procedure Code, 1973 — S. 125 — Claim for maintenance by step — Mother from step — Sons — Non-applicant is first wife of B and is childlessand the applicants are sons of B with his second wife as such, they are step-sons of the non-applicant — Non-applicant being a childless step mother living alone and unable to maintain herself — Held, she is entitled for maintenancefrom her step-sons — Family Court was justified in granting maintenance to the non-applicant keeping in view the benevolent provisions contained in S. 125 of the Code.

Kirtikant D. Vadodaria v. State of Gujarat, (1996) 4 SCC 479; Ulleppa v. Gangabai, 2003 Cri. LJ 2566, reliance placed on

CAV Order

1. The short question that falls for consideration is, "Whether the step-mother can claim maintenance from the step-son under Section 125 of the Code of Criminal Procedure, 1973?"

2. The above stated question arises in the following background: -3. The non-applicant herein filed an application under Section 125 of the Code stating inter alia that she is a widow aged about 70 years and has lost her husband on 22-7-2009, she has no source of earning and the applicants herein being her step-sons having misappropriated their property left by her husband are not maintaining her as such, she is unable to maintain herself and, therefore, an amount of maintenance to the extent of Rs. 3,000/- per month from each of the applicants be granted to her. The applicants herein seriously opposed the application filed by the non-applicant herein for maintenance and averred that the non-applicant herein is only a concubine of their father and as such, there is no family relation between her and the present applicants as such, the question of giving maintenance to her does not arise andtherefore, the application is liable to be rejected.

4. The learned Family Court after appreciating the oral and documentary evidence on record partly granted the application holding inter alia that the non-applicant herein is the first wife of deceased Brijlal and the applicants herein are sons of second wife of deceased Brijlal, Brijlal had already died, the non-applicant who is the first wife of Brijlal is childless and the present applicants being step-sons are not maintaining the non-applicant herein, and the non-applicant, who is an aged widow woman, is unable to maintain herself. The provision under Section 125 of the Code of Criminal Procedure, 1973 (for short 'the Code'), being a welfare provision, step-mother who is childless is entitled for maintenance from her step-son, the applicants herein.

5. Invoking the revisional jurisdiction of this Court under Section 19(4) of the Family Courts Act, this revision has been filed by the applicants herein questioning the order of the Family Court dated 28-11-2014 passed by the Judge, Family Court, North Bastar Kanker in Misc. Criminal Case No. 46/2013 by which the non-applicant's application for grant of maintenance under Section 125 of the Code has been allowed by the Family Court directing the applicants herein to pay maintenanceallowance to the extent of Rs. 1,000/- per month from each of the applicants, to the non-applicant from the date of order i.e 28-11-2014.

6. Mr. D.N Prajapati, learned counsel for the applicants, would submit that Section 125(1)(d) of the Code does not include the step-mother who is unable to maintain herself and only the natural mother is entitled for maintenance and as such, the impugned order is liable to be set aside on that count alone. He would also submit that the finding of the Family Court holding the non-applicant herein to be the step-mother of the present applicants is also not based on evidence available on recordand as such, the order impugned deserves to be set aside.

7. Mr. Ashok Patil, learned counsel for the non-applicant, however, would support the order of the Family Court granting maintenance. He placed reliance on the decision in the matter of Kirtikant D. Vadodaria v. State of Gujarat1 and also in the matter of Ulleppa s/o Siddanna Kamballi v. Gangabai w/o Late Siddanna Kamballi2.

8. Mr. Sourabh Dangi, learned amicus curiae, would submit that though under Section 125(1)(d) of the Code, mother would not include step-mother, but step-mother, who is childless, would be entitled for maintenance from her stepson, as the provision of Section 125 of the Code is a beneficial and benevolent legislationand therefore, the order of the Family Court is not unexceptionable and not liable to be interfered. He also relied upon the decision of Kirtikant (supra) in support of his plea.

9. I have heard learned counsel for the parties and perused the records of the trial Court with utmost circumspection.

10. The question whether step-mother is entitled for maintenance from step-son under Section 125 of the Code is no longer res integra now, as it stands conclusivelyand authoritatively decided by their Lordships of the Supreme Court in the matter of Kirtikant (supra). Their Lordships of the Supreme Court while resolving the controversy and conflict of judicial decision amongst various High Courts with regard to the status and claim of maintenance by stepmother from her step-son, have held that the expression 'mother' as used in Section 125(1)(d) of the Code means only the natural mother who has given birth to the child and not the one who is the wife of one's father by another marriage, by holding as under:-

"……Thus, on a conspectus view of dictionary meaning of the two expressions - 'mother' and 'stepmother' in various dictionaries, it clearly emerges that there is inherent distinction between the status of a 'mother' and 'stepmother' and they are two distinct and separate entities and both could not be assigned the same meaning. The expression 'mother' clearly means only the natural mother who has given birth to the child and not the one who is the wife of one's father by another marriage."

11. Their Lordships further observed in para 12 of the said matter as under:-

"……..That being so, another woman who is taken as a wife by the father of the child cannot be given the status of a mother to the child born from another woman as there is no blood relation between the two."

12. Their Lordships in para 13 of the report concluded that the 'stepfather' or 'stepmother' are not included in the expression "his father or mother" occurring in clause (d) of Section 125(1) of the Code giving a clear indication of the legislative intent, and upheld the view taken by the High Courts of Madhya Pradesh, Bombayand Andhra Pradesh with regard to the meaning of expression 'mother' in Section 125(1)(d) of the Code holding it the correct view.

13. Their Lordships of the Supreme Court thereafter, further considered whether a step-mother can claim maintenance from her step-son with reference to the aimsand objects of Section 125 of the Code and held that a childless stepmother may claim maintenance from her step-son provided she is widow or her husband, if living, is also incapable of supporting and maintaining her by holding as under:-

"…….While dealing with the ambit and scope of the provision contained in Section 125 of the Code, it has to be borne in mind that the dominant and primary object is to give social justice to the woman, child and infirm parents etc. and to prevent destitution and vagrancy by compelling those who can support those who are unable to support themselves but have a moral claim for support. The provisions in Section 125 provide a speedy remedy to those women. children and destitute parents who are in distress. The provisions in Section 125 are intended to achieve this special purpose. The dominant purpose behind the benevolent provisions contained in Section 125 clearly is that the wife, child and parents should not be left in a helpless state of distress, destitution and starvation. Having regard to this special object the provisions of Section 125 of the Code have to be given a liberal construction to fulfill and achieve this intention of the legislature. Consequently, to achieve this objective, in our opinion, a childless stepmother may claimmaintenance from her stepson provided she is widow or her husband, if living, is also incapable of supporting and maintaining her. The obligation of the son to maintain his father, who is unable to maintain himself, is unquestionable. When she claims maintenance from her natural born children, she does so in her status as their 'mother'. Such an interpretation would be in accord with the explanation attached to Section 20 of the Hindu Adoptions and Maintenance Act, 1956because to exclude altogether the personal law applicable to the parties from consideration in matters of maintenance under Section 125 of the Code may not be wholly justified……"

14. The Karnataka High Court in the matter of Ulleppa (supra), following the decision of their Lordships of the Supreme Court in Kirtikant (supra), has clearly held that petition for maintenance by step-mother is maintainable if she proves that she is living alone and due to old age unable to maintain herself, and held as under:-

"10. In the light of the above referred judgments, as I mentioned earlier, a stepmother in terms of the judgment of the Supreme Court can maintain a petition in the light of the larger object of Section 125 but she has to prove her helplessness in the matter. The Supreme Court in (1996) 4 SCC 479 has noticed that liberal construction has to be given to achieve the intention of the legislature and ruled that a childless stepmother can claim maintenance from her stepsons provided she is a widow of her husband, and if living, is also incapable of supporting andmaintaining her."

15. Applying the principles of law laid down by Their Lordships of the Supreme Court in the above cited case Kirtikant (supra) to the factual score of the present case, there is a categorical finding recorded by the learned Family Court after appreciation of oral and documentary evidence on record that the non-applicant is first wife of Brijlal and is childless and the applicants are sons of Brijlal with his second wife Jainbai as such, they are step-sons of the non-applicant. Aforesaid finding is based upon evidence available on record including the admission of the applicants' witnesses Santosh Kumar. The said finding is unexceptionable and unquestionable. Consequently, the non-applicant being a childless step-mother living alone andunable to maintain herself is entitled for maintenance from her step-sons, the applicants, and the order of the Family Court granting maintenance to the non-applicant from the applicants, who

are step-sons, is unexceptionable and the Family Court is absolutely justified in granting maintenance to the non-applicant keeping in view the benevolent provisions contained in Section 125 of the Code.

16. Concludingly, present revision sans substratum and deserves to be and is accordingly dismissed.

17. Before parting with the record, this Court appreciates the excellence of written submission prepared and submitted by learned amicus curiae Mr. Sourabh Dangi, Advocate, on short notice which enabled the Court to decide the issue involved herein.

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SMT. SUSHILA BAI VERSUS BISAUHARAM

HIGH COURT OF CHATTISGARH AT BILASPUR

Criminal Misc. Petition No.242 of 2007

(Before Hon'ble Mr. Justice T.P. Sharma, J.)

1. Smt. Sushila Bai, 2. Topin Bai ...Petitioners

v.

Bisauharam ...Respondents

{Petition under Section 482 of the Code of Criminal Procedure, 1973}

Mr. Anup Majumdar, counsel for the petitioners

Mr. Rakesh Sahju, counsel for the respondent

Dated:01/09/2009

Under the provisions of Section 125 of the Code, the major unmarried daughter is re-quired to prove that she is unable to maintain herself by reason of any physical or mental abnormality or injury. But as has been held by the Apex Court in the matter of Noor Saba (supra), even unmarried daughters are entitled for maintenance till they get married. Paras 10 & 11 of the said judgment read thus, "10. Thus, both under the personal law and the statutory law (Sec. 125,Cr.P.C.) the obligation of a Muslim father, having sufficient means, to maintain his minor children, unable to maintain themselves, till they attain majority and in case of females till they get married, is absolute, notwithstanding the fact that the minor children are living with the divorced wife. Thus, our answer to the question posed in the earlier part of the opinion is that the children of Muslim parents are entitled to claim maintenance under Section 125, Cr.P.C. for the period till they attain majority or are able to maintain themselves, whichever is earlier, and in case of females, till they get married, and this right is not restricted, affected or controlled by the divorcee wife's right to claim maintenance for maintaining the infant child/children in her custody for a period of two years form the date of birth of the child concerned under Section 3 (1) (b) of the 1986 Act. In other words Section 3 (1) (b) of the 1986 Act does not in any way affect the rights of the minor children of divorced Muslim parents to claim maintenance from their father under Section 125, Cr.P.C. till they attain majority or are able to maintain themselves, or in the case of females, till they are married."

ORDER

(Passed on 1st September, 2009)

1. This petition is for quashment of the order dated 26-5- 2007 passed by the 1st Additional Sessions Judge, Rajnandgaon in Criminal Revision No.29/2007 affirming the order dated 24- 1-2007 passed by the Judicial Magistrate First Class, Rajnandgaon in Misc. Criminal Case No.7/2007, whereby learned Judicial Magistrate First Class has awarded maintenance of Rs.2,000/- per month to petitioner No.1, but has denied maintenance to petitioner No.2, the unmarried daughter, on the ground that she is not entitled for maintenance in terms of Section 125 (1) (a) of the Code of Criminal Procedure, 1973 (for short `the Code') which has been affirmed by the revisional Court.

2. Order is challenged on the ground that the unmarried daughter is still unable to maintain herself and only after attaining the age of majority she does not become an earning member or she does not cease

her character to maintain herself without any change relating to income and earning of such daughter, but the Courts below have not considered the material fact and thereby committed illegality by denying maintenance to the unmarried daughter only on the ground of attaining the age of majority.

3. I have heard learned counsel for the parties, perused the order impugned and record of the Courts below.

4. Brief facts giving rise to filing of this petition are that petitioner No.1 is wife & petitioner No.2 is unmarried daughter of the respondent and they are residing separately from the respondent. The respondent has contacted marriage with another woman and has deserted the present petitioners. Petitioner No.2 is unmarried daughter and she is unable to maintain herself. On the ground of inability to maintain themselves, the petitioners have filed petition under Section 125of the Code. The respondent has opposed the petition. He has admitted that he is residing with another woman Pushpa as wife and he has contacted marriage with Pushpa with the consent of petitioner No.1. The petitioners are residing in the house of respondent and getting their livelihood from the agricultural land of the petitioners which is in possession of the petitioners. Petitioner No.2 is an unmarried daughter and she is not entitled for any maintenance underSection 125 of the Code.

5. After appreciating the evidence adduced on behalf of the parties, learned Judicial Magistrate First Class has awarded maintenance of Rs.2,000/- per month to petitioner No.1 and denied maintenance to petitioner No.2 on the ground that she is not minor and is not entitled for maintenance under Section 125 (1) (a) of the Code. The order is affirmed by the revisional Court.

6. Learned counsel for the petitioners vehemently argued that the Courts below have arrived at a finding that petitioner No.2 is not having sufficient means for her maintenance and income of the respondent is at least more than Rs.5,000/- per month. Learned Courts below have further arrived at a finding that petitioner No.2 is not able to maintain herself. The respondent has examined himself and has deposed that he has contacted marriage with Pushpa after getting consent from petitioner No.1 and petitioner No.2 is his unmarried daughter. Petitioner No.1 has also deposed that petitioner No.2 is her unmarried daughter and Rs.2,000/- per month would be required for maintenance of her daughter. Both the parties have led evidence but they have not adduced any evidence to the effect that petitioner No.2 is major and she is having some means of earning or income for her livelihood. Learned counsel placed reliance in the matter of Noor Saba Khatoon v. Mohd. Quasim1 in which the Apex Court has held that Muslim children are entitled for maintenance till they attain majority or are able to maintain themselves, female children are also similarly entitled till they get married. Learned counsel further placed reliance in the matter of Jagdish Jugtawat v. Manju Lata and others2 in which the Apex Court has held that thoughSection 125 of the Code does not fix liability of parents to maintain children beyond attainment of majority, but right of a minor girl for maintenance from parents after attaining majority till her marriage is recognized under Section 20 (3) of the Hindu Adoptions and Maintenance Act, 1956 (for short `the Act'). Therefore, on a combined reading of the two provisions, daughter even after her attaining majority is entitled for maintenance till her marriage and benefit of personal law for awarding or continuing maintenance proceedings can be given to the applicant, ineligible underSection 125 of the Code, to avoid multiplicity. Learned counsel also placed reliance in the matter of Yugeshwar Nath Mishra v. Arpana Kumari and another3 in which the Patna High Court after relying upon the case of Noor Saba (supra) has held that major unmarried daughter is also entitled for maintenance till her marriage. Learned counsel further placed reliance in the matter of Rama Chandra Sahu v. Tapaswini Sahu and another4 in which it has been held by the Orissa High Court that major unmarried daughter is entitled for maintenance in terms of Section 125 (1) (c) of the Code and the word `injury' need not necessarily denote physical injury, it has to be read in context of inability to maintain.

7. On the other hand, learned counsel for the respondent opposed the petition and submitted that this is a proceeding under Section 125 of the Code for grant of maintenance and not a petition under Section 20 (3) of the Act. This is a summary proceeding to save the person from vagrancy and destitution. Unmarried

daughters are not entitled for maintenance from their parents underSection 125 of the Code, but they may seek remedy under Section 20 of the Act after attaining the age of majority without assigning any cause for inability as a result of physical or mental injury. But in case of grant of maintenance under Section 125 of the Code an unmarried daughter who has attained the age of majority is required to prove that she is unable to maintain herself by reason of any physical or mental abnormality or injury. In this case, petitioner No.2 has not adduced any evidence to show that she is unable to maintain herself by reason of any physical or mental abnormality or injury, therefore, she is not entitled for maintenance in a summary proceeding under Section 125 of the Code.

8. It is not disputed that petitioner No.2 is unmarried daughter of the respondent. The respondent, father of petitioner No.2, is not maintaining petitioner No.2 or providing any amount of maintenance to her. Section 125 (1) of the Code 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:

9. Under the provisions of Section 125 of the Code, the major unmarried daughter is re-quired to prove that she is unable to maintain herself by reason of any physical or mental abnormality or injury. But as has been held by the Apex Court in the matter of Noor Saba (supra), even unmarried daughters are entitled for maintenance till they get married. Paras 10 & 11 of the said judgment read thus, "10. Thus, both under the personal law and the statutory law (Sec. 125,Cr.P.C.) the obligation of a Muslim father, having sufficient means, to maintain his minor children, unable to maintain themselves, till they attain majority and in case of females till they get married, is absolute, notwithstanding the fact that the minor children are living with the divorced wife.

11. Thus, our answer to the question posed in the earlier part of the opinion is that the children of Muslim parents are entitled to claim maintenance under Section 125, Cr.P.C. for the period till they attain majority or are able to maintain themselves, whichever is earlier, and in case of females, till they get married, and this right is not restricted, affected or controlled by the divorcee wife's right to claim maintenance for maintaining the infant child/children in her custody for a period of two years form the date of birth of the child concerned under Section 3 (1) (b) of the 1986 Act. In other words Section 3 (1) (b) of the 1986 Act does not in any way affect the rights of the minor children of divorced Muslim parents to claim maintenance from their father under Section 125, Cr.P.C. till they attain majority or are able to maintain themselves, or in the case of females, till they are married."

10. While dealing with the same question of award of maintenance to unmarried daughter after attaining the age of majority, the Apex Court in the matter of Jagdish (supra), after applying the principle has dismissed the S.L.P. filed against the award of maintenance to the major unmarried daughter under Section 125 of the Code. Paras 3 & 4 of the said judgment read thus, "3. In view of the finding recorded and the observations made by the learned Single Judge of the High Court, the only question that arises for consideration is whether the order calls for interference. A similar question came up for consideration by this Court in

the case of Noor Saba (supra) relating to the claim of a Muslim divorced woman for maintenance from her husband for herself and her minor children. This Court while accepting the position that Section 125 CrPC does not fix liability of parents to maintain children beyond attainment of majority, read the said provision and Section 3(1)(b) of the Muslim Women (Protection of Rights on Divorce) Act together and held that under the latter statutory provision liability of providing maintenance extends beyond attainment of majority of a dependent girl.

4. Applying the principle to the facts and circumstances of the case in hand, it is manifest that the right of a minor girl for maintenance from parents after attaining majority till her marriage is recognized in Section 20(3) of the Hindu Adoptions and Maintenance Act. Therefore, no exception can be taken to the judgment/order passed by the learned Single Judge for maintaining the order passed by the Family Court which is based on a combined reading of Section 125 CrPC and Section 20(3) of the Hindu Adoptions and Maintenance Act. For the reasons aforestated we are of the view that on facts and in the circumstances of the case no interference with the impugned judgment/order of the High Court is called for."

11. Further, while dealing with same question and the word `injury' in the matter of Rama Chandra (supra), the Orissa High Court has held that word `injury' need not necessarily denote physical injury and it has to be read in context of inability to maintain. Therefore, as held in the matters of Noor Saba & Jagdish (supra), unmarried daughters are entitled for maintenance even after attainment of the age of majority till they get married.

12. The provisions of Section 125 of the Code are beneficial legislation to protect the de-pendent from vagrancy and destitution and to provide reasonable amount of maintenance for their livelihood. In case of children viz., male till attainment of the age of majority and in case of female till the marriage, but if the daughter is unable to maintain herself by reason of any physical or mental abnormality or injury she is entitled for maintenance till she gets married even after attainment of majority, however, she is required to prove the fact that she is unable to maintain herself and her father is having sufficient means to maintain her. If a minor daughter is unable to maintain herself till the age of her majority and after attainment of majority she does not able to maintain herself, then her inability to maintain herself does not cease automatically and such inability to maintain herself makes her entitle for maintenance from her parents even after the attainment of her age of majority.

13. For the foregoing reasons, it is held that unmarried daughter is entitled for mainte-nance even after attainment of the age of majority, till her marriage, but she is required to prove her inability to maintain herself and that in spite of having sufficient means, her parents are not maintaining her. Consequently, the order impugned requires modification.

14. In the present case, application for maintenance has been filed by petitioner No.2 after attainment of the age of majority. She has shown her age as 27 years, but she has not examined herself before the trial Court or adduced any specific evidence relating to her inability to maintain herself. In spite of having sufficient means the respondent is not maintaining his major daughter.

15. The petition is partly allowed. Orders of the Courts below are modified and denial of maintenance to petitioner No.2 is hereby set aside. The case is remitted back to the Court of Judicial Magistrate First Class, Rajnandgaon for deciding the claim of petitioner No.2 for her maintenance and to pass order afresh.

16. Parties are directed to appear before the trial Court on 6-10-2009.

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RAKESH SACHDEVA AND ORS VERSUS STATE OF JHARKHAND AND ANR

IN THE HIGH COURT OF JHARKHAND AT RANCHI

Cr. Rev. No. 1088 of 2012

With

I.A. No. 2380 of 2013

(Before Hon'ble Mr. Justice H. C. Mishra, J.)

1. Rakesh Sachdeva, 2. Ramesh Sachdeva, 3. Sharda Sachdeva, 4. Rajan Sachdeva, 5. Minakshi Sachdeva @ Meenu Sachdeva ... Petitioners

v.

1. The State of Jharkhand, 2. Neelam Sachdeva ... ... Opposite Parties

For the Petitioner: Mr. Rajan Raj, Advocate

For the State: Mr. Manoj Kumar No. 3, A.P.P.

For the Opposite Party No. 2: M/s. Dilip Jerath, Advocate, Vineet Kr. Vashistha, Advocate

C.A.V. on 18.07.2013 Pronounced on 30.07.2013

The petitioner No. 1 has been directed to make the payment of Rs.2,000/- per month for a period of 9 years and 1 month, as also the medical expenses @ 200/- per month for the same period, which clearly shows that these monetary reliefs under Section 20 of the Act have been allowed to the complainant sometimes from the year 2001. The Protection of Women from Domestic Violence Act, 2005, came into force with effect from 26.10.2006, and this clearly shows that the said monetary reliefs have been granted to the complainant with retrospective effect from prior to the coming into force of the Act. In my considered view, this is a clear violation of Article 20 (1) of the Constitution of India. It is a well settled principle of law that the penal provisions do not operate retrospectively. {Authority: Harjit Singh Vs. State of Punjab, reported in (2011) 4 SCC 441}. However, I do not find any illegality and / or irregularity in the other directions, monetary reliefs and compensation allowed by the Trial Court below, worth interference in the revisional jurisdiction.

ORDER

H.C.Mishra,J. : Heard learned counsel for the petitioners, learned counsel for the State, as also learned counsel for the complainant opposite party No. 2.

2. The petitioners are aggrieved by the Judgement dated 03.10.2012 passed by learned Additional Sessions Judge-II, Dhanbad, in Cr. Appeal No. 184 of 2010, whereby the appeal filed against the Judgement and Order dated 19.07.2010 passed by Smt. Veena Mishra, learned Judicial Magistrate, 1st Class, Dhanbad, in C.P. Case No. 754 of 2009 / T.R. Case No. 727 of 2010, has been dismissed by the learned Appellate Court below.

3. It may be stated that in the complaint filed under the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the 'Act'), the petitioner No. 1, who is the husband of the complainant,

has been directed to provide an alternative accommodation to the victim complainant of the same level as being enjoyed, or pay rent for the same. He has also been restrained from renouncing his rights in the shared household. The petitioner No. 1 has further been directed to make the payment of Rs.2,000/- per month for a period of 9 years and 1 month prior to the order, which comes to Rs.2,18,000/-, medical expenses @ Rs.200/- per month for the same period, which comes to Rs.21,800/- and to make the payment of compensation of Rs.50,000/- for mental injury, and he has been further directed to make the payment of Rs.6,000/- per month towards the food, clothing, medication etc., from the date of filing of the case. All the petitioners have been directed to make the payment of Rs.10,000/- each, as compensation to the victim complainant under section 22 of the Act and they were also refrained from restraining the complainant from continued access to her personal effects in the shared household. The petitioner No. 1 has also been directed to make the payment of 50% of the arrears of Rs.6,000/- per month from May, 2009 till July, 2010, within a period of two months and the rest arrear amount and other amounts within a period of six months in three installments. In view of the fact that it was found by the Trial Court that the complainant was residing outside her matrimonial house / shared household and as there was no evidence against which the respondents be restrained from committing domestic violence, she was not found entitled to any relief under section 18 of the Act.

4. The record shows that the complainant opposite party No. 2, filed the complaint case before the Chief Judicial Magistrate, Dhanbad, which was numbered as C.P. Case No. 754 of 2009 under the provisions of the Act. According to the complainant's case she was married to the petitioner No. 1, Rakesh Sachdeva, as per Hindu customs on 21.2.1985, and thereafter she came to reside in the joint family house of her husband at Dhanbad. In the year 1986 the elder brother of the husband, viz., Ramesh Sachdeva, came from Punjab alongwith his family, and started living in the same house and thereafter the trouble of the complainant lady began. It is alleged that she was being subjected to mental agony by calling her as a barren lady, by the family members, except her husband, as she had not given birth to any child. Subsequently, the complainant along with her husband was shifted to the outhouse to avoid the regular unruly scenes. The younger brother of the husband of the complainant was married in the year 1988 and in the same year they were blessed with a daughter and thereafter the agony of the complainant further increased for not having given birth to any child, despite the marriage having taken place more than three years ago. She was always asked to stay away from the family functions, festivals and ceremonies and when such cruelty to the complainant further increased, the petitioner No. 1, husband brought the complainant to her brother's house on the pretext that her absence from the house would ease the situation and with a promise to take her back as soon as the situation normalized. She was however, never taken back to her matrimonial home, except for a short period when her mother-in-law died in the year 2002, when she had visited her matrimonial home. Again the petitioners continued casting aspersions against her being a barren lady and she was again brought at her brother's house. It was further alleged that while staying at her brother's house, she had taken up a job of a teacher in a local school, but there also she became a subject of talk between the teachers due to her disturbed matrimonial life, which forced her to leave her job due to mental and social stigma. All of a sudden the complainant learnt that the petitioner No. 1 had filed a Title Matrimonial Suit bearing No. 100 of 2006 against the complainant for divorce on the ground of cruelty and desertion. Claiming, that the complainant also perceived that her husband may alienate his share of the joint family property in order to deprive her of her share in the same, and stating that she had no means to maintain herself, whereas her husband was having a lucrative business of supplying earth moving machinery to B.C.C.L. and its sister concerns, the complaint was filed seeking protection under the Act.

5. Upon notice the petitioners appeared in the Court below and they filed their written statement from which it appears that the marriage between the parties is an admitted fact. Objection was taken by the petitioners in the Court below that no report had been received from the Protection Officer as required under Section 12 of the Act, and as such the complaint was not maintainable. The petitioners also denied the allegation that the complainant was ever subjected to any mental cruelty by the petitioners, and it was stated that the complainant in her W.S. filed in T.M.S. No. 100 of 2006 had stated that her husband

was impotent and accordingly, the claim of the petitioner that she was being called as barren lady was absolutely false. The petitioners also denied the claim of the complainant for monetary compensation.

6. The record shows that both the parties adduced evidence in the Court below, both oral and documentary, and on the basis of the detailed discussions of the evidence on record, the Court below has found that the complainant had been able to prove that she was mentally tortured and she was subjected to domestic violence by the petitioners and that continued even after the year 1993 when she was dropped at her brother's house and not taken back in the matrimonial home.

7. The Trial Court below on the basis of the evidence on record also came to the conclusion that it was due to the social stigma, that the complaint had to leave the job of teacher. The Court below took into consideration the objection taken by the petitioners that no report had been received from the Protection Officer as required under Section 12 of the Act, and relying upon a decision of the Allahabad High Court, found that Section 12 of the Act did not mandate for calling a report from the Protection Officer, and held the complaint maintainable. The Court below however, did not find the complainant entitled to any relief under section 18 of the Act, in view of the fact that she was admittedly residing outside the matrimonial home, but she was found entitled to the relief under section 19 of the Act and the respondents were restrained from denying the continued access to the complainant to her personal effects in the shared household and the husband was also directed to provide her an alternative accommodation for which the rent was to be paid by her husband and he was also restrained from renouncing his rights in the shared household, apart from the other monetary reliefs and compensation under sections 20 and 22 of the Act, as detailed above.

8. Learned counsel for the petitioners has submitted that the impugned Judgements and Order passed by the Courts below are absolutely illegal and cannot be sustained in the eyes of law. It has been submitted that the only allegation against the petitioners as regards the domestic violence is that they ill-treated the complainant calling her a barren lady, whereas it is an admitted position in her W.S. filed in the Title Matrimonial Suit filed by the petitioner No. 1, that the petitioner No. 1 is an impotent person. It has been submitted that when the complainant realized her mistake, she tried to amend the pleadings, but the same was not allowed and all these documents have been proved in the Court below. Learned counsel has submitted that without taking those documentary proof into consideration, the Court below has held that she was being subjected to domestic violence on the ground that she was being called a barren lady and not able to bear a child. Learned counsel submitted that the admission by the complainant that the petitioner No. 1 is an impotent person, the allegation of torturing her as a barren lady, has no legs to stand.

9. It is further submitted by the learned counsel that actually the complainant treated the petitioner with cruelty and torture and she herself left the matrimonial home in the year 1993 and she never returned back thereafter. It has been submitted that it has come in the evidence that there was no telephonic conversation between the parties since the year 2007, and as such the allegation of domestic violence does not stand at all. Learned counsel has also submitted that only when the suit for divorce was filed by the petitioner No. 1 on the ground of cruelty and desertion, the complainant filed the instant complaint and she has also filed an application for restitution of conjugal rights.

10. Learned counsel has further submitted that the allegation that she had left the job of a teacher due to social stigma is absolutely false. In this connection learned counsel has placed reliance upon the documents filed and proved by the complainant herself, to show that she was working in the school. These documents were marked as Exhibits-'1' and '2' which only show that the petitioner was working in the school satisfactorily. There is nothing in these documents to show that the petitioner had left the job due to any social stigma as alleged by her.

11. It is next contended by learned counsel for the petitioner that the Court below has not given any finding as regards the income of the petitioner and accordingly, the monetary reliefs and compensation could not have been granted by the Courts below without giving a finding about the income of the petitioner. In this connection learned counsel has placed reliance upon the decision of the Orissa High Court in Manorama Swain Vs. Giridhari Swain, reported in, (1993) 3 RCR (Cri.) 279. Learned counsel has also

placed reliance upon a decision of the Rajasthan High Court in Madhu Sudan Vs. Pushpa @ Bhawana, reported in (1987) 2 RCR (Cri.) 144, wherein it has been held that when the order of maintenance pendentelite is not supported by reasons and does not discuss the pros and cones of rival versions of the parties relating to the quantum of income of the husband, the order is liable to be set- aside.

12. Lastly, it has been submitted by learned counsel for the petitioners that the impugned orders granting monetary relief to the complainant under section 20 of the Act have been granted for a period of nine years and one month from the date of order, which was passed on 19.7.2010, and accordingly this period goes back to sometimes in the year 2001, when the Act itself was not in force and accordingly, the monetary relief has been granted to the complainant with retrospective effect from prior to the coming of the Act into force, which cannot be allowed. With these submissions learned counsel for the petitioners has submitted that the impugned Judgments are absolutely illegal and are fit to be set aside.

13. Learned counsel for the State, as also learned counsel for the complainant opposite party No. 2, on the other hand have opposed the prayer and have stated that the Courts below have discussed the evidence in detail and have come to the conclusive finding that the complainant was being subjected to domestic violence since the year 1986 itself, and ultimately she was dropped at her brother's place in the year 1993 and the domestic violence continued to her even thereafter, due to the social stigma of being a deserted women, due to which she had to leave the job of teacher in the school, as she was not able to bear the social stigma. Learned counsel has submitted that domestic violence has been defined in Section 3 of the Act, which includes the verbal, emotional and economic abuses, as well as mental injury, and accordingly, it cannot be said that the complainant was not subjected to domestic violence by the petitioners. Learned counsel has submitted that even if the complainant had stated in the written statement that her husband was impotent, this in itself is not sufficient to disbelieve the evidence of the complainant that she was being characterized as a barren lady due to the fact that she did not bear any child. Learned counsel further submitted that the complainant in her cross-examination has clearly stated that the petitioner had to leave the job of the school due to the social stigma which she was not able to bear, and accordingly it cannot be said that since there is nothing in the Exts-1 & 2 to show that she had left the job of the teacher in the school due to the social stigma, the same was not proved.

14. Learned counsel further submitted that the petitioner No. 1, who had examined himself as D.W.-1 in the Court below, had admitted in his cross-examination that he is a Mechanical Engineer and presently he is running a firm which deals in earth moving machines' spares, and he is running the firm since 1991 itself. It is submitted by learned counsel for the complainant that since no income was disclosed by the petitioner from his business, in view of the admitted fact that the petitioner was running the said business, the Court below found that the petitioner No. 1 is a man of means, and has also held that the complainant has no source of income and accordingly, allowed the monetary reliefs and compensation to the complainant under Sections 20 and 22 of the Act.

15. Learned counsel for the petitioner has also submitted that it is well settled principle of law that the Courts may take into consideration the conduct of the parties even prior to the coming into force of the Act, and as such, there is no illegality in allowing the monetary relief and compensation with the retrospective effect. In this connection learned counsel has placed reliance upon the decision of the Supreme Court of India, reported in V.D. Bhanot Vs. Savita Bhanot, reported in (2012) 3 SCC 183, wherein it has been held as follows:-

"12. 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."

Placing reliance on this decision, learned counsel submitted that there is no illegality in the impugned Judgements and Order passed by the Courts below, worth interference in the revisional jurisdiction.

16. After having heard learned counsels for both the sides and upon going through the record, I find that the Trial Court as well as the Appellate Court below have dealt with the evidence led by both the parties, both oral and documentary, and have come to the conclusion about the domestic violence, to which the complainant opposite party No. 2 had been subjected to. As the findings of the Courts below are based on the evidence on record, the same cannot be interfered with in the revisional jurisdiction. All the findings in the impugned Judgments regarding the domestic violence to which the complainant was subjected to, by the petitioners right from the year 1986, when the elder brother of the husband came and started living in the same house, which continued even after 1993 when the complainant was left by her husband at her brother's place, are fully supported by evidence. The definition of domestic violence as given in Section 3 of the Act clearly embraces the verbal, emotional and economic abuses, as also the mental injury to the victim, and accordingly, no fault can be found in the Judgements passed by the Courts below finding that the complainant was subjected to domestic violence by the petitioners. Similarly, even the finding by the Court below that the complainant had to leave the job due to social stigma attached to a deserted lady, is also based on the evidence on record and the same cannot be interference with.

17. Thus, I do not find any illegality and / or irregularity in the impugned Judgments and Order passed by the Courts below, finding that the complainant had been subjected to domestic violence and she is entitled to the protection under the Act.

18. Similarly, I do not find any merit even in the submission of the learned counsel for the petitioner that the Court below has not given any finding as regards the income of the petitioner. The petitioner No. 1, who had examined himself as D.W.-1 in the Court below, had admitted in his cross-examination that he is a Mechanical Engineer and presently he is running a firm which deals in earth moving machines' spares, and he is running the firm since 1991 itself. Since no income was disclosed by the petitioner from his business, the Court below has found that the petitioner No. 1 is a man of means, and accordingly, has rightly allowed the monetary reliefs and compensation to the complainant, and the same cannot be said to be excessive, taking into consideration the nature of the business of the husband.

19. This takes us to the last submission of the learned counsel for the petitioner that some of the monetary reliefs under Section 20 of the Act have been allowed with retrospective effect from prior to the coming into force of the Act. The petitioner No. 1 has been directed to make the payment of Rs.2,000/- per month for a period of 9 years and 1 month, as also the medical expenses @ 200/- per month for the same period, which clearly shows that these monetary reliefs under Section 20 of the Act have been allowed to the complainant sometimes from the year 2001. The Protection of Women from Domestic Violence Act, 2005, came into force with effect from 26.10.2006, and this clearly shows that the said monetary reliefs have been granted to the complainant with retrospective effect from prior to the coming into force of the Act. In my considered view, this is a clear violation of Article 20 (1) of the Constitution of India. It is a well settled principle of law that the penal provisions do not operate retrospectively. {Authority: Harjit Singh Vs. State of Punjab, reported in (2011) 4 SCC 441}. However, I do not find any illegality and / or irregularity in the other directions, monetary reliefs and compensation allowed by the Trial Court below, worth interference in the revisional jurisdiction.

20. In view of the aforementioned discussions, the monetary reliefs granted to the complaint opposite party No. 2, under Section 20 of the Act, which have been allowed for the period of 9 years and 1 month, are hereby, set aside, and it is directed that the same may be recalculated at the same rates as allowed by the Court below, with effect from the coming into force of the Act, and not prior to that date. With this modification in the impugned Judgement and Order dated 19.7.2010 passed by Smt. Veena Mishra, learned Judicial Magistrate, 1st Class, Dhanbad, in C.P. Case No. 754 of 2009 / T.R. No. 727 of 2010, this application stands dismissed.

21. Accordingly, I.A. No. 2380 of 2013 filed by the complainant opposite party No. 2, for vacating the stay order dated 7.2.2013, also stands disposed of.

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KADMI DEVI VERSUS JHALKU MISHRA

2015 SCC OnLine Jhar 4591

(Before Hon'ble Mr. Justice D.N Patel & Hon'ble Mr. Justice Ratnaker Bhengra, JJ.)

Kadmi Devi, wife of Jhalku Mishra, daughter of Late Rameshwar Mishra, Present &Permanent resident of village and P.O Pichhri, P.S Petarwar, Dist-Bokaro (Jharkhand) ..... Petitioner/Appellant

v.

Jhalku Mishra, son of Late Ayodhiya Mishra, resident of Sector-IX/B, Qtr. No. 300, Street 12, P.O Sector-IX, P.S Harla, B.S City, District-Bokaro, Jharkhand ..... Respondent/Defendant

For the Appellant: Mrs. Vandana Singh, Advocate

For the Respondent: Mr. Prabhash Kumar, Abhishek Kumar, Advocates

First Appeal No. 51 of 2015
Decided on October 6, 2015

The application preferred by this appellant for divorce under Section 13(1)(ib) of the Hindu Marriage Act, 1955 was allowed and the respondent was directed to make payment of Rs. 4,00,000/- towards permanentalimony/future maintenance within three months from the date of the decree. This appeal has been preferred by the original petitioner for enhancement of the amount of permanent alimony.

It appears from the facts of the case that since last 40 years the appellant-wife is not staying with the appellant.

(ii) As per the evidence on record, it appears that the respondent has remarried since last 20 years with one Smt. Sunita Devi.

(iii) Moreover, it appears from the evidences on record that this appellant had gone to her parental house and not returned and there is no child arising out of the marriage between the parties to this litigation.

(iv) It further appears, as per the evidence on record, that the respondent is working as an employee of Bokaro Steel Limited and is getting salary of Rs. 25,950/- per month i.e Exhibit-B which was also presented before the learned trial court.

(v) It further appears that arising out of 2nd wedlock there are four children and the respondent has also to maintain his parents.

(vi) It further appears from the evidence on record that Rs. 1200/- per month maintenance order has already been passed under Section 125 of the Code of Criminal Procedure and the respondent is paying such maintenance since 1stApril, 2009 till the order of Principal Judge, Family Court, Bokaro. Moreover, the respondent has also deposited amount of Rs. 4,00,000/- before the learned trial court as per the order passed by the trial court for permanentalimony.

(vii) It also appears from the evidence on record that two criminal cases were lodged by this appellant and they are as under:

(a) Complaint Petition Case No. 219 of 1992 under Section 498-A of the Indian Penal Code, which resulted into acquittal.

(b) Sessions Trial No. 83 of 2011 under Section 420, 471, 498-A, 494, 452 and 307 of the Indian Penal Code. This has been resulted into acquittal vide order dated 08.08.2014, passed by the Additional Sessions Judge-II, F.T.C, Bermo at Tenughat.

(viii) Looking to these aspects of the matter, it appears that this appellant had lodged complaint under Section 498-A of the Indian Panel Code, which resulted into an acquittal and also further allegations as stated hereinabove, which also resulted into acquittal. These also tantamounts to cruelty upon the respondent-husband.

(ix) Looking to the totality of the circumstances, as stated hereinabove, and the evidences on record and the placement of the respondent as a Class-IV employee and also looking to his further liability and also looking to the behaviour of this appellant, permanent alimony amount awarded by the trial court, which is at Rs. 4,00,000/- is just and proper.

Oral order

D.N PATEL, J.:— This first appeal has been preferred against the judgment and order delivered by the Principal Judge, Family Court, Bokaro in TMS No. 292 of 2013 dated 18th January, 2015 whereby, the application preferred by this appellant for divorce under Section 13(1)(ib) of the Hindu Marriage Act, 1955 was allowed and the respondent was directed to make payment of Rs. 4,00,000/- towards permanentalimony/future maintenance within three months from the date of the decree. This appeal has been preferred by the original petitioner for enhancement of the amount of permanent alimony.

2. Counsel appearing for the appellant submitted that the marriage between appellant and the respondent was solemnized in the year, 1974 thereafter, the respondent has also solemnized another marriage since last 20 years as per the evidence given before the trial court. It is further submitted by the counsel for the appellant that since 1st April, 2009 the respondent is paying Rs. 1200/- per month as a maintenance. This order of maintenance has been passed under Section 125 of the Code of Criminal Procedure. As this respondent is an employee of Bokaro Steel Limited and looking to the standard of life per month amount requires approximately Rs. 10,000/- for the maintenance and therefore, permanentalimony may be enhanced to Rs. 10,00,000/- instead of Rs. 4,00,000/-. The maintenance is being paid from 1st April, 2009, but, since last several years the maintenance has not been paid by the respondent and therefore, permanentalimony may be enhanced upto Rs. 10,00,000/-.

3. Counsel for the respondent submitted that the respondent is a Class-IV employee of Bokaro Steel Limited. He has already remarried since last 20 years and there are four children arising out of 2nd marriage. This respondent has also to maintain his parents. Moreover, previous desertion was at the behest of this appellant. Infact initially, the respondent was ready and willing to keep this appellant, but, she had left the house of the respondent since last 40 long years and therefore, the permanent alimony amount awarded by the trial court is absolute just and proper and the same may not be enhanced by this Court. Moreover, it is submitted by the counsel for the appellant that two criminal cases were lodged by this appellant one is C.P Case No. 219 of 1992 which resulted into acquittal which was about false allegations under Section 498-A of the Indian Penal Code and another case is Sessions Trial No. 83 of 2011 under Sections 420, 471, 498-A, 494, 452 and 307 of the Indian Penal Code and the order of acquittal has been passed in both the trials. In second case acquittal order is 8th August, 2014 passed by the Additional Sessions Judge-II, F.T.C, Bermo at Tenughat. Thus, there is a cruelty on the part of this appellant upon the respondent and this is how the appellant has miserably failed to perform her marriage obligation towards her husband.

4. Having heard counsels for both the sides and looking to the facts and circumstances of the case, we see no reason to entertain this first appeal mainly for the following facts and reasons:

   (i) It appears from the facts of the case that since last 40 years the appellant-wife is not staying with the appellant.

(ii) As per the evidence on record, it appears that the respondent has remarried since last 20 years with one Smt. Sunita Devi.

(iii) Moreover, it appears from the evidences on record that this appellant had gone to her parental house and not returned and there is no child arising out of the marriage between the parties to this litigation.

(iv) It further appears, as per the evidence on record, that the respondent is working as an employee of Bokaro Steel Limited and is getting salary of Rs. 25,950/- per month i.e Exhibit-B which was also presented before the learned trial court.

(v) It further appears that arising out of 2nd wedlock there are four children and the respondent has also to maintain his parents.

(vi) It further appears from the evidence on record that Rs. 1200/- per month maintenance order has already been passed under Section 125 of the Code of Criminal Procedure and the respondent is paying such maintenance since 1stApril, 2009 till the order of Principal Judge, Family Court, Bokaro. Moreover, the respondent has also deposited amount of Rs. 4,00,000/- before the learned trial court as per the order passed by the trial court for permanentalimony.

(vii) It also appears from the evidence on record that two criminal cases were lodged by this appellant and they are as under:

(a) Complaint Petition Case No. 219 of 1992 under Section 498-A of the Indian Penal Code, which resulted into acquittal.

(b) Sessions Trial No. 83 of 2011 under Section 420, 471, 498-A, 494, 452 and 307 of the Indian Penal Code. This has been resulted into acquittal vide order dated 08.08.2014, passed by the Additional Sessions Judge-II, F.T.C, Bermo at Tenughat.

(viii) Looking to these aspects of the matter, it appears that this appellant had lodged complaint under Section 498-A of the Indian Panel Code, which resulted into an acquittal and also further allegations as stated hereinabove, which also resulted into acquittal. These also tantamounts to cruelty upon the respondent-husband.

(ix) Looking to the totality of the circumstances, as stated hereinabove, and the evidences on record and the placement of the respondent as a Class-IV employee and also looking to his further liability and also looking to the behaviour of this appellant, permanent alimony amount awarded by the trial court, which is at Rs. 4,00,000/- is just and proper. We see no reason to take any other view than what is taken by the learned trial court so far aspermanent alimony is concerned.

5. In view of these facts, there is no substance in this first appeal and hence, the same is hereby, dismissed.

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MANJU DEVI VERSUS AWADH BIHARI PRASAD

2015 SCC OnLine Jhar 5395

(Before Hon'ble Mr. Justice D.N Patel & Hon'ble Mr. Justice Ratnaker Bhengra, JJ.)

Manju Devi, wife of Shri Awadh Bihari Prasad, daughter of Jagdish Ram, resident of Kandu Mohalla, P.O & P.S - Daltanganj, District - Palamau ..... Appellant

v.

Awadh Bihari Prasad, son of Late Nandu Ram, resident of Village & P.O Chiyanki, P.S -Daltoganj, District Palamau at present resident of Sthan Type Quarter No. 2, General Pool Shahpur, P.O, P.S & District - Bhopal (M.P) ..... Respondent

For the Appellant: M/s. N.K Sahani, Gauri Debi, Sucheta Nath

For the Respondent: M/s. Ajit Kumar, Vikash Kumar

F.A No. 110 of 2013
Decided on December 14, 2015

the application preferred by the respondent-husband was allowed for divorce and only Rs. 1,25,000/- was awarded by way of permanentalimony to his appellant-wife. Being aggrieved by this order, the original respondent (appellant herein) has preferred this appeal for enhancement of the permanentalimony amount.

The terms and conditions, which have been mentioned by the Conciliator of Jharkhand State Legal Services Authority, Ranchi, are as under: -

(i) That both the appellant and the respondent agreed to file joint compromise petition in the Hon'ble High Court in the First Appeal No. 110 of 2013, pending before the Hon'ble Court for mutual divorce.

(ii) That the respondent husband agreed to pay Rupees five lakhs and twenty five thousand only to his appellant wife towards one time settlement, alimony, maintenance and compensation. The aforesaid agreed amount of Rs. 5,25,000 (Rs. Five lacs and twenty five thousand only) will be paid by the respondent husband to his appellant wife by way of Bankdraft payable in her name in three installments within three months to which the appellant wife also accepted.

(iii) That the first installment of Rupees three lakhs by way of Bankdraft payabe in the name of the appellant will be paid by the respondent husband to the appellant wife on the date of the hearing of this case on 14.12.2015, before the Hon'ble Court.

(iv) That the rest two installments will be paid by the respondent husband to his appellant wife by way of Bankdraft in the name of the appellant within March, 2016 in two equal installments. The date of the second and third installment will be fixed by the Hon'ble Court on which dates the respondent husband gave undertaking and agreed to pay the rest balance amount of Rupees two lakhs twenty five thousand only to the appellant wife on the date fixed by the Hon'ble Court.

(v) That after the full and final payment of agreed amount of Rupees five lakhs and twenty five thousand only by the respondent husband to his appellant wife, both will file joint Petition for mutual divorce U/s 13 B of Hindu Marriage Act in the present case for mutual divorce decree, before the Hon'ble Court.

(vi) That both the appellant and the respondent agreed to file joint compromise Petition between them, which are filed by the appellant and the respondent against each other and will get those cases disposed of in the light of the above settlement.

(vii) That alternatively both the parties are at liberty to file separate mutual divorce Petition U/s 13 B of Hindu Marriage Act before the Family Court Daltonganj after withdrawal of this case, if they desire.

(viii) That after obtaining the divorce-decree, both the parties are at liberty to lead their own lives according to their wishes.

(ix) That there will be no further claims or counter-claims against each other in future by either parties, after this settlement.

(x) That the appellant wife and the respondent husband shall have no any claims whatsoever in future with regard to the movable and immovable property of each other.

(xi) That the above settlements have been arrived between the parties at their sweet-will and without any undue influence."

4. Upon the aforesaid terms, both parties have agreed to for the divorce between them. In view of the settlement arrived at between the parties on the aforesaid terms and conditions, the judgment of the trial Court is hereby upheld with a modification about payment of alimony amount. Instead of Rs. 1,25,000/-, now it shall be Rs. 5,25,000/-. Rest of the judgment delivered by learned Principal Judge, Family Court, Palamau at Daltonganj dated 1st May, 2013 in Matrimonial Case No. 11 of 2011 is maintained as it is.

D.N PATEL, J.:— This appellant has challenged the order passed by Principal Judge, Family Court, Palamau, at Daltonganj in Matrimonial Case No. 11 of 2011 judgment dated 1st May, 2013 whereby the application preferred by the respondent-husband was allowed for divorce and only Rs. 1,25,000/- was awarded by way of permanentalimony to his appellant-wife. Being aggrieved by this order, the original respondent (appellant herein) has preferred this appeal for enhancement of the permanentalimony amount.

2. At the request of both sides, as there were chances of settlement of the disputes between the parties, the matter was referred to the Jharkhand State Legal Services Authority, Ranchi for mediation and now after completion of the mediation process, settlement has been arrived at between the parties. The mediator has given a report dated 2nd November, 2015 and as per the terms of the settlement between the parties, the respondent-husband has agreed to pay Rs. 5,25,000/- to this appellant-wife, out of which, on 14th December, 2015, he had agreed to make payment of Rs. 3,00,000/- for which three bank drafts have been brought each of Rs. 1,00,000/- of Allahabad Bank, Chhipodhar branch dated 11th December, 2015 have been brought before this Court by the counsel for the respondent-husband. Thus, the three bank drafts each of Rs. 1,00,000/- brought on behalf of the respondent-husband are handed over to the counsel for the appellant-wife who shall give acknowledgement of the same. The wife of the respondent is also present in the Court and she is accepting the same. Counsel for the respondent-husband has submitted that they shall make the payment of Rs. 2,25,000/- on or before 31stMarch, 2016 in two equal instalments.

3. The terms and conditions, which have been mentioned by the Conciliator of Jharkhand State Legal Services Authority, Ranchi, are as under: -

   (i) That both the appellant and the respondent agreed to file joint compromise petition in the Hon'ble High Court in the First Appeal No. 110 of 2013, pending before the Hon'ble Court for mutual divorce.

   (ii) That the respondent husband agreed to pay Rupees five lakhs and twenty five thousand only to his appellant wife towards one time settlement, alimony, maintenance and compensation. The aforesaid agreed amount of Rs. 5,25,000 (Rs. Five lacs and twenty five thousand only) will be paid by the respondent husband to his appellant wife by way of Bankdraft payable in her name in three installments within three months to which the appellant wife also accepted.

(iii) That the first installment of Rupees three lakhs by way of Bankdraft payabe in the name of the appellant will be paid by the respondent husband to the appellant wife on the date of the hearing of this case on 14.12.2015, before the Hon'ble Court.

(iv) That the rest two installments will be paid by the respondent husband to his appellant wife by way of Bankdraft in the name of the appellant within March, 2016 in two equal installments. The date of the second and third installment will be fixed by the Hon'ble Court on which dates the respondent husband gave undertaking and agreed to pay the rest balance amount of Rupees two lakhs twenty five thousand only to the appellant wife on the date fixed by the Hon'ble Court.

(v) That after the full and final payment of agreed amount of Rupees five lakhs and twenty five thousand only by the respondent husband to his appellant wife, both will file joint Petition for mutual divorce U/s 13 B of Hindu Marriage Act in the present case for mutual divorce decree, before the Hon'ble Court.

(vi) That both the appellant and the respondent agreed to file joint compromise Petition between them, which are filed by the appellant and the respondent against each other and will get those cases disposed of in the light of the above settlement.

(vii) That alternatively both the parties are at liberty to file separate mutual divorce Petition U/s 13 B of Hindu Marriage Act before the Family Court Daltonganj after withdrawal of this case, if they desire.

(viii) That after obtaining the divorce-decree, both the parties are at liberty to lead their own lives according to their wishes.

(ix) That there will be no further claims or counter-claims against each other in future by either parties, after this settlement.

(x) That the appellant wife and the respondent husband shall have no any claims whatsoever in future with regard to the movable and immovable property of each other.

(xi) That the above settlements have been arrived between the parties at their sweet-will and without any undue influence."

4. Upon the aforesaid terms, both parties have agreed to for the divorce between them. In view of the settlement arrived at between the parties on the aforesaid terms and conditions, the judgment of the trial Court is hereby upheld with a modification about payment of alimony amount. Instead of Rs. 1,25,000/-, now it shall be Rs. 5,25,000/-. Rest of the judgment delivered by learned Principal Judge, Family Court, Palamau at Daltonganj dated 1st May, 2013 in Matrimonial Case No. 11 of 2011 is maintained as it is.

5. First Appeal is allowed with the modification to the aforesaid extent.

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NEELAM KUMARI SINHA VERSUS PRASHANT KUMAR

2010 SCC OnLine Pat 687 : AIR 2010 Pat 184 (FB) : (2011) 3 CHN 152 (FB) : (2011) 1 CTC 753 : (2010) 3 PLJR 632 (FB) : (2010) 3 BLJ 145 (PHC)

Full Bench

(Before Hon'ble Mr. Justice Dipak Misra, C.J., Hon'ble Mr. Justice Mihir Kumar Jha & Hon'ble Mr. Justice Jyoti Saran, JJ.)

Neelam Kumari Sinha
v.
Shree Prashant Kumar

C.R No. 346 of 2010
Decided on May 18, 2010

"Subsequent to the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (for short "the Act") as it was considered that the jurisdiction of the Magistrate under Section 125, Cr.P.c can be invoked only when the condition precedent mentioned in Section 5 of the Act is complied with, in the case in hand, the Magistrate came to a finding that there has been no divorce in the eye of law and as such, the Magistrate has the jurisdiction to grantmaintenance under Section 125 of the Cr.P.C This finding of the Magistrate has been upheld by the High Court. The validity of the provisions of the Act was for consideration before the Constitution Bench in the case of Danial Latifi v. Union of India, JT 2001 (8) SC 218: (2001) 7 SCC 740. In the said case by reading down the provisions of the Act, the validity of the Act has been upheld and it has been observed that under the Act itself when parties agree, the provisions of Section 125, Cr.P.C could be invoked as contained in Section5 of the Act and even otherwise the Magistrate under the Act has the power to grant maintenance in favour of the divorced woman, and the parameters and considerations are the same as those in Section 125, Cr.P.C It is undoubtedly true that in the case in hand, Section 5 of the Act has not been invoked. Necessarily, therefore, the Magistrate has exercised his jurisdictionunder Section 125, Cr.P.C But, since the Magistrate retains the power of granting maintenance in view of the Constitution Bench decision in Danial Latifi's case (supra) under the Act and since the parameters for exercise of that power are the same as those contained in Section 125, Cr.P.C, we see no ground to interfere with the orders of the Magistrate granting maintenance in favour of a divorced Muslim woman.

DIPAK MISRA, C.J:— Questioning the pregnability of the order dated 19-12-2009 passed by the learned Principal Judge, Family Court, Siwan in Divorce Case No. 15/05, whereby the said Court had allowed an ad interim maintenance of Rs. 4,500/- per month and litigation cost of Rs. 10,000/- in favour of the petitioner-wife in exercise of powers under Section 24 of the Hindu Marriage Act, 1955 (for brevity 'the 1955 Act') and under Section 19(5) of the Family Courts Act, 1984 (for short 'the 1984 Act'), the petitioner-wife has preferred the present civil revision invoking the revisional jurisdiction of this Court under Section 115 of the Code of Civil Procedure. Before the learned Single Judge, the question of maintainability of the revision was raised on the basis of an order passed on 23-2-2010 in Misc. Appeal No. 654 of 2009 (Anand Kumar Thakur v. Madhuri Kumari) wherein it has been held that a miscellaneous appeal would be the proper remedy under. Section 19(1) of the 1984 Act.

2. The learned single Judge, after referring to certain provisions of the Act andthe decisions in the field, expressed a doubt with regard to the order passed in Misc. Appeal No. 654 of 2009 and referred the following questions and felt that the controversy should be put to rest by a larger Bench. The learned single Judge recommended the following issue for adjudication by a larger Bench :—

"Whether an appeal would be available under Section 19(1) of the Family Courts Act, 1984, against an order passed under Section 24 of the Hindu Marriage Act, 1955?"

That is how the matter has been placed before us.

3. An order passed under Section 24 of the 1955 Act was appealable underSection 28 of the 1955 Act. After the amendment in the year 1976, Section 28 of the 1955 Act had undergone a sea change. The unamended Section 28 of the 1955 Act reads as follows:—

"28. All decrees and orders made by the Court in any proceeding under this Act shall be enforced in like manner as the decrees and orders of the Court made in exercise of the original civil jurisdiction are enforced and may be appealed from under any law for the time being in force; Provided that there shall be no appeal on the subject of costs only."

4. On a reading of the aforesaid provision, there can be no shadow of doubt that an appeal did lie from an order passed under the Act. The Parliament by Act No. 68 of 1976 substituted Section 28. The substituted provision contained in Section 28 reads as follows :—

"28. (1) All decrees made by the Court in any proceeding under this Act, shall be subject to the provisions of sub-section (3), be appealable as decrees of the Court made in exercise of its original civil jurisdiction and every such appeal shall lie to the Court to which appeals ordinarily lie from the decisions of the Court given in exercise of its original civil jurisdiction.

(2) Order made by the Court in any proceeding under this Act under Section25 or Section 26 shall, subject to the provisions of sub-section (3) be appealable if they are not interim orders, and every such appeal shall lie to the Court to which appeals ordinarily lie from the decisions of the Court given in exercise of its original civil jurisdiction.

(3) There shall be no appeal under this section on the subject of costs only.

(4) Every appeal under this Section shall be preferred within a period of thirty days from the date of the decree or order."

5. On a studied scrutiny of the amended provision, it is clear as noon day that the right of appeal against interim order passed under Sections 24, 25 and 26 of Act has been expressly taken away. It has also been clearly provided that the orders passed under Section 25 or Section 26 shall be subject to the provision of sub-section (3) and are appellable if they are not interim orders. Section 25 of the 1955 Act deals with grant of permanent alimony. The aforesaid provisions came to be interpreted in Captain Ramesh Chander Kaushal v. Mrs. Veena Kaushal, (1978) 4 SCC 70 : (AIR 1978 SC 1807), wherein their Lordships have held thus :—

"6. 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 formaintenance of the children although the order does advert to the fact that the respondent has their custody. This incidental direction is no comprehensive adjudication."

6. From the aforesaid pronouncement, it is clear as crystal that an order passed under Section 24 of the 1955 Act is an interim order and is incidental to the comprehensive adjudication.

7. The Parliament considering the public interest and the need of the hour thought it apposite to establish Family Courts and conferred with jurisdiction to deal with the disputes with a view to promote conciliation and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith. Section 7 of 1984 Act deals with the jurisdiction of a Family Court. Section 8 deals with the exclusion of jurisdiction and pending proceedings.Section 17 prescribes that a judgment of a Family Court shall contain a concise statement of the case, the point for determination, the decision thereon and the reasons for such decision Section 19 provides for appeals and revisions. The said provision, being relevant for the present proceeding, is reproduced hereinbelow :—

"19. Appeal.— (1) Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law.

(2) No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties or from an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) :

Provided that nothing in this sub-section shall apply to any appeal pending before a High Court or any order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) before the commencement of the Family Courts (Amendment) Act, 1991.

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment or order of a Family Court.

(4) The High Court may, of its own motion or otherwise, call for and examine the record of any proceeding in which the Family Court situate within its jurisdiction passed an order under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) for the purpose of satisfying itself as to the correctness, legality or propriety of the order, not being an interlocutory order, and, as to the regularity of such proceeding.

(5) Except as aforesaid, no appeal or revision shall lie to any Court from any judgment, order or decree of a Family Court.

(6) An appeal preferred under sub-section (1) shall be heard by a Bench consisting of two or more Judges."

8. Section 20 stipulates that the Act would have overriding effect. In Anand Kumar Thakur (supra), the Division Bench has observed thus :—

"Heard learned counsel for the appellant in respect of office objection regarding maintainability of this appeal on the ground that the order awarding interim maintenance under S. 24 of the Hindu Marriage Act is an interlocutory order and, therefore, no appeal shall lie under S. 19(1) of the Family Courts Act, 1984. Learned counsel for the appellant submits that the issue of interim maintenance under S. 24 of the Hindu Marriage Act cannot be treated as interlocutory because an order deciding such an issue affects the rights and liabilities of the parties to the suit. We are in agreement with the aforesaid submission advanced on behalf of the appellant. Accordingly, we hold that appeal against an order under S. 24 of the Hindu Marriage Act awarding or refusing interim maintenance is maintainable underS. 19 of the Family Courts Act."

9. The centripodal issue that emerges for consideration is whether an order passed under Section 24 of the. 1955 Act would be an interlocutory order so that it will not be covered within the meaning of Section 19(1) of the 1984 Act. In this context, we may refer with profit to a Full Bench decision of Orissa High Court inSwarna Prava Tripathy v. Dibyasingha Tripathy, AIR 1998 Orissa 173 (DB). In the said case, the

Full Bench speaking through Pasayat, J. (as his Lordship then was) after noticing the decisions rendered in Dilip Chhaganlal Patel v. State of Maharashtra, AIR 1983 Bom 128; Laxmibai v. Ayodhya Prasad, AIR 1991 MP 47; Kumud Wadhwa v. M.K Wadhwa, (1994) 1 DMC 543; Narendra Kumar Mehta v. Smt. Suraj Mehta, AIR 1982 Andh Pra 100; Rakesh Chandok v. Vinodi, AIR 1982 J & K 95; Rajpal v. Smt. Dharmavati, AIR 1980 All 350; Jang Bahadur Syal v. Smt. Mukta Syal, AIR 1986 Delhi 422; and Smt. Satish Bindra v. Surjit Singh Bindra, AIR 1977 Punj & Har 383, adverted to the issues what can be called 'interlocutory orders' and 'final orders'and in that context, has held thus :—

"6. At this juncture it is necessary to pigeonhole which can be called interlocutory orders and final orders. Interlocutory orders are of various kinds; some like orders of stay, injunction, or receiver, are designed to preserve the status quo pending the litigation and to ensure that the parties might not be prejudiced by the normal delay which the proceedings before the Court usually take. They do not, in that sense, decide in any manner the merits of the controversy in issue in the suit and do not, of course, put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation, the principle of res judicata does not apply to the findings on which these orders are based, though if application were made for relief on the same basis after the same has once been disposed of, the Court would be justified in rejecting the same as an abuse of the process of Court. An order may be final for one purpose and interlocutory for another. The expression 'interlocutory order' as used in restricted sense and not in any broad or artistic sense, denotes orders of a purely interim or temporary nature which do not decide or touch the important rights or liabilities of the parties. In Webster's Third International Dictionary, the expression 'interlocutory' has been defined as, 'not final or definite, made or done during the progress of an action; intermediate, provisional'. The emphasis is, therefore, at the stage when the order is passed. Interlocutory stage is decidedly the stage between the cognizance taken by the Court and the judgment pronounced. The interlocutory order is supplemental proceeding which is a means to an end and not an end itself. The word 'interlocutory' means according to the import of the dictionary 'intermediate' and the interlocutory order is one passed during the progress of the proceeding that is to say, interlocutory order must be an order passed after the initiation of the proceedings and before the final order disposing of the matter. In New Webster's Dictionary, College Edition, the meaning given is 'of the nature of, pertaining to, or occurring in, conversation or dialogue; spoken intermediately, as interlocutory conversation interjected into the main speech. Law, pronounced during the course of an action, as a decision or order, not finally decisive of a case, pertaining to a provisional decision.' Interlocutory orders are steps taken towards the final adjudication for assisting the parties in the prosecution of their case in the pending proceedings.

See Central Bank of India v. Gokul Chand, AIR 1967 SC 799. Interlocutory inter alia means not that which decides the case, but that which only settles some intervening matter relating to the cause. As interlocutory order is one which is made pending the cause and before a final hearing on the merits. An interlocutory order is made to secure some end and purpose necessary andessential to the progress of the suit, and generally collateral to the issues formed by the pleadings and not connected with the final judgment."

Thereafter, their Lordships referred to a decision in Ramesh Chander Kaushal(supra) and eventually expressed the view as follows :

"8. In view of the law as laid by the Apex Court, the inevitable conclusion is that an order passed under Section 24 or 26 of Marriage Act is an interlocutory order and as such, no appeal would lie in terms of Section19(1) of the Act. The question is whether revision would lie. In view of what has been stated in sub-section (5), revision would not lie."

After so holding, the question arose as to what can be the remedy available to the affected person if the order is treated as interlocutory. Their Lordships placed reliance on Mahadeo Savlaram Shelke v. Pune Municipal Corporation, (1995) 3 SCC 33 : (1995 AIR SCW 1439 at p. 1441) and came to hold that a writ petition under Art. 227 of the Constitution of India would lie against such an order.

10. In Ravi Saran Prasad alias Kishore v. Smt. Rashmi Singh, AIR 2001 All 227, a Division Bench of the Allahabad High Court has expressed the view as under :—

"A conjoint reading of sub-section (1) and sub-section (5) makes us crystal clear that only one appeal lies to the High Court; that no appeal or revision lies except as provided under sub-section (1) from any judgment, order or decree of a Family Court; and further that no appeal lies against such judgment or order which is interlocutory. It cannot be said that the Legislature has created an appellate form in 1984 against the orders passed under Section 24 of the Hindu Marriage Act nullifying Section 28 of that Act contrary to the object of enactment of the Act as stated in the Bill."

11. In this context, we may note with profit a decision by learned Single Judge inSmt. Usha Kumari v. The Principal Judge, Family Court, Patna, 1997-II BLJ 474 : (AIR 1998 Pat 50) wherein the learned Single Judge, after referring to the relevant provisions, has held that no appeal from an interlocutory stage is permissible. In that context, after so holding, the learned Single Judge has expressed thus :

"12. Now the question is whether powers given to this Court under Art. 227 of the Constitution can be utilised to achieve a purpose which has been expressly negatived by a competent piece of legislation. The answer is obviously an emphatic "No". It is well known that the powers under Art. 227 of the Constitution are powers of superintendence over the Subordinate Courts and the main purpose for exercising such power is to keep the Subordinate Court within the bounds of their authority. It is settled beyond controversy that under Art. 227, the High Court cannot interfere with an order which has been passed by a Subordinate Court simply because of the fact that on the said facts the High Court entertains a different view of the matter. However, the obiter observation of the Supreme Court which has been quoted in Raj Kumar's case (supra) merely reiterates that High Courts' power under Art. 227 are obviously there but said power cannot be exercised as a handy substitute for the statutory powers. This Court is absolutely convinced that this is not a fit case where there is any grave injustice and High Court should interfere under Art. 227 of the Constitution of India on merits of the order even if the High Court feels that a different order could have been passed."

12. The aforesaid order has to be read in proper perspective to mean that it only relates to the exercise of power under Art. 227 of the Constitution of India and it should not be construed that the writ petition is not maintainable.

13. The learned counsel for the petitioner submitted that when no appeal would lie, a revision can be entertained.

14. A Full Bench of this Court in Durga Devi v. Vijay Kumar Poddar connected matters decided on 27-4-2010 : (AIR 2010 Pat 126) has held that when an order is interlocutory in nature, no civil revision would lie as the acid test has to be that it could have finally disposed of the suit or other proceeding. In the said decision, it has been held that a writ petition under Art. 227 of the Constitution of India would be maintainable. It has been further held therein that the civil revision which is pending can be converted into a writ petition on fulfillment of the other conditions.

15. In view of the aforesaid analysis, it is held that an order passed by the learned Principal Judge, Family Court under Section 24 of the 1955 Act would be amenable to writ jurisdiction under Art. 27 of the Constitution of India. Thus, the conclusion recorded in M.A No. 654 of 2009 does not lay down the law correctly and is hereby overruled.

16. It is obligatory to clarify here that if a civil revision has been filed, the same can be converted into a writ petition on fulfillment of other requisite conditions.

17. The reference is answered accordingly. The matter be placed before the learned Single Judge for delineation in accordance with law.

Order accordingly.

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RAM NARAIN MAHTO AND ORS. VERSUS PHUL KUMARI DEVI AND ORS.

Patna High Court

Equivalent citations: II (1990) DMC 262

(Before Hon'ble Mr. Justice P Mishra, J.)

Ram Narain Mahto And Ors.
vs
Phul Kumari Devi And Ors.

Decided on 1 August, 1988

JUDGMENT

Section 23 of the Hindu Marriage Act is a provision which states that in any proceeding under the Hindu Marriage Act whether defended or not, if the court is satisfied that any of the grounds for granting relief exists and the petitioner (except in cases where the relief is sought by him on the ground specified in Sub-clause (a), Sub-clause (b) or Sub-clause (c) of Clause (ii) of Section 5) is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief the decree may not be granted. Defendant No. 1 has not appeared to deny the allegations made by the plaintiffs. It is not on the record of the case that the plaintiff No. 2 contracted the marriage with the defendant No. 1 knowing that he had a living spouse or that there was no representation made to her which misled her to believe that no illegality was committed by the second marriage. If she was subjected to a wrong act by the defendant No. 1, he could not take shelter under Section 12 of the Act to suggest that the marriage was void. In the absence of any material for such a conclusion merely on the basis that plaintiff No. 1 was still alive when plaintiff No. 2 was taken as the wife by the defendant No. 1 it can not be said that she is not a wife entitled to claim maintenance from the defendant No. 1.

P.S. Mishra, J.

1. Since notice was issued to the plaintiffs-opposite party and they have entered appearance and the main contention, not decided, may prejudice one or the other party, I propose to decide the matter finally and accordingly proceed to deliver my judgment.

2. The plaint and the written statement which precisely precipitate the issues are produced for the Court's perusal by the learned counsel for the petitioners. Plaintiffs opposite party have come forward with a simple case. According to them, plaintiff No. 1 was married with the defendant No. 1 in accordance with Hindu rites about 25 years ago and lived with him giving birth to a son who died. About 15 years ago defendant No. 1 married with the plaintiff No. 2 according to Hindu rites. She, however, could not give any child to the defendant No. 1. Defendant No. 1 being a simpleton, however, fell under the undue influence and pressure of defendants 2 to 4 and executed a deed of gift with respect to his interest to the extent of half with defendants 2 to 4, in their favour on 18-6-1985. Defendants 2 to 4 thereafter, taking advantage of the deed of gift removed the plaintiffs-petitioners from their shelter in the house of the defendant No. 1 and they were accordingly driven to the houses of their respective parents. Since they have no other means of livelihood and are living at the charity of their respective parents, they have instituted the suit for maintenance by the defendants. In their common written statement defendants 2 and 3 Opposite party have admitted that plaintiff No. 1 was married with the defendant No. 1 and have also not specifically disputed the fact that plaintiff No. 2 was married with the defendant No. 1, but have

said that she deserted the defendant No. 1 before the execution of the deed of gift and remarried herself to one Rajendra Mandal. They have further mentioned in their written statement that the plaintiffs are not entitled to any maintenance and that the gift is valid and final and they have become absolute owner of the said property without there being any attached encumbrance including maintenance.

3. Their further case, however, is that the defendant No. 1 became a Sadhu and died a civil death.

4. After the defendants appeared in the suit the plaintiffs moved a petition for interim maintenance. The learned Subordinate Judge, Sitamarhi has ordered that defendants 2 and 3 should pay interim maintenance at the rate of Rs. 150/- per month to each of the plaintiffs, from the date of the institution of the suit until its disposal. Petitioners have moved this Court against the said order.

5. Mr. Mishra, learned counsel appearing for the petitioners has contended that defendant No. 1 who has already met a civil death could not contract a second marriage in the life time of his first wife, namely, the plaintiff No. 1 in view of the provisions forbidding such marriage as contained in the Hindu Marriage Act. Section 18 of the Hindu Adoption and Maintenance Act is a provision to grant maintenance after adjudication and not any interim maintenance. According to the learned counsel, the order thus is invalid as without jurisdiction and fit to be set aside.

6. It is not in dispute that the defendant No. 1 took his first wife some time in the year 1960 and the second wife some time in the year 1972. The defendant No. 1, therefore, was married to the plaintiffs after the Hindu Marriage Act, 1955 had come into force. Section 5 of the Act lays down the conditions which must be fulfilled before a marriage may be solemnized. Clause (i) thereof says :

"Neither party has a spouse living at the time of marriage."

Section 11 of the Act says that any marriage solemnized 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. When a dispute had arisen in connection with the grant of maintenance under Section 125 of the Code of Criminal Procedure and a contention was raised as to whether a Hindu woman married with a man already having a living spouse is entitled to such maintenance or not, a Bench of the Supreme Court in the case of Smt. Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav and Anr. (AIR 1988 SC 644) has said :

"The marriages covered by Section 11 are void ipso jure, that is, void from the very inception, and have to be ignored as not existing in law at all if and when such a question arises. Although the section permits a formal declaration to be made on the presentation of a petition, it is not essential to obtain in advance such formal declaration from a court in a proceeding specifically commenced for the purpose."

7. Relying upon the said judgment of the Supreme Court it has been contended that assuming all the facts in favour of the plaintiffs-opposite party the court below would not have allowed maintenance to two wives who claim to be married with the defendant No. 1 after the Hindu Marriage Act came into force. It was plaintiff No. 2 who was taken as the second wife by the defendant No. 1. According to the petitioners, she contracted a second marriage after the alleged civil death of the defendant No. 1. The court below, according to the learned counsel, has thus gone beyond jurisdiction in recognising the right of the plaintiff No. 2 as the wife of the defendant No. 1 for maintenance. Casual reading of the provisions of the Hindu Marriage Act, however, may take one to the above conclusion. On the facts of the case decided by the Supreme Court conclusion that a wife contracting a second marriage is not entitled to maintenance is alone possible because such void marriage could not give a legal basis for maintenance. A closer examination of the law, however, may indicate a situation in which the wife may be a victim of the designs of the husband and in a situation obtaining as indicated in the various provisions of the Hindu Marriage Act, a void marriage may not be a ground for a decree of divorce or a decree that the marriage was a nullity. Section 23 of the Hindu Marriage Act is a provision which states that in any proceeding under the Hindu Marriage Act whether defended or not, if the court is satisfied that any of the grounds for granting relief exists and the petitioner (except in cases where the relief is sought by him on the

ground specified in Sub-clause (a), Sub-clause (b) or Sub-clause (c) of Clause (ii) of Section 5) is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief the decree may not be granted. Defendant No. 1 has not appeared to deny the allegations made by the plaintiffs. It is not on the record of the case that the plaintiff No. 2 contracted the marriage with the defendant No. 1 knowing that he had a living spouse or that there was no representation made to her which misled her to believe that no illegality was committed by the second marriage. If she was subjected to a wrong act by the defendant No. 1, he could not take shelter under Section 12 of the Act to suggest that the marriage was void. In the absence of any material for such a conclusion merely on the basis that plaintiff No. 1 was still alive when plaintiff No. 2 was taken as the wife by the defendant No. 1 it can not be said that she is not a wife entitled to claim maintenance from the defendant No. 1. That defendant No. 1 had met a civil death or that the plaintiff No. 2 had contracted a second husband are facts which require proof. These allegations have been brought on the record by the defendants 2 and 3 and unless they prove that the defendant No. 1 has met a civil death or that the plaintiff No. 2 has taken a second husband, it can not be said that her rights as the wife of the defendant No. 1 are destroyed. It is in this background that the court considering whether interim maintenance be granted or not has to proceed to examine how defendants 2 and 3 have entered upon the property of the defendant No. 1 on the basis of the alleged deed of gift which has been described in the plaint as obtained by fraud and undue influence, H.L. Agrawal, J. as he then was, has taken the view in Baliram Ram v. Radhika Devi (AIR 1980 Patna 67) that interim maintenance can be granted to the wife in a claim against the husband if relationship of husband and wife between the parties is not in dispute. He based his judgment upon several authorities including a judgment of the Supreme Court in Manohar Lal Chopra v. Seth Hiralal (AIR 1962 SC 527). Although the said case of the Supreme Court was not with respect to grant of maintenance or under the Hindu Adoption and Maintenance Act, it dealt with general powers of the Court to grant interim relief under Section 151 of the Code of Civil Procedure. Cases referred to in the said judgment carry the consensus that where the wife established a prima facie case the court was competent to order for grant of pendente lite maintenance. Learned counsel for the petitioner has, however, drawn my attention to two judgments (i) in the case of Gorivelli Appanna v. Gorivelli Selthamma (AIR 1972 AP 62) and (ii) in the ease of Ram Chandra Behera and Ors. v. Smt. Snehalata Devi (AIR 1977 Orissa 96). Andhra Pradesh judgment has been taken notice of by this Court in the case of Baliram Ram (supra). The Orissa Judgment, however, is one which appears to support the contention of the learned counsel for the petitioners to the effect that the court has no power to award interim maintenance under Section 18 of the Hindu Adoption and Maintenance Act. The view taken by the Orissa Court, however, is in conflict with atleast three judgments of the Calcutta High Court and judgments of the Rajasthan, Madras and Karnataka High Courts. It is also contrary to the view expressed by a Full Bench of the Punjab High Court in the case of Durga Das v. Smt. Tara Rani (AIR 1971 Punjab and Haryana 141). The Orissa Court has proceeded on the basis that in a case where maintenance is claimed under Section 18 of the Act, the Court, since it proceeds to exercise its inherent powers only in the absence of any specific provisions therefor generally declines to exercise its inherent power under Section 151 of the Code of Civil Procedure. But it is one thing to say that a Court may decline to exercise its inherent power and another to say it has no jurisdiction to do so. Where issue as to the claim of marriage is hotly contested the court may express reluctance and refuse to grant any interim maintenance. It has been invariably pointed out that a court adheres to the provisions of law if they are made for specific purposes and does not go beyond them but where there are no provisions of law and justice demands an order to protect interests pendente lite, recourse is taken to the inherent power preserved in all courts and specified in Section 151 of the Code of Civil Procedure. I am, therefore, not in agreement with the view expressed by the Orissa High Court. The precedent of this Court supports my view that interim maintenance can be granted by the Court. In the set of facts of this case I am satisfied that grant of interim maintenance to the plaintiffs-opposite parties is legal and valid.

8. No other contention having been raised I find no merit in this application. It is accordingly dismissed.

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SARASWATI DEVI VS STATE OF BIHAR AND ORS.

Patna High Court

Equivalent citations: 2006 (1) BLJR 26, II (2006) DMC 358

(Before Hon'ble Mr. Justice C K Prasad, J.)

Saraswati Devi

v.

State Of Bihar And Ors.

Decided on 2 January, 2005

JUDGMENT

In my opinion, the Court exercising the power under Section 125 of the Code of Criminal Procedure, gets the jurisdiction to pass order for maintenance of wife only when it is satisfied that the person claiming is legally wedded wife. If on the material on record this jurisdictional fact is not established, the Court exercising the power under Section 125 of the Code does not get jurisdiction to pass any order. On petitioner's own showing her marriage with her husband was during the subsistence of the first marriage and therefore void and hence the contention of Mr. Pandey that so long it is not declared to be so, petitioner is entitled for maintenance is fit to be rejected.

Chandramauli Kr. Prasad, J

1. This application has been filed for quashing the order dated 22.8.2002 passed by the Sub-Divisional Judicial Magistrate, Jehanabad in Misc. Case No. 17 of 2000 (Trial No. 186 of 2002), whereby the prayer made by the petitioner for grant of maintenance under Section 125 of the Code of Criminal Procedure has been rejected. Further prayer made by the petitioner is to quash the order dated 13.1.2004; passed by the Sessions Judge, Jehanabad in Criminal Revision No. 73 of 2003, whereby the revision preferred against the aforesaid order has been dismissed.

2. Short facts giving rise to the present application are that the petitioner filed application for maintenance under Section 125 of the Code of Criminal Procedure, inter alia, alleging that he married Opposite party No. 2 according to Hindu rites in the year 1980 and excepting for the brief period lived as husband and wife till December 1999. Petitioner has herself averred in her application that her husband opposite party No. 2 was married from before but had married her again, concealing the aforesaid fact as he had no child from the first marriage. The learned Magistrate on the plea of the petitioner itself found that her marriage cannot be said to be a valid marriage and therefore, not entitled for maintenance under Section 125 of the Code of Criminal Procedure. Revisional Court agreeing with the same, by the impugned order, has dismissed the revision application.

3. Mr. S.R.C. Pandey, appearing on behalf of the petitioner submits that the heading of Section 125 of the Code of Criminal Procedure, hereinafter referred to as the 'Code', provides for order for maintenance of wives and, as such, petitioner cannot be denied maintenance only on the ground that she happens to be the second wife. In support of his submission he has placed reliance on a judgment of the Supreme Court in the case of Narinder Pal Kaur Chawla v. Manjeet Singh Chawla, , and my attention has been drawn to paragraph 9 of the judgment which reads as follows :

As the legal right of the second wife to claim maintenance under the Act and its quantum are hotly contested issues in the main case, we refrain from expressing any opinion on merit of the claims and contentions of the parties. For the purpose of fixing appropriate amount of interim maintenance, we may assume that the financial position of the husband is such that he can easily pay a sum of Rs. 1500/- per month as interim maintenance without disturbing the right of separate residence provided to the wife on the second floor of the husband's premises.

4. I do not find any substance in the submission of the learned Counsel and the authority relied on is clearly distinguishable. The expression wife used in Section 125 of the Code means only a legally wedded wife. The word wife has not been defined in the Code except indicating in explanation (b) to include a women who has been divorced or has obtained a divorce and not remarried. The term wife, therefore, has to be given the meaning in which it is understood in law applicable to the party.

Undisputedly, the party are Hindus and the marriage according to the petitioner herself having taken place in the year 1980 shall be governed by the provisions of Hindu Marriage Act. Section 5 of the Hindu Marriage Act provides for conditions for a Hindu Marriage and Section 5(i) thereof provides that neither party should have a spouse living at the time of marriage as one of the conditions for a Hindu marriage. Section 5(i) of the Act which is relevant from the purpose reads as follows :

5. Conditions for a Hindu Marriage.--A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely : (i) neither party has a spouse living at the time of the marriage;

xxx xxx xxx

5. Section 11 of the Hindu Marriage Act, provides that marriage solemnized after the commencement of the Act shall be null and void if it contravenes the conditions specified in Clause

(i) of Section 5 of the Act. Same reads as follows ;

11. Void maniages.--Any marriage solemnized after the commencement of this 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 specified in Clauses (i), (iv) and (v) of Section 5.

6. According to the petitioner's own showing her marriage had taken place during the life time of the first wife of her husband and therefore petitioner's marriage in accordance with the Hindu rites with a man having a living spouse is complete nullity. In my opinion, marriage of a Hindu Woman with the Hindu man with a living spouse performed after coming into force of the Hindu Marriage Act, 1955 is null and void and once it is found so the woman is not entitled to maintenance under Section 125 of the Code. Reference in this connection can be made to a decision of the Supreme Court in the case of Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav and Anr. , in which it has been held as follows :

8.--We, therefore, hold that the marriage of a woman in accordance with the Hindu rites with a man having a living spouse is a complete nullity in the eye of law and he is not entitled to the benefit of Section 125 of the Code. The appeal is accordingly dismissed. There will be no order as to costs. During the pendency of the appeal in this Court some money was paid to the appellant in pursuance of an interim order. The Respondent shall not be permitted to claim for its refund.

7. The Supreme Court considered this question in the case of Bakulabai and Anr. v. Gangaram and Anr. which reads as follows :

We have by our judgment in Criminal Appeal No. 475 of 1983 (Smt. Yamunabai v. Anantrao Shivram Adhav) delivered today held that the marriage of a Hindu woman with a Hindu male with a living spouse performed after the coming in force of the Hindu Marriage Act, 1955, is null and void and the woman is not entitled to maintenance under Section 125 of the Code.'

8. The Supreme Court had the occasion to consider this question in the case of Khemchand Om Prakash Sharma v. State of Gujarat and Anr. in which it has been held as follows :

The short question that arises for consideration in this appeal is whether the respondent Jasumatiben, who claimed maintenance, being the wife of the applicant, can be allowed any maintenance on the admitted position that the applicant's first wife is alive and there has been no annulment of marriage by a decree of divorce or otherwise. During the subsistence of the first marriage, any second marriage is null and void, and therefore, the Courts below committed a mistake in granting maintenance in favour of Jasumatiben, who claimed maintenance as the second wife of the applicant. We, therefore, set aside the grant of maintenance in favour of Jasumatiben alone, needless to mention the children, namely, Trupti and Vaishali will continue to get maintenance, as directed.

9. As regards the authority of the Supreme Court in the case of Narendra Paul Chawla (supra) relied on by Shri Pandey, the Supreme Court has not ruled that the second wife can claim maintenance under Section 125 of the Code. In fact the Supreme Court was considering the grant of maintenance under Section 18 read with Section 20 of the Hindu Adoption and Maintenance Act and as the order which fell for consideration was for payment of interim maintenance and in those circumstances, the Supreme Court refrained "from expression any opinion on merit of the claims." Thus this judgment in no way supports the case of the petitioner.

10. Mr. Pandey, then submits that the petitioner was not informed about her husband's earlier marriage and in fact her marriage had taken place after concealing the first marriage and, as such, her marriage cannot be said to be null and void.

11. I do not find any substance in the submission of the learned Counsel. The Hindu Marriage Act provides for conditions of valid marriage and one of the conditions is that either party of the marriage must not have a living spouse. Undisputedly, petitioner's husband had a living spouse at the time of marriage and her marriage cannot be saved only on the ground that said fact was not known to her or concealed from her. I am of the opinion that her lack of knowledge about her husband's earlier marriage would be of no avail. Reference in this connection can be made to a decision of the Supreme Court in the case of Yamunabai Anantrao Adhav, (supra) in which it has been held as follows ;

7. Lastly it was urged that the appellant was not informed about the respondent's marriage with Litabai when she married the respondent who treated her as his wife, and, therefore, her prayer for maintenance should be allowed. There is no merit in this point either. The appellant cannot rely on the principle of estoppel so as to defeat the provisions of the Act. So far as the respondent treating her as his wife is concerned, it is again of no avail as the issue has to be settled under the law. It is the intention of the legislature which is relevant and not the attitude of the party.

12. Mr. Pandey, then submits that the power to declare a marriage to be void vests with the Civil Court and so long such a declaration is not made petitioner is entitled to get maintenance under Section 125 of the Code.

I do not find any substance in the submission of the learned Counsel. In my opinion, the Court exercising the power under Section 125 of the Code of Criminal Procedure, gets the jurisdiction to pass order for maintenance of wife only when it is satisfied that the person claiming is legally wedded wife. If on the material on record this jurisdictional fact is not established, the Court exercising the power under Section 125 of the Code does not get jurisdiction to pass any order. On petitioner's own showing her marriage with her husband was during the subsistence of the first marriage and therefore void and hence the contention of Mr. Pandey that so long it is not declared to be so, petitioner is entitled for maintenance is fit to be rejected.

13. In the result, I do not find any merit in the application and it is dismissed in limine.

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SARZINA BIBI @ PARUL BIBI & ANOTHER VERSUS ISMAEL SHAIKH

IN THE HIGH COURT OF JHARKHAND AT RANCHI

Cr. Revision No. 986 of 2010

Sarzina Bibi @ Parul Bibi & Another .... Petitioners

v.

Ismael Shaikh .... Opposite Party

(Before Hon'ble Mr. Justice H. C. Mishra, J.)

For the Petitioners : Mr. B.K.Pandey, Advocate

For the O.P. : Mr. S.K. Verma, Advocate

Section 125 Cr.P.C. clearly prescribes that 'wife' includes a women, who has been divorced by, or has obtained a divorce from her husband and has not remarried. In that view of the matter, it is clear that a divorced wife is fully entitled to maintenance under Section 125 Cr.P.C.

In the facts of this case, I am of the considered view that the impugned Judgment has been passed by the learned Court below overlooking the provisions of law, whereunder even a divorced woman is entitled to maintenance from her husband and as such, the same is not sustainable in the eyes of law. Accordingly, the impugned Judgment dated 3rd August 2010 passed by the learned Principal Judge, Family Court, Pakur in Cr.Misc. Case No. 21 of 2009 is hereby set aside and the Court below is directed to pass the judgment afresh in accordance with law with respect to both the petitioners.

3/ 24.04.2012

Heard learned counsel for the petitioners and learned counsel appearing on behalf of the opposite party, who has appeared on notice.

The petitioners have filed this revision application challenging the Judgment dated 3rd August 2010 passed in Cr. Misc. Case no. 21 of 2009 by the learned Principal Judge, Family Court, Pakur, whereby the maintenance claimed by the petitioner-wife has been refused only on the ground that she was divorced by her husband.

It appears from the impugned Judgment itself that marriage is admitted between the parties and the case of opposite party-husband is that he had divorced his wife in presence of villagers and accordingly, the petitioner being the divorced lady, was not entitled to any maintenance from her husband. The Court below, finding that the petitioner was divorced, has refused to grant maintenance to the petitioner. However, the Court below has directed the O.P. to make the payment of Rs. 400/- per month as maintenance to petitioner No. 2, who is the son of parties.

Learned counsel for the petitioners has submitted that the impugned Judgment passed by the learned Court below is absolutely illegal, inasmuch as, the application was filed by the petitioner under Section 125 Cr.P.C., which clearly provides for maintenance even to the divorced wife and accordingly, the impugned Judgment passed by the learned Court below cannot be sustained in the eyes of law.

Learned counsel for the opposite party no. 2, on the other hand, has reiterated the ground taken in the judgment for refusing the maintenance to the petitioner-wife.

Section 125 Cr.P.C. clearly prescribes that 'wife' includes a women, who has been divorced by, or has obtained a divorce from her husband and has not remarried. In that view of the matter, it is clear that a divorced wife is fully entitled to maintenance under Section 125 Cr.P.C.

In the facts of this case, I am of the considered view that the impugned Judgment has been passed by the learned Court below overlooking the provisions of law, whereunder even a divorced woman is entitled to maintenance from her husband and as such, the same is not sustainable in the eyes of law. Accordingly, the impugned Judgment dated 3rd August 2010 passed by the learned Principal Judge, Family Court, Pakur in Cr. Misc. Case No. 21 of 2009 is hereby set aside and the Court below is directed to pass the judgment afresh in accordance with law with respect to both the petitioners.

This revision application is, thus, allowed with the direction as above.

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MOHD. WAQAR AND OTHERS VERSUS STATE OF U.P AND ANOTHER

2014 SCC OnLine All 15002 : (2014) 86 ACC 782 : (2014) 4 All LJ 513 : (2014) 142 AIC 759

In the High Court of Allahabad at Lucknow

(Before Hon'ble Mr. Justice Arvind Kumar Tripathi (II), J.)

Mohd. Waqar and Others … Revisionists;

v.

State of U.P and Another … Opposite Parties.

Cr. Revision No. 161 of 2014

Decided on May 6, 2014

The Muslim Women (Protection of Rights on Divorce) Act, 1986-- "Section 3(1)

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 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 in section 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.

Domestic Violence Act-The definition of sections 2 (a) & (f) and 3 of the Act do not make any distinction between Hindu women and Muslim women. Concept to matrimonial violence cannot vary in accordance with religious persuation. The Secular constitution does not recognize and accept the existence of different varieties of Matrimonial violence like Hindu violence, Christian violence, Muslim violence and Secular violence.

The Judgment of the Court was delivered by

ARVIND KUMAR TRIPATHI (II), J.:— Heard Shri Khaleeq Ahmad Khan, learned Counsel for the revisionists, Shri Sharad Dixit, learned AGA for the State respondent and Dr. L.P Misra, learned Counsel for opposite party No. 2.

2. This criminal revision has been filed by Mohd. Waqar and others challenging the order dated 5.3.2014 passed by the learned Additional Sessions Judge, Court No. 1, Faizabad in Criminal Appeal No. 2 of 2014 by which the appeal filed by the revisionist against the judgment and order dated 7.12.2013 passed by the learned Additional Chief Judicial Magistrate-I, Court No. 10, Faizabad was dismissed.

3. By the order dated 7.12.2013 the Additional Chief Judicial Magistrate-I, Court No. 10, Faizabad has partly allowed the application of Smt. Amna Muzaffar moved under section 12 of Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'the Act') in Complaint Case No. 977 of 2013.

4. As per factual matrix of the case, a complaint under section 12 of the Act was filed by Amna Muzaffar, claiming herself to be the wife of Mohd. Waqar, against Mohd. Waqar, Mahboob, Smt. Shakila, Sahar

Sayyed and Rehana alleging that she was married with Mohd. Waqar on 8.6.2004, as per Muslim Law. She went to her matrimonial house same day, and was living as wife. Mohd. Waqar was working at Sharjah before marriage, so she also went to Sharjah. Mohd. Waqar was getting inadequate salary, so she herself started working as teacher, and saved much amount. Later on, salary of Mohd. Waqar was also increased, then she left the job and became involved in family life. In the month of August, 2011, she came to India along with her husband Mohd. Waqar and started living in her matrimonial house where opposite parties started demanding twenty lacs cash and a scorpio. She refused to fulfil the demand, then she was being tortured physically, mentally, emotionally and economically. On 18.11.2011, she was beaten by kicks and fists, and they tried to evict her from the house, but in order to save her future, she tried to make harmony. On 1.2.2012, she was made to sign on blank papers on the point of pistol, and her jewellery and clothes were usurped by the opposite parties, and later on, she was kicked out from the house on 21.2.2012 Then, she went to her maika. Later on, she learnt that Mohd. Waqar had gone to Sharjah. She also went to Sharjah, but Mohd. Waqar was not found there, then she returned back on 27.2.2012, and went to her matrimonial house, but she was not permited to enter in the house, hence she went to her maika. It was submitted that Mohd. Waqar is MBA degree holder, and now, he is earning Rs. 50,000/- per month from his employment in metrocity Mumbai. By filing this complaint, she claimed Rs. 20,000/- per month for fooding and medical treatment. Rs. 10,000/- per month for maintenance, and Five Lacs as compensation. Opposite party Nos. 1 and 2 (revisionist Nos. 1 and 2) appeared before the Court and filed objection admitting the marriage and it was averred that family members of Amna Muzaffar were presurising them to fix fifty One Lacs as mahr, then they said that they are not in a capacity to pay such heavy amount. Then Amna Muzaffar said that after marriage she will forgive this mahr. It was submitted that in Sharjah the husband used to give his entire salary to Amna Muzaffar, but she always got it transferred in her account in Syndicate Bank, Faizabad, and used to purchase jewellery. She has purchased 1.5 kilograms gold including jewellery, and has deposited forty lacs from the salary of Mohd. Waqar. When they were at Sharjah, Amna Muzaffar requested that her two brothers also be called there and get them employed some where, which was done by Mohd. Waqar, and after that, there was change in the behaviour of Amna Muzaffar, and she started treating him with cruelty and started demanding divorce. On 30.1.2012, Mohd. Waqar divorced Amna Muzaffar, as per Muslim Law, and he has sent the information to Amna Muzaffar, which she refused to acknowledge. Then, the information was sent through e-mail. It was further submitted in objection that because of Muslim Personal Law (Shariyat) Application Act, 1937, Domestic Violence Act is not applicable to divorced muslim lady.

5. The complainant filed her evidence through affidavit along with affidavit of Rizwan Ahmad, Rukhsana and Parveen. Salary certificate of Mohd. Waqar was also submitted. She also examined herself as PW-1.

6. Mohd. Waqar has filed his affidavit along with affidavit of Maulana Jalal, Ashraf and Mohd. Mehfooz. Some documentary evidence was also filed. Mohd, Waqar also examined himself as DW-1. Learned Magistrate, after going through the evidence on record and hearing the parties, partially allowed the application under section 12 of the Domestic Violence Act, and directed Mohd. Waqar to provide one room in his house for Amna Muzaffar, also directed to provide food from his kitchen and was also directed to pay. Rs. 10,000/- per month as maintenance, and Four Lacs as compensation. He was further directed not to assault or use violence over her. Feeling aggrieved, criminal appeal was filed that too was dismissed. Feeling aggrieved, this criminal revision has been filed.

7. It was submitted by the learned Counsel for the revisionist that as an irrovocable divorce has been given to Amna Muzaffar by Mohd. Waqar, then there was no occasion for application of the 'Act'. There is no evidence of violence being committed either by revisionist No. 1 or his relatives. After divorce, wife is not entitled for protection under the 'Act'. The Muslim Women (Protection of Rights on Divorce) Act, 1986 (later on, referred to as 'Act of 1986') prohibited divorced women from claiming any maintenance allowance or compensation or damage beyond iddat period, which ended much earlier from her husband, and no order of maintenance allowance and compensation could have been passed either by the Magistrate

or by the Appellate Court. There is no FIR, injury report, or any complaint to justify the allegations made by Amna Muzaffar for cruelty. Respondent No. 2 has chosen three courses simultaneously (1) An application was moved before the Magistrate under section 156(3) Cr.P.C for registering the case under Dowry Prohibition Act and allied laws; (2) The instant complaint; and (3) Application under section 3(2) of 'Act of 1986'.

8. It was further submitted that after divorce there was no occasion for respondent No. 2 to live in the house of Mohd. Waqar and the order providing of accommodation and food is illegal, arbitrary and in violation of the provisions of Muslim Law.

9. It was further submitted that Amna Muzaffar is an educated lady, able to maintain herself, hence she is not entitled to maintenance.

10. It was also submitted that about Forty Lacs was sent in the account of Mrs. Amna Muzaffar, and she has transferred Rs. 37,00,000/- to one Mr. Akbar, and Rs. 11,50,000/- to one Mrs. Rukhsana in the month of February, 2012, so she is not in need of compensation and maintenance.

11. Learned Counsel for opposite party No. 2 argued that the act applies even to the divorced muslim woman and as divorce has not been proved, she is entitled for residence and food in her husband's house. It was further submitted that the amount, in her account, is her earning, from her job in Dubai. It was further submitted that in the 'Act' for granting maintenance and compensation, the wife is not required to prove that she is not able to maintain herself.

12. Before entering into the merit of rival contention of the parties, it is essential to have a look at sections 2 (a) & (f), 3 and 12 of the 'Act'. It is reproduced below:—

2. 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;

3. 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) harssses, 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 purpose 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 herstridhan 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.

12. Application to Magistrate.—

(1) An aggrieved person or a Protection Officer or any other per son on behalf of the aggrieved per son 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 subsection (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.

13. The rival submission of the parties is to be considered in the light of above provisions. In the case of Danial Latifi v. Union of India,1 while considering the constutionality of the Act of 1986 the Apex Court has held as under:—

"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. (para 27)

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 in section 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 (para 28)

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 lumpsum to his wife, in addition to having paid his wife's mahr and restored her dowry as per section 3(1)(c) and 3(1)(d) of the Act. Precisely, the point that arose for consideration in Mohd. Ahmad Khan v. Shah Bano Begum,1 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 4 of 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 woman's 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 o??? mata as maintenance though may be incorrect and that other translations employed the word provision, this Court inShah 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 Bano's casehad 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 in section 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 Bano's case, actually codifies the very rationale contained therein. (para 28)"

14. The Apex Court has further held that "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 125 CrPC 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."

15. The Apex Court has in the case of Union of India v. Devendra Kumar Pant,1dealing with the principles of invoking or applying the provisions of any Act has held in paragraph 16 that "When invoking or applying the provisions of the Act, it is necessary to keep in view that the intention of the Act is to give a helping hand to persons with disability so that they can lead a self-reliant life with dignity and freedom."

16. In the case of Badshah v. Sou. Urmila Badshah Godse,2 the Apex Court has held that "purposive interpretation needs to be given to the provisions of section 125 Cr.P.C The purpose is to achieve "social justice", which is the Constitutional vision, enshrined in the Preamble of the Constitution of India. Preamble to the Constitution of India clearly signals that we have chosen the democratic path under rule of law to achieve the goal of securing for all its citizens, justice, liberty, equality and fraternity.

It specifically highlights achieving their social justice. Therefore, it becomes the bounden duty of the Courts to advance the cause of the social justice. While giving interpretation to a particular provision, the Court is supposed to bridge the gap between the law and society."

17. It is to be noted that when the decision of Danial Latifi v. Union of India(supra) was pronounced, the 'Act' was not in existence. It came into force after receiving the assent of the President on September 13, 2005, and published in the Gazatte of India, Extra Part II, section 1 dated 14.9.2005, from the date October 17, 2006.

18. The definition of sections 2 (a) & (f) and 3 of the Act do not make any distinction between Hindu women and Muslim women. Concept to matrimonial violence cannot vary in accordance with religious persuation. The Secular constitution does not recognize and accept the existence of different varieties of Matrimonial violence like Hindu violence, Christian violence, Muslim violence and Secular violence. The violence is confined to the violence mentioned in sections 12 of the 'Act'.

19. Section 36 of the Act, reads as follows:—

"36. Act not in derogation of any other law.—The provisions of this Act shall in addition to, and not in derogation of the provisions of any other law, for the time being in force."

20. Section 36 of the 'Act' also makes it clear that the provisions of this Act are in addition to the provisions of any other law for the time being in force. This clearly goes to show that the provisions of the 'Act' are in addition to the provisions of 'Act of 1986'.

21. Section 2(a) and (f) of the 'Act' includes any woman, who is or has been in domestic relationship and during that relationship lived together in shared household. In view of this, the submissions made by the learned Counsel for the revisionists that the provisions of the 'Act' are not applicable to divorced muslim women is not acceptable, as this 'Act' has been passed to give relief to an aggrieved woman, who has suffered from domestic violence, irrespective of caste and religion, and is a beneficial legislation. Sections 17, 18, 19 & 20 of the Act are reproduced below:—

"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.

22. Protection orders.—The Magistrate may, after giving the aggrieved person and the respondent an opportunity of being heard and on being prima faciesatisfied 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 otherproperty 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.

23. 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 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.

(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.

24. 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 not limited to,—

(a) the loss of earnings;

(b) the medical expenses;

(c) the loss caused due to the destruction, damage or removal of anyproperty 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 lumpsum 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 subsection (1).

(6) Upon the failure on the part of the respondent to make payment in terms of the order under subsection (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."

25. A perusal of 'Act', specially proviso of section 12(2) of the Act, shows that it does not create any additional right in favour of wife regarding maintenance. It only enables the Magistrate to pass a maintenance order as per the rights available under existing laws. While the 'Act' specifies the duties and function of Protection Officer, police officer, service providers, Magistrate, medical facility providers and duties of Government, but the 'Act' is silent about the duties of husband, or the duties of wife. Thus, maintenance can be fixed by the Court under the 'Act' only, as per prevalent law regarding providing of maintenance by husband to the wife, and also under section 20(3) of the 'Act'.

26. The words 'Compensation' and 'Damages' used in section 12 of the 'Act' cannot be treated and equated with the word 'Maintenance', mentioned in section 20(3) of the 'Act'.

27. For getting relief of maintenance under sub-clause (3) of section 20 of the Act, any woman has to prove that she was subjected to economic abuse, as defined under section 3, Explanation 1 (iv) of the Act, and that she was deprived of all or any economic or financial resources to which the aggrieved person is entitled to under any law or custom whether payable under the order of Court or otherwise.

28. Sections 3 and 4 of 'Act of 1986' are quoted below:—

"3. Mahr or other properties of Muslim woman to be given to her at the time of divorce.—

(1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to—

(a) A reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband:

(b) Where she herself maintains the children born to her before or after her divorce, a reasonable and fair 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 her time of her marriage or at any time thereafter according to Muslim law; and

(d) All the properties given to her before or at the time of marriage or after the marriage by her relatives or friends or the husband or any relatives of the husband or his friends.

(2) Where a reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made or paid or the proper ties 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 ap plication 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.

(3) Where an application has been made under sub-section (2) by a divorced woman the Magistrate may; if he is satisfied that—

(a) Her husband having sufficient means, has failed or neglected to make or pay her within the iddat period a reasonable and fair provision and maintenance for her and the children; or

(b) The amount equal to the sum of mahr or dower has not been paid or that the properties referred to in clause (d) of sub-section (1) have not been delivered to her, make an order, within one month of the date of the filing of the application, directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as 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 her former husband or, as the case may be, for the payment of such mahr or dower or the delivery of such properties referred to in clause (d) of sub-section (1) to the divorced woman:

Provided that if the Magistrate finds it impracticable to dispose of the application within the said period, he may, for reasons to be recorded by him dispose of the application after the said period.

(4) If any person against whom an order has been made under subsection (3) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance or mahr or dower due in the manner provided for levying fines under the Code of Criminal Procedure, 1973 (2 of 1974) and may sentence such person, for the whole or part of any amount remaining unpaid after the execution of the warrant, to imprisonment of a term which may extend to one year or until payment if sooner made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code.

4. Order for payment of maintenance.—

(1) Notwithstanding anything contained in the foregoing provisions of this 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:

Provided that where such divorced woman has children, the Magistrate shall order only such children to pay maintenance to her, and in the event of any such children being unable to pay such maintenance, the Magistrate shall order the parents of such divorced woman to pay maintenance to her:

Provided further that if any of the parents is unable to pay his or her share of maintenance ordered by the Magistrate on the ground of his or her not having the means to pay the same, the Magistrate may, on proof of such inability being furnished to him, 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.

(2) Where a divorced woman is unable to maintain herself and she has no relative as mentioned in subsection (1) or such relatives or any one of them have 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 proviso to sub-section (1), the Magistrate may, by order direct the State Wakf Board established under section 9 of the Wakf Act, (29 of 1954), or under any other law for the time being in force in a State, functioning in the area in which the woman resides, to pay such maintenance as determined by him under sub-section (1) or, as the case may be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order."

29. These provisions make husband of a divorced muslim woman liable to certain extent, that too if conditions mentioned have not been complied.

30. In her complaint, Amna Muzaffar has in para 4 averred that earlier Mohd. Waqar was getting inadequate salary, so she also sought employment as a teacher and saved much. It has been stated that when salary of Mohd. Waqar increased, she left her job.

31. In her statement, she has admitted that she left the job, when she was admitted in hospital, being ill. She was employed in Dubai for only three years.

32. She has further replied in her cross examination that Waqar never transferred any amount from his earning to her account in Faizabad.

33. Statement of account of Mrs. Amna Muzaffar bearing No. 86612200040523 of Syndicate Bank has been filed as Annexure 5. A perusal of it reveals that in the month of March, 2009 an amount of Rs. 2,74,468/-, in the month of May, 2009, Rs. 1,05,982/-, in the month of August, 2009 an amount of 6,13,589.02, in the month of January, 2010 an amount of Rs. 22,02,643/-, in the month of March, 2010 an amount of Rs. 1,76,722/-/in the month of May, 2010 an amount of Rs. 3,50,000/-, in the month of November, 2010 an amount of Rs. 2,00,000/-, in the month of December, 2010 an amount of Rs. 2,31,058/- and in the month of March, 2011 an amount of Rs. 2,00,000/- was transferred in the above account from Sharjah.

34. It is also noteworthy that according to statement of Mrs. Amna Muzaffar, she left the job in the year 2007 or 2008, so she has not explained as to what was the source of above amount, which was transferred in her bank account from Sharjah. It is also evident from the above bank account statement that she had 30,62,526.98 in her above account as balance on 31st March, 2011. This statement of account also reveals that in the month of February, 2012 Rs. 10,00,000/-, Rs. 12,00,000/- and Rs. 15,00,000/- was transferred to one Akbar, by Mrs. Amna Muzaffar, and Rs. 11,50,000/- was transferred to Mrs. Rukhsana, and only Rs. 50,839.06 and Rs. 52,775.98 remained remained left in her account on 31st March, 2012 and 31st March, 2013.

35. The above financial status/transactions by parties have tearing on the capacity of Mrs. Amna Muzaffar for maintaining herself.

36. In the instant case, Mrs. Amna Muzaffar is an educated woman, with a qualification of M.Sc (Enviorental Science). Under these circumstances, fixing the maintenance amount by the Court without considering this aspect is not warranted under the provisions of the 'Act'.

37. We are living in an er? of equality of sexes. The constitution provides equal treatment to be given irrespective of sex, caste, creed and religion.

38. Right or residence and right of food from the kitchen of matrimonial home is a significant factor considering the averments of divorce. If the wife has been divorced, then the order passed by both the Courts below regarding providing of room in matrimonial house and food from the kitchen is definitely erroneous, and if she is not divorced, then that order may be treated to be justified.

39. The husband has very categorically stated in the objection to the complaint of domestic violence that he has given divorce to Amna Muzaffar on 30.1.2012 Annexure 4 is an application moved by Amna Muzaffar before the Family Court, Faizabad under section 3(2) of Act of 1986. This application was filed on 12.8.2013 in which she has admitted that she is filing this application as divorced woman. It has also been mentioned that after going through the objection filed by Mohd. Waqar in the proceedings of the Act, she came to know of the divorce, and its intimation. In para 4 too she has claimed that after giving divorce she has not received the amount of mahr, which is Fifty One Lacs.

40. The statement of the victim in the complaint under section 12 of the 'Act' was recorded on 22.8.2013 before the Magistrate i.e after filing of application under section 3(2) of Act of 1986.

41. A perusal of the statement of Amna Muzaffar before the Additional Chief Judicial Magistrate, Ist Class, Faizabad reveals that she has not stated about the divorce in her examination in chief. Her statement continued till 23.9.2013 Both the Courts below have not considered this while deciding the complaint and appeal. Additional Chief Judicial Magistrate, Ist Class, Faizabad has while deciding the application has considered the plea that even a divorced muslim woman is entitled to get protection under the Act. This clearly goes to suggest that the Magistrate has considered and passed order in the light of fact that there was divorce between Mohd. Waqar and Amna Muzaffar. In view of the above, the observation made by the Appellate Court in the decision that Mohd. Waqar has failed to prove the divorce is perverse, and not based on evidence on record.

42. Considering this fact that Amna Muzaffar has herself filed an application under section 3(2) of 'Act of 1986' for mahr treating herself to be a divorced woman, then the order passed by the Magistrate granting a room in matrimonial house and food from the joint kitchen is erroneous, and illegal. Consequently, the condition imposed that without permission and consent of the petitioner no one should enter in her room is also erroneous, as a muslim divorced wife is not entitled to live in the matrimonial house, and get food from the joint kitchen, in view of provisions of section 4 and other sections of Act of 1986.

43. The learned Magistrate and learned Appellate Court have not ventured into this aspect. They have to give clear cut finding as to whether there was any domestic violence. From a perusal of order of learned Magistrate dated 7.12.2013 it is clear that the learned Magistrate has given two instances of domestic violence, (1) demand of money and vehicle is domestic violence; and (2) forcefully getting the signature of the wife on blank papers, and curtailing her freedom also comes within the perview of domestic violence.

44. It is also on record that to prove the financial transactions an application was moved before the Magistrate for summoning the statement of account of Amna Muzaffar from the bank, but that was rejected on the ground that husband should have filed 'refusal of bank to provide these documents'. This order, rejecting summoning of statement of account, clearly goes to show, that revisionist was deprived from producing certain evidence, which, in view of financial statement mentioned in this judgment, has bearing on the capacity of maintenance, hence this application was wrongly rejected.

45. A perusal of section 12 of the 'Act' also reveals that the Magistrate shall, while passing the order, take into consideration any domestic incident report received by him from the protection officer, or service provider, as has been mentioned in proviso to section 12(1) of the 'Act'. From a perusal of appellate order, or the order of the Trial Court, it is clear that no such report was considered by the Magistrate before passing the order.

46. It is worth mentioning that the Revisional Court cannot reassess or reappraise the evidence, and cannot upset the findings of fact recorded by the Trial Court by substituting its own finding. In the cases of State of Kerala v. KM. Abdullah and Co.,1Munna Devi v. State of Rajasthan,2Associated Cement Co. Ltd. v. Keshvanand,3 andDulichand v. Delhi Administration,4 it has been held that while the appellate jurisdiction is co-extensive with the original Court's jurisdiction as an appreciation and re-appreciation of evidence is concerned, the Revisional Court has simply to confine to the legality and propriety of the findings and as to whether the subordinate Court acted within it's jurisdiction. A Revisional Court has no jurisdiction to set aside the findings of the fact recorded by the Magistrate and impose or substitute it's own findings. Sections 379 to 401 Cr.P.C confer only limited power of Revisional Court to the extent of satisfying the legality, propriety or regularity of the proceedings or orders of the lower Court and not to act like Appellate Court for other purposes including, the recording of new findings of fact on fresh appraisal of evidence.

47. It will not be out of place to quote the words of Justice Shiv Narayan Dhingra of Delhi High Court in Criminal Misc. Case No. 491 of 2009 (Sanjay Bhardwaj v. The State) decided on August 27, 2010 that "It must be remembered that there is no legal presumption that behind every failed marriage, there is either dowry demand or domestic violence. Marriages do fall for various other reasons also. The difficulty is that real causes of failure of marriages are rarely admitted in Courts. Truth and honesty is becoming a rare commodity in marriages and in averments made before the Courts."

48. Both the Courts below have not considered the entire evidence on record in right perspective and have also not applied the law properly.

49. In view of the aforementioned discussions, the criminal revision is liable to be allowed, and is hereby allowed. Both the impugned orders dated 5.3.2014 passed by the learned Additional Sessions Judge, Court No. 1, Faizabad in Criminal Appeal No. 2 of 2014; and dated 7.12.2013 passed by the learned Additional Chief Judicial Magistrate-I, Court No. 10, Faizabad are quashed. The matter is remanded back to the Trial Court for deciding the case afresh in the light of the observations made above. Parties are directed to appear before the Court below on 21.5.2014, and the Court below will make all endeavour to decided the case within another period of two months.

50. Revision Allowed.

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LANDMARK JUDGMENTS ON

DIVORCE

DR. TARA CHARAN AGARWAL VERSUS SMT. DR. VEENA AGARWAL

2011 SCC OnLine All 1008 : (2011) 87 ALR 817 : (2011) 106 AIC 378 :
(2011) 5 All LJ 513 : 2011 AIR CC 3051

(Allahabad High Court)

(Before Hon'ble Mr. Justice Yatindra Singh & Hon'ble Mr. Justice Yogesh Chandra Gupta, JJ.)

Between

Dr. Tara Charan Agarwal
v.
Smt. Dr. Veena Agarwal

F.A No. 37 of 1992
Decided on July 5, 2011

Marriages be it for love or arranged—are demanding as well as fragile institution. It takes patience, effort, and faith to preserve them. Yet, they do fail. And if that happens then 'are the defaulters entitled to take advantage of their own fault in divorce proceeding' is the main question involved in this appeal.

The following points arise for determination in the case:

(i) Whether there is any cruelty on the respondent's part;

(ii) Whether the marriage has broken down irretrievably;

(iii) Whether divorce should be granted, as there is no purpose in continuing themarriage

…..... Any wife would be loath to accept any other women in her husband's life—more so or even though, the other women might be her sister. This is valid justification for withdrawing from husband-wife relationship.

…..... Under the Act, if the parties agree for the divorce then it can be granted on mutual consent: there cannot be any objection to it. However, In case there is no consent, then divorce can only be granted on the grounds mentioned in section13 of the Act.

…..Incompatibility in marriage or irretrievability of a marriage, or marriagebeing broken down irretrievably is not a ground for divorce though recommended by the Supreme Court in Naveen Kohli v. Neelu Kohli for consideration to amend the Act. It may amount to mental cruelty entitling a party to divorce but it should be without any fault or at least fault of both sides. This is not the case here. In this case, the fault is of the appellant: he has been cruel to the respondent by insisting for the immoral compromise.

…..... In case, divorce is granted in this case, then it would mean that a party can take advantage of his misdeed; it is not permissible under the Act. Had there been some fault of the respondent also then the matter would have been different—the relief could have been considered.

The Judgment of the Court was delivered by

YATINDRA SINGH and YOGESH CHANDRA GUPTA, JJ.:— Marriages be it for love or arranged—are demanding as well as fragile institution. It takes patience, effort, and faith to preserve them. Yet, they do fail.

And if that happens then 'are the defaulters entitled to take advantage of their own fault in divorce proceeding' is the main question involved in this appeal.

THE FACTS

2. Dr. Tara Charan Agarwal (the appellant) and Smt. Dr. Veena Agarwal (the respondent) are allopathic doctors. They knew each others from the school days. They went to the same medical college, fell in love, and married on 17.1.1967, while completing their studies.

3. A son was born to them in June, 1970 but he died young within a few of days of his birth. A daughter was born on 21.12.1971 At present, she is married.

4. The respondent was operated twice in 1973 and 1984 before the proceeding started and for the third time in 1988 during the proceeding.

5. Initially, the relations between the parties were happy. However, they started deteriorating after second operation, when the respondent came to know about a letter (paper 39-Ka) said to be written by the appellant to Shashi, the younger sister of the respondent.

6. The relations came to an end when the respondent discovered the two letters (photostat copies are 30-Ga and 31-Ga) said to be written by Shashi to the appellant.

7. The appellant filed matrimonial petition No. 618 of 1987 under section 13 of the Hindu Marriage Act, 1955 (the Act) for divorce on the ground of cruelty. It was after husband-wife relations came to an end. The specific instances of cruelty were also alleged in paragraph 9 of the plaint.

8. The respondent filed the written statement contesting the proceeding. She denied the specific instances alleged by the appellant. She alleged that there was cruelty on the part of the appellant inasmuch as,

   - The appellant was carrying on an affair with Shashi;
   - The appellant insisted that the respondent should accommodate Shashi in the same house. This proposal was neither accepted by the respondent nor by their daughter, who was student of intermediate at that time;
   - The appellant tortured and threw tantrums on rejection of his proposal to accommodate Shashi in the house.

9. The appellant examined the following witnesses:

   - Dr. Tara Charan Agarwal (P.W 1): the appellant himself. He deposed about the cruelty and the specific instances;
   - Sri Chandra Veer Singh (P.W 2): an advocate and friend of the appellant. He deposed about the incident dated 25.1.1987, when the respondent is said to have refused to make tea;
   - Sri Ram Prakash Goyal (P.W 3): the brother of the appellant's brother-in-law (Jijajee). He deposed about the incident dated 26.1.1987, when the respondent is said to have used foul language for the appellant;
   - Sri A.S Kapoor (P.W 4): the hand writing expert. He proved his report and opined that the hand writing in paper No. 39-Ka, the alleged love letter, is not in the appellant's hand writing.

10. The respondent examined the following witnesses:

   - Dr. Veena Agarwal (D.W 1): the respondent herself. She denied the incidents narrated by the appellant. She deposed about the affair of the appellant with Shashi and cruelty on his part;
   - Sri Risal Uddin (D.W 2): clerk in the Physiology Department. He proved the leave application given by the respondent for granting leave from January 24th to 26th, 1987 for going to Gwalior;

- Sri Suresh Chand (D.W 3): the brother of the respondent and Sashi. He had found the letter 39-Ka and deposed about the affair of the appellant with Shashi;
- Sri J.P Tiwari (D.W 4): the tax assistant in the Income Tax Department. He produced the income tax records for the year 1980-81 and 1981-82;
- Sri Deepak Kashyap (D.W 5): the hand writing expert. He proved his report and opined that hand writing in the paper No. 39-Ka is the appellant's handwriting.

11. Apart from other documents, the following documents were also filed:
    - Paper No. 39-Ka: The alleged love letter by the appellant to Shashi;
    - 30-Ga and 31-Ga: The photostat copies of the alleged love letters by Shashi to the appellant.
12. The Trial Court dismissed the suit after recording the following findings:
    - The respondent has no illicit relationship with any others man;
    - It is not proved that the respondent had set the daughter against the appellant;
    - The specific instances of abuse and insult by the respondent (said to be cruelty) were not proved;
    - There is no cruelty on part of the respondent;
    - The appellant has illegal relationship with Shashi;
    - There is cruelty on the appellant's part.
13. Hence the present appeal by the plaintiff.
14. In this appeal, initially a Counsel had put up appearance on behalf of the respondent. Subsequently, he was elevated to the High Court at Uttarakhand and notices were sent to the respondent to engage another Counsel. The notices were served but no one put up appearance her behalf. Subsequently, the notices were again served personally through C.J.M Agra on the respondent but she has chose not to put up appearance through any advocate.

POINTS FOR DETERMINATION

15. We have heard Shri B Dayal, Counsel for the appellant. The following points arise for determination in the case:
    (i) Whether there is any cruelty on the respondent's part;
    (ii) Whether the marriage has broken down irretrievably;
    (iii) Whether divorce should be granted, as there is no purpose in continuing themarriage.

1st POINT: NO CRUELTY ON RESPONDENT'S PART

16. The Counsel for the appellant submits that cruelty on the respondent's part is proved inasmuch;
    (i) The respondent had misbehaved and used foul language on 25.1.1987 and 26.1.1987;
    (ii) She has withdrawn from husband-wife relationship.

1st Submission: Incidents Not Proved

17. The appellant in paragraph 9 of his petition has alleged some specific incidents to show misbehaviour and cruelty on part of the respondent. The Counsel for the appellant has emphasised about two incidents said to have taken place on 25.1.1987 and 26.1.1987

The First Incident

18. On the first occasion, Sri Chandra Veer Singh (P.W 2) is said to have come to their house and it is said that the respondent refused to make tea for him.

19. The aforesaid incident was deposed by the appellant as well as by Sri Chandra Veer Singh (P.W 2); whereas it was denied by the respondent (D.W 1).

20. The respondent (D.W 1) and Sri Suresh Chand (D.W 3) have deposed that at present Sri Chandra Veer Singh is an advocate but earlier he was compounder of the appellant. Sri Chandra Veer Singh has admitted that he gave injunction and glucose to the patients referred to him by the appellant and earned some money in this process. This gives credence to the statement of the respondent that earlier he was compounder of the appellant.

21. Sri Chandra Veer Singh is not only a friend of the appellant but is obliged to him. He has reason to depose in his favour.

The Second Incident

22. The other incident is said to have taken place on 26.1.1987 The appellant (P.W 1) and Sri Ram Prakash Goyal (P.W 3) have deposed that:

    - On 26.1.1987, the appellant's sister, her husband (Jijajee of the appellant), and Sri Ram Prakash Goyal (younger brother of the appellant's Jijaji) (P.W 3) had come to the house for reconciliation;
    - The respondent used foul language for the appellant in front of them.

23. The respondent denied both the incidents. She deposed that she had gone to Gwalior to meet her sister and was not present at Agra on those dates.

24. The respondent also examined Sri Risal Uddin (D.W 2) clerk in the Physiology Department of the medical college where she worked. He proved the application for leave filed by the respondent in the Medical College for grant of leave from January 24 to 26, 1987. The leave was sanctioned.

25. Sri Suresh Chand (D.W 3), brother of the respondent, also deposed that he had gone to the station to drop the respondent. It is also not disputed that the respondent's sister lives in Gwalior.

26. The Trial Court has held that the appellant has not been able to prove the incidents dated on 25th and 26th January, 1987 or that the respondent misbehaved or used foul language on those days or on any other day. Considering the evidence on the record, there is no illegality in this finding.

2nd Submission: There is Justification

27. The parties no longer have husband-wife relationship. The appellant claims that it came to end in 1986; whereas, the respondent claims it to have lasted till March 1987. However, this variance is not material.

28. The matrimonial petition was filed on 21.5.1987 after March 1987. The parties did not have husband-wife relationship prior to the filing of the matrimonial petition and this void still continues.

29. Withdrawal from husband-wife relationship is a serious matter. In case there is no justification for the same, it may be mental cruelty entitling the other party fordivorce. Let us consider, if there is any justification.

Love Letters Proved: Paper 39-Ka

30. According to the respondent, she came to know about love affair between the appellant and her young singer Shashi through paper No. 39 Ka in 1984. It is a love letter said to be written to a lady called Chand. This letter was found by Sri Suresh Chand, brother of the respondent (D.W 3), at the time of respondent's second operation. It was shown to her subsequently.

31. The appellant has denied writing the aforesaid letter. He has also examined Sri A.S Kapoor (P.W 4), a hand writing expert. Shri Kapoor compared it with the appellant's specimen hand writing and gave a report. He proved his report where he had opined that the letter was not in the appellant's hand writing.

32. The respondent has examined herself as D.W 1. She has also examined her brother Sri Suresh Chand (D.W 3) and Sri Deepak Kashyap (D.W 5), the hand writing expert. D.W 1 and D.W 3 stated that:

- Their sister Shashi, is also known as Chand;
- They have seen the appellant's writing and recognise his hand-writing;
- The hand writing on 39-Ka is that of the appellant.

33. Sri Deepak Kashyap (D.W 5) gave a report. He proved his report and opined that the hand writing on 39-Ka is of the appellant. The hand writing experts of the parties differ in their opinion.

34. It is admitted case that Shashi was married in 1984 but the respondent (D.W 1) as well as her brother (D.W 3) have deposed that Shashi had left her matrimonial home and was living in Agra in a rented house. D.W 3 has further deposed that this house was taken on rent by the appellant for Shashi

35. The hand writing experts have given reasons for their different opinions. The Trial Court has agreed with the reasons given by the expert of the respondent and has held that the letter was in hand writing of the appellant. On this finding, he should have exhibited the documents. Perhaps, this is an inadvertent mistake.

36. We affirm the finding recorded by the Trial Court that paper No. 39-Ka was written by the appellant on the following considerations:

- Sri Suresh Chand (D.W 3) deposed that he caught the letter (paper No. 39-Ka);
- He (D.W 3) as well as the respondent (D.W 1) have deposed that they recognise the hand writing of the appellant and it is his hand writing;
- The reason given by Shri Kashyap (D.W 5) are more convincing;
- Nothing has been pointed out to show that this finding is incorrect.

Paper No. 30-Ga and 31-Ga

37. The respondent has also filed two photostat copies of two letters 30- Ga and 31-Ga. A reading of these letters indicate that they are love letters written by Chand. The respondent deposed that:

- She had found two letters written by Shashi to the appellant;
- She got photostat done of the letters;
- When the appellant came to know about it, he took away the originals but could not take the photostat copies as he did not know about them.

38. The respondent (D.W 1) and Sri Suresh Chand (D.W 3) have also deposed that:

- They recognise handwriting of their sister Shashi;
- The writing in the photostat copies (30-Ga and 31-Ga) is that of Shashi;

39. There is no suggestion or any material to show that originals of 30-Ga and 31-Ga were not taken back by the appellant or they were not written by Shashi: in fact during argument it was accepted. In view of this as the original letters were with the appellant, they were also formally proved— they should have been also exhibited: this also appears to be inadvertent mistake.

Appellant's Affair with Shashi

40. The Trial Court has recorded a finding that the respondent was not having an affair with any person. Nothing has been pointed out that any other inference is possible. This is upheld.

41. The appellant (P.W 1) had denied his relationship with Shashi. However, the respondent is elder sister of Shashi. Sri Suresh Chand (D.W 3) is real brother of the respondent as well as of Shashi. Both of them deposed about illicit relationship between the appellant and Shashi. In case, there was no such relationship then there was no reason for the respondent or Sri Suresh Chand to depose against Shashi, their own sister. No brother or sister would depose against their sister.

42. Any wife would be loath to accept any other women in her husband's life—more so or even though, the other women might be her sister. This is valid justification for withdrawing from husband-wife relationship.

43. We have already indicated (paragraph 33 of the judgment) the evidence of the respondent (D.W 1) and her brother (D.W 3) that Shashi has left matrimonial home and was living in Agra; perhaps in the house rented by the appellant. The Trial Court has recorded a finding that the appellant had sexual relations with Shashi and was having an affair with her. Considering the evidence on record, this finding is also upheld.

44. In our opinion:

- The appellant has not been able to prove specific instances of misbehaviour;
- The appellant was having a love affair with Shashi;
- There was justification for the respondent to withdraw from husband-wife relationship;
- There is no cruelty on the part of the respondent.

2nd & 3rd POINT: THE APPELLANT CANNOT TAKE ADVANTAGE OF HIS FAULT

45. The Counsel for the appellant submits:

- There is no husband-wife relationship for 25 years;
- The marriage has broken down;
- There is no justification for the marriage to continue; and
- The appellant should be granted divorce.

46. Under the Act, if the parties agree for the divorce then it can be granted on mutual consent: there cannot be any objection to it. However, In case there is no consent, then divorce can only be granted on the grounds mentioned in section13 of the Act.

47. Section 13(I)(a) provides that divorce can be granted if the other party has treated the petitioner with cruelty: it has to be by the person other than the one seeking divorce.

48. While discussing the second submission of the previous point, we have discussed the evidence and have held that the appellant was having an affair with Shashi, the younger sister of the respondent. The respondent also deposed that:

- The appellant insisted that Shashi should be permitted to live in the same house;
- He used to torture and throw tantrums, when his proposal was refused by the respondent;
- She was willing to resume relationship if the appellant dropped the proposal/condition.

49. The aforesaid part of the oral testimony of the respondent (D.W 1) appears credible and worth accepting, if seen in the light of the evidence and finding recorded while dealing with the first point. This amounts to cruelty on part of the appellant on the respondent. This is also finding of the Trial Court. We affirm it.

50. The appellant cannot be granted divorce on the ground of cruelty on his part. But can divorce be granted on the ground that marriage has broken down irretrievably.

51. We have our doubts whether marriage has broken down irretrievably or not as the respondent is willing to resume husband-wife relationship, if the appellant drops the immoral compromise. However, it is not necessary to decide whethermarriage has broken down irretrievably or not, as even if it has so broken, divorcecannot be granted. For the purpose of the appeal, we assume that the marriage has broken down irretrievably.

52. Incompatibility in marriage or irretrievability of a marriage, or marriagebeing broken down irretrievably is not a ground for divorce though recommended by the Supreme Court in Naveen Kohli v. Neelu Kohli1 for consideration to amend the Act. It may amount to mental cruelty entitling a party to divorce but it should be without any fault or at least fault of both sides. This is not the case here. In this case, the fault is of the appellant: he has been cruel to the respondent by insisting for the immoral compromise.

53. In case, divorce is granted in this case, then it would mean that a party can take advantage of his misdeed; it is not permissible under the Act. Had there been some fault of the respondent also then the matter would have been different—the relief could have been considered.

54. In view of above, the third point is decided against the appellant.

AN OBSERVATION

55. In view of our findings, the appeal has to be dismissed. However, this does not preclude the parties to settle their differences by mutual consent. After all, life has to go on: forgive and forget are essential part of the same. We hope that this may happen.

CONCLUSIONS

56. Our conclusions are as follows:

(a) There is no cruelty on part of Dr. Veena Agarwal (the respondent);

(b) The cruelty is on part of Dr. T.C Agarwal (the appellant);

(c) The appellant cannot take advantage of his own fault.

57. In view of our conclusions, the appeal is dismissed.

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SMT. ARTI PANDEY VERSUS VISHNU KANT TIWARI

2012 SCC OnLine All 2247 : (2012) 95 ALR 494 : (2013) 1 All LJ 360

(Allahabad High Court)

(Before Hon'ble Mr. Justice Prakash Krishna &
Hon'ble Mr. Justice Arvind Kumar Tripathi (II), JJ.)

Between

Smt. Arti Pandey
v.
Vishnu Kant Tiwari

First Appeal No. 263 of 2011
Decided on September 12, 2012

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 crueltyunder 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 over-look or gloss over mutual faults and failures. As said by Lord Reid in his speech in Gollins v. Gollins:

"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 about them the better."

…..Clause (i-a) of sub-section (1) of section 13 of the Act is comprehensive enough to include cases of physical as also mental cruelty. It was formerly thought that actual physical harm or reasonable apprehension of it was the prime ingredient of this matrimonial offence. That doctrine is now repudiated and the modern view has been that mental cruelty can cause even more grievous injury and create in the mind of the injured spouse reasonable apprehension that it will be harmful or unsafe to live with the other party. The principle that cruelty may be inferred from the whole facts and matrimonial relations of the parties and interaction in their daily life disclosed by the evidence is of greater cogency in cases falling under the head of mental cruelty. Thus mental cruelty has to be established from the facts.

…….What is cruelty in one case may not amount to cruelty in the 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 belief, 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 mental cruelty after a passage of time or vice versa. There can never be any straitjacket 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.

….it is proved that the appellant has treated the respondent with mental cruelty and also permanently deserted the respondent in terms ofsections 13 (1)(i-a) and 13 (1)(i-b) of the Hindu Marriage Act. Since the year 2005 at least.

The Judgment of the Court was delivered by

PRAKASH KRISHNA, J.:— This is an appeal under section 19 of the Family CourtsAct, 1984 at the instance of wife against the judgment and decree dated July, 2011 passed by the Principal Judge, Family Court, Allahabad in Matrimonial Petition No. 688 of 2005, decreeing the petition filed by the husband for divorce.

2. Smt. Arti Pandey, the appellant, daughter of a District Bank Co-operative Officer, having urban background, resident of Allahabad city got married to Vishnu Kant Tiwari, the respondent, resident of a Village of Allahabad District of rural back ground, a student at the time of marriage, on 14.5.1997 The parties are Brahmin by caste. The father of the husband mostly resides at Kolkata in connection with his business, leaving his wife (mother-in-law of the appellant) and son respondent to reside in the Village, and used to visit once or twice in a year.

3. As per custom prevalent in the community, the wife remained in her parental house after the marriage and after about five years on 9.3.2002, 'gouna' ceremony was performed (second marriage) and then she visited to her matrimonial house in the Village where she lived happily for 15 to 20 days.

   Thereafter, she went to her parents' house. The husband says that the parents of the wife wanted that the husband should reside with them at City Allahabad and that is the reason they used to create all sorts of obstructions and hurdles on the occasion of 'Bidai' of the wife to her matrimonial home.

4. The husband had earlier filed a petition under section 9 of the HinduMarriage Act for restitution of conjugal rights on 27.9.2002 being petition No. 519 of 2002, against his wife and her parents. After getting the information of the said petition, the parents of the wife acceded to his request and the parties compromised the dispute. The wife visited her matrimonial home in the month of 2003, consequently, the said petition was got dismissed in default on 21.5.2003

5. The case of the husband in brief is that after about 10 months, in-laws again started pressurizing (the husband) to leave his parents and shift to Allahabad. The wife lived with him upto 11.3.2005 before Holi in his Village and thereafter without any lawful excuse, she has refused to come to her matrimonial house. It was further pleaded that he being a student and belongs to a family of limited means and the only son, it is not possible for him to have a separate accommodation in the City Allahabad although he has all love and affection for his wife and has all respect for her. Last effort for 'Bidai' was made on 25.10.2005 but without any success, on the above allegations a petition No. 688 of the 2005 for restitution of conjugal rights, was presented.

6. In reply, the factum of marriage and of 'Gauna' held on 9.3.2002 was admitted by the wife. She came out with the case that the husband and his family members treated her very badly for inadequate dowry. She is also lone daughter of her parents besides a brother. She was beaten many times and was turned out by the husband and his family members. The allegation that mother-in-law is an old lady was denied and it was stated that even grandmother of the husband is alive. The husband and his other family members made murderous assault on her and it would be better if she resides in her parent's house, it would also be better for both the parties. There is no question in the facts and circumstances of the present case for passing a decree for restitution of conjugal rights.

7. During the pendency of the petition for restitution of conjugal rights, the wife filed a case being Case No. 20 of 2006 for maintenance.

8. Certain other developments which goes to the root of the case were taken place during the pendency of these proceedings. The husband who was preparing for competitive examination of Indian Administrative Services took a room on rent in the city for preparation of the competition. The wife also resided at her parent's house. She completed the nursery teachers training course and thereafter joined law classes and obtained the L.L.B degree. With the passage of time, she got herself enrolled as an Advocate and started practice. The husband successfully competed the I.A.S exams and was declared successful in I.A.S allied services. He was selected in Indian Railways in May 2006 and joined thereon 15.1.2007 He joined the training college at Railway Staff College, Barodara on 15.1.2007

9. Thereafter, the things started moving very fast at the end of the wife. She diverted all her energy to malign and started levelling all sorts of allegations against him. The subsequent events which took place will be narrated in the later part of the judgment, suffice it to say that the husband filed an amendment application to amend the petition. By amendment he added certain paragraphs in the petition raising grounds of 'cruelty' and 'desertion' on the part of the wife and sought a decree for divorce instead of restitution of conjugal rights. The amendment application was hotly contested by the wife but without success. She also approached this Court by filing writ petition which came to be dismissed.

10. The Family Court as well the High Court took out conciliation proceedings to settle the dispute between the parties but this exercise became futile.

11. In response to the amended petition for divorce, the wife filed additional written statement and took the stand that she has always discharged the obligation of a Hindu wife and it is the husband who did not discharge his part of obligation. The grounds for seeking divorce are all false and fabricated and she is prepared to live with her husband. She never treated the husband or his family members with cruelty. The fact remains that it is the husband and his family members who ill-treated her because of inadequate dowry. She lived most of the time over a period 2002–2005 in her matrimonial house and now the husband having been selected in I.A.S services, she is being ill-treated and has been turned out. For the first time she pleads that she had become pregnant and there was miscarriage on account of the ill behavior of her husband and his family members. She, shifts her stand and by filing a petition under section 9 of Hindu Marriage Act prayed that the decree for restitution of conjugal rights be passed instead of a decree for divorce.

12. The parties led evidence oral and documentary in support of their respective cases. The respondent examined himself as P.W 1, the wife examined herself as D.W 1. She also examined Shesh Nath Tewari as D.W 2, Akchaybar Nath Pandey her father as D.W 3 and Ram Pher as D.W 4. The Family Court by the judgment underappeal dated 14.7.2011 has accepted the petition for divorce of the marriagedated 14.5.1997 and also dismissed the petition filed by the wife under section 9 of the Hindu Marriage Act.

13. Heard Shri O.P Singh, learned Senior Counsel alongwith Shri Satya Prakash, Advocate, in support of the appeal, Shri Navin Sinha, learned Senior Counsel alongwith Shri M.C Chaturvedi, learned Counsel for the respondent.

14. Having heard the learned Counsel for the parties, we are of the opinion that the fate of the appeal depends on appreciation of facts on the basis of which the Family Court has decided the case against the appellant. Broadly speaking the following points fall determination before us:

    (1) Whether the allegation of the husband that he has been treated with mental cruelty by the wife is established within the meaning of section 13 of theHindu Marriage Act?

    (2) Whether the wife who is residing since 11.3.2005 or 15.6.2005 (as per appellant's allegation) separately in her parental house amounts 'desertion' on her part? The appellant had a justified cause for not returning to the husband/respondent?

15. Before, however, dealing with these two points which are crux of the matter, it is necessary to summarize briefly the history of the marriage life of the parties.

16. The parties belong to Brahmin community. As per custom prevailing in this community, the marriage was performed on 14.5.1997 but the wife remained in her parental house and there was no 'joint living' of the parties. The parties got the occasion of 'joint living' after about five years when 'gauna ceremony' was performed on 9.3.2002 The wife came to her matrimonial house and lived there happily for 15 to 20 days. She was married to a person who was student and was an unemployed youth. He belongs to rural background and living in a Village namely, Nahawai, Meja of District Allahabad. The wife was brought up in a family having urban background in the City Allahabad. Her father is employed as Manager District Co-operative Bank. It looks to us as if it is possible that the trouble between the spouses erupted in part at least due to these variations.

17. It appears that immediately after a short span of marriage, the wife found it difficult to adjust herself in the atmosphere of Village in her in-law's house. The trouble started shortly after the marriage. Her disinclination to live in the Village with her mother in law and that too with unemployed husband, compelled the husband to file a petition No. 519 of 2002 for restitution of conjugal rights. The said petition was not pursued further and it was got dismissed in default as in the meantime, the well wishers and family friends of the parties intervened in the matter and persuaded the wife to live with her husband in the Village. The wife tried to adjust in the family of her husband by living in the Village but some how she could not adjust and finally came to her parents house on the occasion of Holi festival somewhere in the month of March, 2005. Here the parties are at variance. According to wife she is living in her parent's house since 15.6.2005 This variation in dates is not of much importance.

18. We have narrated the incidents upto the year 2005.

19. Thereafter, the husband was selected in I.A.S Allied in the year 2006 and joined the training at Barodara. How far the success of the husband has been appreciated by the appellant is the next question. The wife could not tolerate the success of the husband and she became furious. With a revengeful attitude she filed the following complaints/applications with wild allegations against her husband before various authorities on various dates. The bone of contention is whether these complaints/letters written by the appellant against the respondent husband, amount to cruelty or not. The contents of these complainants may be noticed in brief:

    (1) The appellant made a complaint to the Director General, Railway Staff College, Barodara, paper No. 70-C/20. The tenor of the complaint speaks a lot. There the wife alleged that Sri Vishnu Kant Tiwari, the selected candidate, her husband, is a 'corrupt person'. She has been treated inhumanly by her husband, father in law, sister in law, brother in law by demanding dowry. An attempt was made to kill her by giving electric shock unsuccessfully, boiling water was thrown on her. She was turned out from her matrimonial home almost in dying state and was hospitalized and could recover after treatment for a considerable period of time. It is further stated that Sri Vishnu Kant Tiwari is a man of 'criminal reputation' and has 'contacts with unsocial and undesirable elements'. He on 22nd September, 2005 visited her parent's house and threatened to kill her. In this connection, he on 22nd of June, 2006 made a criminal assault on her. Information was given through application to the authorities concerned. Criminal Case No. C/28/2005 under sections 323, 504, 506, 324 and 498-A, I.P.C read with 3/4 of Dowry Prohibition Act, Arti v.Vishnu Kant Tiwari is pending. In addition, criminal case No. 20/2006, undersection 125, Cr. P.C is pending before Judge, Family Court, Allahabad. Similarly, a case under section 9 of the Hindu Marriage Act, Vishnu Kant Tiwari v. Arti is pending. She concludes that Sri Vishnu Kant Tiwari is an 'accused person' involved in number of cases. 17.2.2007, 21.2.2004, 14th March, 2007 are the dates fixed in those cases and a sum of Rs. 75/- was imposed as cost and he has been directed to pay a monthly sum of Rs. 400/- as interim maintenance. He remained absent in the Court proceedings and information has been

given by her to the President of India, Prime Minister of India, Home Ministry and the Chairman, Union Public Service Commission, New Delhi etc. etc..

It has been further stated that Sri Vishnu Kant Tiwari has been appointed in utter violation of Indian Civil Service Rules and of Railway Account Service Rules. Action be taken against him. The complaint further recites that she is giving necessary information in the interest of justice and in the interest of public so that 'legal proceedings may be ensured against him'. In the concluding part, she again asserts that the husband is a 'corrupt person' and has been selected in violation of the relevant Rules.

(2) She filed second complaint dated 19th February, 2007 with the Secretary, Union of India (Karmik). It is paper No. 70/18. In the complaint it has been alleged that the said complaint is being sent with reference to her earlier letters dated 28.12.2006, 13th December, 2006 and 5th of February, 2007. It has been stated that Sri Vishnu Kant Tiwari having roll number 153888 rank No. 243 has been selected in the Civil Services Exam 2005, is a 'corrupt person' and it was prayed that an action may be taken against him. The allegations are that Sri Vishnu Kant Tiwari is quarrelsome, a person of inhuman behaviour and has attempted unsuccessfully to kill her and is an accused person underlaw. He is 'wanted by Court' in a proceeding under Dowry Prohibition Act in connection with sections 323, 504, 506, 324 and 598-A etc.. It has been further stated that he is such a person against whom 'criminal cases' detailed therein are pending against him. He, obtained the selection by playing 'fraud' and 'concealing the material fact' from the Public Service Commission, although he is 'not qualified' for the post of public servant. He by giving 'false declaration' has secured the service of Indian Administrative Services. A prayer was made 'to terminate his services' and to get lodged a criminal case against him under the provisions of Indian Penal Code for obtaining services by committing 'forgery and fraud' of fabricating documents, under intimation to her.

(3) She filed the third complaint before the Senior Superintendent of Police, Allahabad paper No. 70-C/23 apprehending danger to her life and property and abduction at the hands of Sri Vishnu Kant Tiwari and unsocial elements. It has been stated therein that Sri Vishnu Kant Tiwari is a 'corrupt and mischievous person' and has 'connection with hardened criminals of the city'. On 14th of March, 2007 he was seen alongwith four to five unknown persons around her residence at 8:00 p.m He abused her and her mother and threatened to kill her. Thereafter, all of them disappeared in a Jeep which was waiting at some distance. Due to darkness she could not notice the registration number of the Jeep. All unknown persons were armed with weapons. She and her family members are in a state of fear and therefore, it was prayed that necessary steps be taken for safety and security of life and property of the appellant and her family members. The copies of the aforesaid complaint were sent to the District Magistrate, Allahabad, Director General, Railway, Staff College Barodara and the Secretary, Union of India (Karmik).

(4) The appellant again filed an application before the Senior Superintendent of Police, Allahabad dated 4th July, 2007 making all sorts of wild allegations against her husband and in-laws. It has been stated therein that boiling water was thrown on her person to kill. She was given electric shock and an attempt was made for miscarriage of her pregnancy. She has been turned out from her matrimonial house and is residing with her parents and details of various criminal cases etc. have been mentioned therein. It is paper No. 70-C/24 and copies of this complaint have been sent to District Magistrate, Allahabad, D.I.G, Lucknow and the Chief Minister.

(5) She filed an application under section 156(3), Cr. P.C before the Chief Judicial Magistrate, Allahabad for registering a criminal case against her husband Sri Vishnu Kant Tiwari and two unknown persons for abusing her and for threatening her. It was rejected by the order dated 25th June, 2007. It is paper No. 70-C/27.

(6) Paper No. 70-C/8 is again a complaint to the Senior Superintendent of Police, Allahabad against the selection of her husband on the allegations that she has reason to believe that her husband Sri Vishnu Kant Tiwari has obtained fitness certificate with regard to physical verification proceeding, by giving 'illegal gratification' to the police and administration who submitted a 'false report'. Number of cases are pending against Sri Vishnu Kant Tiwari and therefore, an inquiry may be instituted against him in the interest of public.

(7) Then, on 14th of August, 2007, a complaint was given to the Secretary (Karmik and Training) and to the Authorized Officer, Secretary/Information Officer, Union of India, North Block, New Delhi with the allegations that she has not been informed in the light of her letter dated 28th December, 2006 as to what 'departmental proceeding' has been initiated against Sri Vishnu Kant Tiwari. She demanded the following information:

(i) What action has been taken on her earlier letter dated 28th December, 2006 by the department?

(ii) Whether the police verification of Sri Vishnu Kant Tiwari has been done or not? And whether the factum of cases pending against him have been noticed or not?

(iii) The trainee has been appearing on the dates fixed before the Court in connection with the criminal cases pending against him at Allahabad District Court and the High Court as well. It may be informed whether Sri Vishnu Kant Tiwari is attending the Courts after obtaining leave?

(8) She also got lodged a First Information Report against her husband at the Police Station being F.I.R No. 40/05 dated 6th of December, 2005 undersections 323, 504, 506, 324 and 598-A, I.P.C and 3/4 of the Dowry ProhibitionAct against her husband, mother in law Smt. Mithilesh Tiwari, Shambhu Nath Tiwari, Smt. Priyanka (Nand) and Praveen Kumar Mishra (Nandoi). The matter was investigated by police who on 30th December, 2005 submitted a final report as no evidence in support of the allegations in the First Information Report was found. She then filed an application before the Senior Superintendent of Police, Allahabad for reinvestigation by Special Force. The matter was reinvestigated and a final report was submitted on 20th July, 2006. The police has stated that the appellant has expressed reluctance/unwillingness to reside in the village, due to this reason there is lack of marital happiness with her husband. Paper No. 70-C/14 is the report of Police Station, Colonel Ganj, Allahabad to the Chief Judicial Magistrate, Allahabad in connection with her application undersection 156(3) of Cr. P.C in respect of an alleged incidence dated 3rd of July, 2006 involving Sri Vishnu Kant and his two friends in the incidence of Marpit and abusive language. The police has found that the said allegations made by the wife are unfounded and wrong;

Paper 70-C/32 is a report submitted to the Senior Superintendent of Police, Allahabad by the Circle Officer, Allahabad. It is dated 2nd of November, 2007. The Circle Officer has reported that the complainant (appellant) is original resident of District Allahabad. While her matrimonial house is in rural area. She appears to be a lady of progressive thoughts (Vah Swakshand Vicharon Ki Mahila Prateet Hoti Hai). The said report totally discards the allegations made by the appellant against her husband and his family members, as untrustworthy. It further recites that the appellant has filed the application within a view to take revenge after concealing the stay order passed by the High Court with a view to mislead. The stay order dated 24th August, 2007 passed in Misc. Writ Petition No. 21355 of 2007 by the High Court has restrained the police from taking any action in the matter. The allegations made by the appellant in absence of any evidence could not be established.

(9) On 15th December, 2007, being paper No. 70-C/36 a complaint was made to the Civil Officer (O.B) and Central Public Information Officer, Railway Staff College, Barodara with regard to the alleged forgery and irregularities committed by Sri Vishnu Kant Tiwari, IRS. Through this complaint it was stated that Sri Vishnu Kant Tiwari has attended the Court on 29th October, 2007 and was also present in the training College on the same date, which is not possible. He has committed criminal offence and should be punished accordingly.

(10) This is an undated letter being paper No. 70-C/37 addressed to Ms. Mamta Kandpal, Deputy Director (GR), Railway Board, New Delhi wherein similar kind of allegations referred to herein above as mentioned in the earlier complaints were reiterated. It was stated that Sri Vishnu Kant Tiwari is attending the cases in the Courts and is simultaneously getting training in the College. Are these two things possible simultaneously? He is playing fraud. Number of criminal cases are pending against him. He has obtained the character verification report by use of money, power and influence.

(11) Paper No. 70-C/40 is a letter dated 9th April, 2008 being addressed to Public Information Officer, Railway Staff College, Ministry of Railway, Government of India making various allegations against the character, reputation and working of Sri Vishnu Kant Tiwari. The allegations are of wild nature. They are repetitions of the allegations made in earlier to various authorities referred to above.

(12) The appellant through her letter dated 16th of June, 2008 being paper No. 70-C/42 addressed to Public Information Officer inquired as to what action has been taken by the department against Sri Vishnu Kant Tiwari on her earlier complaints, failing which she will approach the Central Information Commission and the High Court and Supreme Court, at his costs.

(13) The appellant has not left even the Chief Justice, High Court, Allahabad. The background fact is that the sister in law is married to one Praveen Kumar who is working as Stenographer in the District Court, Fatehgarh. With a view to create pressure, she made a complaint to the Hon'ble the Chief Justice against Praveen Kumar Stenographer through her complaint dated 12th of March, 2010 when he has hardly to do anything in the matter. An explanation was called for from him by the District Judge, Fatehgarh.

20. Faced with this situation, the husband respondent filed application for amendment of his petition to convert it, into a petition for divorce under section13 of the Hindu Marriage Act by incorporating the facts relating to cruelty and desertion based on the complaints made by the wife. The amendment as noticed herein above, was allowed.

21. Submission of the learned Senior Counsel for the appellant is that these allegations do not amount to cruelty.

22. It is not disputed that all these complaints etc. were written by the appellant. She admitted her signatures on photostat copies of these complaints produced in evidence by the husband. The learned Counsel submitted that since no action has been taken on the basis of these complaints, therefore, it does not amount to cruelty. Much emphasis was laid by him on the deposition of the respondent husband that he possessed the original copies of these documents, which is an impossibility. It is of little importance as to where the original documents lie. Here is a case where the parties appeared in person before the Court and themselves conducted the case. The 'original' word in the context of this factual ground, would mean the 'original' from which photostat copies were made, as the public in general understands it and not in the legal sense, as one finds mention in the Evidence Act. The fact is that the writing of these complaints is not in dispute and has not been disputed by the appellant in her deposition. The question which falls for consideration is—Whether making of such type of complaints by a spouse against the other spouse amounts to cruelty within the meaning of section 13(1)(i-a). It says that a decree for divorce

can be obtained on the ground that the other party has, after solemnisation of the marriage, treated the petitioner with cruelty. The word "cruelty" has not been defined anywhere in the Hindu Marriage Act.

23. The learned Counsel for the appellant submitted that these letters were written by the wife with a view to obtain the whereabouts and details of the posting etc. of her husband and there is nothing wrong about it. He submitted that the wife has always been ready and willing to reside with her husband but it is the husband who after his selection in I.A.S has refused to give his company. Further, the allegation that the wife refused to live in the village or compelled the husband to reside at Allahabad is concoction and cannot be relied upon. After getting selected in the I.A.S examination, the husband wants to remarry with another girl. It was also submitted that after the marriage, the husband concentrated and focussed his attention to get success in the competitive examination. In other words, the husband was having more interest in shaping his career and was not interested in appellant. That is the reason the appellant took the training of Nursery Course. Thereafter, she joined LLB classes and got herself enrolled as a practising advocate with the U.P Bar Council. No case for grant of divorce decree has been made out, submits the appellant.

24. The learned Counsel for the respondent submitted that in the unamended written statement dated 25th November, 2006, the only allegation put forward by the wife is that she was turned out from her matrimonial house many times afterMarpit, vide para 5 of the written statement. In para 6 it has been stated that many times the husband and his family members made murderous assault on her person and she left the house and is leading a life of a deserted wife under compulsion in her parents' house. Still danger to her life and property persists in laws' house therefore, there is no question of restitution of conjugal rights and it would be in the interest of justice and beneficial to both of them if they reside separately.

25. Elaborating the argument, he submitted that the wife took a somersault, after she came to know about the success of her husband in the competitive examination. She took an 'U' turn and now set up the plea that she is prepared to live with her husband. The said plea of the wife is nothing but an eye-wash. In totality of the circumstances, the wife left no stone unturned to spoil both the life and career of the respondent. The learned Counsel for the respondent pointed out many contradictions and holes in the case of the appellant and submitted that taking an overall picture of the case it is but apparent that the appellant is not telling truth. On the other hand, the husband all times till the filing of complaints by the wife against him was ready and willing to continue the marital relations. This is evident from the fact that he earlier filed a petition for restitution of conjugal rights and withdrew it when the appellant on intervention of the well-wishers returned to the husband's house. Further, in the second petition for restitution of conjugal rights he has not levelled any serious allegation against the character of the appellant. In the petition he has used a very temperate language with the hope that with the passage of time the wife would become mature and would join his company. Para-7 of the petition for restitution of conjugal rights makes it crystal clear that the husband was confident about his success in the competitive examination and has expressed hope that within two to four years he will be able to have a residential accommodation in the city and by that time his father would return from Kolkata. He, with his beloved wife would lead a respectful and peaceful happy married life together. He, never used any intemperate language against the appellant either in the petition or in evidence. The things became unbearable and reached to the point of no return when the appellant crossed all the limits of propriety and decency and got lodged false complaints one after the other on false and frivolous and manipulated grounds. This not only affected him but also his other family members including the mother who became seriously ill and was taken to Delhi for treatment. The appellant left no member of husband's family unhurt. The appellant went to the extent of making complaints to the Hon'ble the Chief Justice against the husband of sister (Nand), who is a class-III employee in a Civil Court and a newly wed. Every attempt was made to involve the husband and his family members to rope them in criminal cases, beunder the provisions of I.P.C, Dowry of Prohibition Act or relating to service. The life of husband has been made hell and only then

under the compelling circumstances an application to amend and convert the matrimonial petition into a petition for divorce, was filed. The relations between the parties on account of action of the appellant is very strained and in such circumstances, the Court below has committed no illegality in passing a decree of divorce.

26. Considered the respective submissions of the learned Counsel for the parties. In the earlier part of the judgment, the various complaints made against the husband by the wife have been summarised. The filing of these complaints by the appellant is admitted. She in her deposition admitted her signatures on these complaints. Filing of these complaints was a conscious decision of the appellant with motive, which is crystal clear, to torpedo the career of the husband at its threshold. The first complaint is dated 8th February, 2007 addressed to the Director General of the Training College where the husband was getting training after his selection in IRS. She described her husband as a 'corrupt candidate' (Bhrastha Abhyarthi) and a person of criminal image who still has 'illegal connections with unsocial and undesirable elements'. The tenor of the complaint is to paint the husband as a criminal man involved in criminal cases. With a view to give colour to the complaint a false statement (as discussed below) that the husband and his family members tried to kill the complainant with electric shock was made. Similarly, incorrect allegations that boiling water was thrown to kill her and she was turned out after Marpit on 10th July, 2002 in a dying state while she was pregnant, with the result, she suffered miscarriage, were made.

27. The above allegations regarding the giving of electric shock with a view to kill her or throwing of boiling water or compelling her to leave the house on 10th July, 2002 during pregnancy are all incorrect in view of her deposition in the case. She has deposed in her cross-examination that on 27th July, 2002 at the time of her Bedai a demand of dowry was made and a threat was given that if she comes again without dowry she would be put to trouble (Pareshan Karenge). The incidence of Marpitstarted after 27th July, 2002 because of dowry. She further states that she was never beaten earlier. Meaning thereby the things were smooth according to her own deposition up to 27th July, 2002. In further cross-examination, she could not even state at what time she was beaten on 10th July, 2002. She could not tell even whether she was beaten in morning or afternoon or in the evening. It seriously doubts the correctness of the allegation. This sounds strange that a newly wedded lady who is in laws' house for the first time after marriage was manhandled, according to her, by her husband and family members and she could not even remember the time of such incident but could remember the date. She further states that her father fetched her to his house and was got treated there. She was hospitalized in the year 2002 and was under treatment for about one and half months. It is unbelievable and does not appeal to reason. No such complaint by anybody from the side of appellant or her parents, was ever made earlier. She further admits that she got lodged the First Information Report in the month of December, 2005. A bare perusal of the First Information Report reveals that there is no such allegation of any such incident of the year 2002.

28. The truth of allegation of her manhandling, on account of which she suffered miscarriage, of giving electrical shock and throwing of boiling water on her, may be examined.

29. At this juncture, it is apt to notice the pleading of the appellant as was set out in her written statement filed to the original petition. It is strange that there is no whisper in the written statement of any such incident dated 10th July, 2002 regarding giving of electric shock, throwing boiling water or miscarriage of pregnancy. The averments which could be found out in this regard are contained in paragraphs 5, 6 and 11. General allegations of murderous assault and demand of dowry without specifying anything as regards the time, place or date etc. have been made therein. Had any such incident happened in the year 2002, it must have found mention in the written statement dated 25th of November, 2006 filed to the unamended petition for restitution of conjugal rights. For the sake of convenience these three paragraphs are reproduced below:

30. It was rightly submitted by the learned Counsel for the husband that had there been even nano fraction of truth with regard to the allegations made in the complaint made by the appellant, these should have

been disclosed in the First Information Report lodged in December, 2005, or at any rate in the written statement dated 25.11.2006 Logically, it can be inferred that after 25.11.2006, there appears to be sea change in the stand of the appellant.

31. With regard to the miscarriage of pregnancy the stand of the husband-respondent is that he was never made aware of the pregnancy. According to him, she intentionally got terminated the pregnancy without his knowledge or consent as the appellant was not prepared to lead a married life with him. There is no material on record to show that at any point of time either the husband-respondent or his family members were informed about the pregnancy of the appellant. Whether it was a miscarriage of pregnancy or intentional termination could be established by producing the medical reports. The appellant admits that this happened in her father's house and according to her she was under medical treatment, hospitalized too. She has not filed the relevant documents. She has filed only one report of Prayag Scanning Centre dated 30th August, 202 and one prescription of Y.P Naithani Memorial Hospital dated 2nd of September, 2002 showing her pregnancy. Nothing more and nothing less than that. The allegation of the appellant that the miscarriage was caused due to manhandling does not inspire any confidence nor it finds corroboration from the attending facts and circumstances of the case. It does not appeal to reason that the appellant or her parents would have kept mum, had such an incident taken place. The marriage was only of few months old. First, pregnancy is a matter of joy and happiness. It is unbelievable that due to Marpit the miscarriage occurred, but the appellant and her parents accepted everything silently. Logically, it follows that the allegations made in this regard in the complaints by the appellant were wrong. The appellant persisted in her attempt to spoil the future and career of the respondent at its very inception. She should have relished and felt lucky had there was a sincere desire of love and affection of re-union, on the successful selection of the respondent-husband in I.A.S (Allied). The Indian Administrative Services is the most cherished Government service of the country. This is one of the most toughest competitive examination. Only laborious, determined and brilliant persons can compete. Selection in such services is not a matter of chance or luck. The appellant instead of having a feeling of proud and elevation apparently felt dejection and humiliation. Making of series of complaints to higher ups on false and baseless allegations against the respondent, makes it evident that she could not relish the success secured by the respondent. She forgot duties of a concerned wife towards her husband. She not only wrote complaints to higher authorities but expected from them that they would act on her false complaints to the detriment of the respondent. With this sadistic approach she used the worst adjectives against the respondent by describing him as a 'corrupt person' (Bhrastha Abhyarthi), 'man of criminal image', 'man of illegal connection with unsocial and unwanted elements' (vide complaint dated 8th February, 2007), obtained the service 'by giving false declaration' (vide complaint dated 19th February, 2007), 'has connection with hardened criminals of the District' (Jile Ke Shatir Apradhiyon Se Bhi Sambandh Hai), vide complaint dated 17th of March, 2007, involved in half a dozen cases and made unsuccessful attempt to kill her (vide complaint dated 12th July, 2007), obtained physical verification report from the police and the administration by giving them 'illegal gratification' (complaint dated 12th July, 2007), attending criminal cases without taking leave (vide complaint dated 14th August, 2007) etc. etc.. There seems to be no end. Wife in Indian culture is considered as Ardhangini, better half, who remains with the husband like shadow in happiness and sorrow always. In Hindu Law marriage is sacrament by taking of seven steps before sacred fire by the parties. They jointly take the following vow:

"We

shall always remain together in happiness and sorrow,

shall express love and affection for one another,

shall aim for contentment and respect for all,

shall remain loyal and support each other under any circumstances,

shall always keep the family integrity,

shall care endlessly so that our love shines,

shall practise all religious and family responsibilities sincerely diligently and faithfully."

32. It is also admitted to the appellant that she filed First Information Report against her husband in the month of December, 2005 under the various sectionsof I.P.C and Dowry Prohibition Act already referred to above. The matter was investigated twice by the police no truth was found in those allegations of the appellant. Police submitted a final report. On a protest petition filed by the appellant notice has been issued to the respondent by the concerned Magistrate, but we have been informed that the criminal proceedings have been stayed by the High Court. Be that as it may, till date, there is no supportive material to corroborate the allegations of the appellant.

33. The investigation report submitted by the police has been placed before us. The police has found that it is the appellant who all times was pressing the respondent herein to live in the city on a rental house which was not acceptable to the respondent due to his financial constraints and family problems. The appellant is a lady of progressive thoughts and could not adjust herself with the orthodox family to which the respondent belongs, finds mention in the police report.

34. There is evidence on record to show that besides making complaints against her husband to higher authorities and the police, attempts were made by the appellant to involve the husband in other criminal cases. She filed applications one after the other before the Chief Judicial Magistrate under section 156(3), Cr. P.C for taking cognizance of the alleged incidents involving the respondent. The Chief Judicial Magistrate after obtaining the report from the police dismissed them.

35. The learned Counsel for the appellant submitted that the filing of these complaints does not amount to cruelty. The submission of the appellant that being wife of the respondent, she wanted to collect information with regard to the husband's whereabouts, is meritless. It is not expected from a man of ordinary prudence and intelligence to make such complaints against her husband informing the authorities concerned that the husband is attending the Court during training hours without taking leave or has obtained the service by making false declaration or the husband is a man of criminal image and has association with unsocial and unwanted elements of the society. The question now arises as to whether such anact and behaviour amounts to cruelty within the meaning of section 13(1)(i-a) ofHindu Marriage Act or not.

36. In Dr. N.G Dastane v. Mrs. S. Dastane1 the Apex Court has held as follows:

"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.

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 undersection 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. (Emphasis supplied)

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37. 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 crueltyunder 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 over-look or gloss over mutual faults and failures. As said by Lord Reid in his speech in Gollins v. Gollins1:

"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 about them the better."

38. In Shobha Rani v. Madhukar Reddi2, the Apex Court has held as follows:

4. "section 13(1)(i-a) uses the words "treated the petitioner with cruelty". The word "cruelty" has not been defined. Indeed it could not have been defined. 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 of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical, the Court will have no problem to determine it. It is a question of fact and degree. If it is mental, the problem presents difficulty. First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment in the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it 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."

39. In V. Bhagat v. D. Bhagat (Mrs)3, the Apex Court has held as follows:

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."

40. In G.V.N Kameshwara Rao v. G. Jabillia1, the Apex Court has held as follows:

12. "The Court has to come to a conclusion whether the acts committed by the counter-petitioner amount to cruelty, and it is to be assessed having regard to the status of the parties in social life, their customs, traditions and other similar circumstances. Having regard to the sanctity and importance of marriages in a community life, the Court should consider whether the conduct of the counter-petitioner is such that it

has become intolerable for the petitioner to suffer any longer and to live together is impossible, and then only the Court can find that there is cruelty on the part of the counter-petitioner. This is to be judged not from a solitary incident, but on an overall consideration of all relevant circumstances."

41. In Vijaykumar Ramchandra Bhate v. Neela Bhate2, the Apex Court has held as follows:

11. ……"A conscious and deliberate statement leveled with pungency and that to placed on record, through the written statement, cannot so lightly be ignored or brushed aside, to be of no consequence merely because it came to be removed from the record only. The allegations leveled and the incidents enumerated in the case on hand, apart from they being per se cruel in nature, on their own also constitute an admission of the fact that for quite some time past the husband had been persistently indulging in them, unrelated and unmindful of its impact. That the husband in this case has treated the wife with intense cruelty is a fact, which became a fait accompli the day they were made in the written statement."

12. "The submission on behalf of the appellant that once the decree fordivorce is set aside, there may be fresh avenues and scope for reconciliation between parties to revert back to matrimonial home, does not appeal to us in any manner, viewed in the context of the attitude of the wife, seriously contesting the claims of the appellant, by filing her reply in this Court, with enclosures thereto, though not appearing either in person or through Counsel. The allegations and counter allegations exchanged are indicative of the strong hatred and rancour between them. Judged in the background of all surrounding circumstances noticed by the Courts below and what has been observed by us supra, the claim appears to us to be too desolate merely born out of despair rather than based upon any real, concrete or genuine purpose or aim. Once the decree for divorceis confirmed, the relief sought for by the husband for restitution has to inevitably fail."

42. In A. Jayachandra v. Aneel Kaur3, the Apex Court has held as follows:

"16. The matter can be looked at from another angle. If acts subsequent to the filing of the divorce petition can be looked into infer condonation of the aberrations, acts subsequent to the filing of the petition can be taken note of to show a pattern in the behaviour and conduct. In the instant case, after filing of the divorce petition a suit for injunction was filed, and the respondent went to the extent of seeking detention of the respondent. She filed a petition for maintenance which was also dismissed. Several caveat petitions were lodged and as noted above, with wrong address. The respondent in her evidence clearly accepted that she intended to proceed with the execution proceedings, and prayer for arrest till the divorce case was finalized. When the respondent gives priority to her profession over her husband's freedom it points unerringly at disharmony, diffusion and disintegration of marital unity, from which the Court can deduce about irretrievable breaking of marriage."

43. In Parveen Mehta v. Inderjit Mehta1, the Apex Court has held as follows:

"19. Clause (i-a) of sub-section (1) of section 13 of the Act is comprehensive enough to include cases of physical as also mental cruelty. It was formerly thought that actual physical harm or reasonable apprehension of it was the prime ingredient of this matrimonial offence. That doctrine is now repudiated and the modern view has been that mental cruelty can cause even more grievous injury and create in the mind of the injured spouse reasonable apprehension that it will be harmful or unsafe to live with the other party. The principle that cruelty may be inferred from the whole facts and matrimonial relations of the parties and interaction in their daily life disclosed by the evidence is of greater cogency in cases falling under the head of mental cruelty. Thus mental cruelty has to be established from the facts (Mulla Hindu Law, 17th Edition, Volume II, page 91)."

44. In Samar Ghosh v. Jaya Ghosh2, the Apex Court has held as follows:

101. "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) …….

(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.

(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.

(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) …….

(viii) ……

(ix) …….

(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.

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(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. Themarriage 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 ofmarriage; 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."

45. Recently, the Supreme Court again considered the matter in Vishwanath v.Sau. Sarla Vishwanath Agrawal1. It has taken into consideration its various earlier judgments referred to above. In this case the assertion against the wife was that she used to hide the pressed clothes of her husband while he was ready to go to the factory. She used to crumple the ironed clothes and hide the keys of the motor-cycle or closed the main gate to cause trouble to the husband. This was held to be cruelty on the party of the wife.

46. On an application of the ratio of the decisions referred to above, it would be clear that the action of the wife of making false complaints against her husband to the higher authorities, lodging false First Information Reports with the police officials, initiating the criminal proceedings before the Court of Magistrate by levelling false and fictitious allegations, would amount to mental cruelty. The explanation of the wife that she was trying to find out the whereabouts of her husband being a concerned wife is nothing but an eye-wash. At no stage, she expressed any regret or remorse. Allegations of very serious nature were made against the working and conduct of husband by calling him a person having criminal background involved in criminal cases and has connection with unsocial and undesirable elements of the city. Such type of allegations to a person having self respect and reputation are more humiliating than death. She made conscious and deliberate statements with poignancy. They cannot be ignored so lightly. The verification of the character and antecedents is one of the important criteria to test whether the selected candidate is suitable to the post. Though the candidate has passed the written test and interview

and physical test too, he can be dismissed on account of his antecedent record. In our considered opinion, a normal reasonable man is bound to feel the sting and pungency. The conduct of the appellant makes it graphically clear that she had really humiliated the respondent and caused mental cruelty. The feeling of deep anguish, disappointment agony and frustration of the husband is obvious. She had made attempts to prosecute him in criminal litigations which she had failed to prove.

47. What is cruelty in one case may not amount to cruelty in the 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 belief, 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 mental cruelty after a passage of time or vice versa. There can never be any straitjacket 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.

48. Humiliating words were written in the complaints. The fault, if any, lies with the appellant who could not adjust herself with her husband's orthodox family living in a village. Instead of making adjustments, she not only raised hue and cry but focussed all her attention, energy and time to destroy the respondent's career completely, to ruin him. A reading of paragraph 4 of the additional written statement filed to the amended petition supports our above conclusion. It has been stated therein that the wife before the marriage had understanding that she is being married to an advanced family residing in a developed village wherein the facilities are not less than a city which turned to be incorrect. We have also considered the plea regarding the demand of dowry. The said plea appears to have been put forward as an excuse by the appellant. The pleadings as set out in the written statement before the amendment are quite interesting. It contains only general allegations and not more than that. The matter on the demand of dowry complained by the appellant was investigated by the police and it has been found to be incorrect. In the circumstances of the case, we are not prepared to accept the testimony of the appellant in this regard and hold that matrimonial charge of cruelty is established; the appellant treated the respondent with mental cruelty, as discussed above. Having regard to the facts of the case, we reject the plea with regard to the demand of dowry or ill-treatment of the appellant by the respondent or by his family members. Now, the question of desertion may be considered.

49. The respondent husband has come out with the case that the appellant is living separately in her father's house since 11th March, 2005 when she had gone thereon the Holi festival. The appellant, on the other hand, states that she is living separately since 15th June, 2005. The question is whether she is living separately since then for any sufficient cause or not?

50. The cause of separate residence given by the appellant wife is that she was ill-treated in her in-laws house wherefrom she has been turned out. The husband has a different story to tell. According to him, she is living separately out of her own free-will and the attempt for Bidai of appellant proved futile. The unsuccessful attempt for appellant's Bedai was made by his father who visited the appellant's residence on 25th October, 2005 (It is customary that usually the father of the husband goes for Bedai). This was the cause of action for filing of the petition for restitution of conjugal rights. The appellant, on the other hand, submitted that the husband and his father visited her house on 21st September, 2005 and demanded dowry, in absence of her parents. Appellant's father at that time had gone to bank in connection with his duty, while her mother was away for the purposes of marketing. Taking the advantage of the absence of the her parents, she was abused, threatened and beaten. Indisputably, the First Information Report with regard to the said incident was lodged in the month of December, 2005 after about three months, apparently with a view to deter the husband and his family members not to compel her to live in her matrimonial home. The appellant's written statement to the unamended petition is dated 25th November, 2006 wherein she took the stand in para 9 that there is no justification for restitution of conjugal rights

as her life, property is in danger and in the prevailing tense atmosphere it is better for both the parties if she lives in her parental house. In her written statement she contested the husband's claim for restitution of conjugal rights and has not even whispered that she is ready and willing to join the company of her husband.

Cause for separate residence, as found above, while dealing the question of cruelty, is not justified. Appellant permanently repudiated the marriage tie as is apparent from her subsequent conduct already discussed above.

51. In Adhyatma Bhattar Alwar v. Adhyatma Bhattar Sri Devi1, the Apex Court has held as follows:

"Desertion in the context of matrimonial law represents a legal conception. It is difficult to give a comprehensive definition of the term. The essential ingredients of this offence in order that it may furnish a ground for relief are:

(1) The factum of separation;

(2) The intention to bring co-habitation permanently to an end animus deserendi;

(3) The element of permanence which is a prime condition requires that both these essential ingredients should continue during the entire statutory period; The clause lays down the rule that desertion to amount to a matrimonial offence must be for a continuous period of not less than two years immediately preceding the presentation of the petition. This clause has to be read with the Explanation. The Explanation has widened the definition of desertion to include willful neglect of the petitioning spouse by the respondent. It states that to amount to a matrimonial offence desertion must be without reasonable cause and without the consent or against the wish of the petitioner. From the Explanation it is abundantly clear that the legislature intended to give to the expression a wide import which includes willful neglect of the petitioner by the other party to the marriage. Therefore, 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 co-habitation 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 and their continuance throughout the statutory period."

52. The Apex Court in Ramani v. Saraswathi2, has held as follows:

"8. The question whether the wife was guilty of desertion or not is essentially a question of fact. Both the Trial Court and the Lower Appellate Court had, on the basis of the evidence on record, concurrently come to the conclusion that the wife had deserted the husband about three and a half years prior to the filing of the divorce petition. This concurrent finding of fact has been upset on the basis that the wife did not know about the address of her husband when he had gone away to Kuwait. We, however, find, as noticed by the District Judge, that the parents of the respondent were living only 4 km away from Chidambaram and there is nothing to show that any effort was made by the respondent or her parents for finding out the address of the appellant. Moreover, the evidence of P.W 2 has, unfortunately, not been discussed by the High Court. We find from the documents which had been filed in the Trial Court that a letter Exh. B-6 is

stated to have been written by the respondent to the appellant on 16.10.1985 nearly one year after filing of the divorce petition. No document had been placed on record by the respondent to show that any such letter was written by her to the appellant between April 1981 and 18.10.1984 Under these circumstances, the High Court ought not to have reversed the concurrent finding of fact of the Trial Court and the

Lower Appellate Court. From the evidence on record, it is clear that the appellant was entitled to a decree of divorce on the ground of desertion."

53. Coming to the facts of the present case, the marriage somehow survived for about a period of three years. The parties are living separately. The marital life was not happy, even to start with. They got the opportunity of co-habitation in the month of March, 2002, for the first time, and quarrel started within few months thereafter. First petition for restitution, which was withdrawn, was filed on 27.9.2002 The wife's version is that she was ill-treated by her in-laws on the occasion of first Bedai which took place on 29.7.2002 when she was pregnant.

54. It has come on record that the parties are living separately since the year 2005. The husband resided in a rented room at Allahabad for the purposes of preparation of competitive examination. While the wife was residing at her parental house, according to her, since 15th June, 2005. The uncontroverted evidence of the husband is that he visited his in-laws house only twice. First time on the occasion of his marriage i.e, on 14th of May, 1997 and second time on 9th March, 2002 when Gauna, the second marriage, took place. There is also no evidence nor the case is of either party that the parties had gone to meet each other while both were living at Allahabad. The lodging of FIR and spate of complaints with all sorts of allegations by wife against the husband is indicative of the fact that there was no desire on the part of the wife to continue the marital relation with the husband. Obviously, she could not adjust herself in the rural atmosphere prevailing in the husband's house and she took a conscious decision to break the marital tie permanently and with this design in her mind she did not care the husband any more.

55. We are not impressed by the appellant that the respondent-husband has not examined his parents to prove the cruelty and desertion, a fact weighs heavily against him. In the case on hand, the questions are being addressed on the almost undisputed documentary evidence in the shape of the letters written by the appellant her pleading.

56. The learned Counsel for the appellant (wife) has relied upon the following cases:

(1) Brajesh Kumar v. Anjali1;

(2) Devram Bilve v. Indumati2;

(3). Smt. Purnima Gupta v. Ajit Kumar Gupta3;

(4) Neelam Kumar v. Dayarani4;

(5) M. Pushpalatha v. M. Venkateshwerlu5;

(6) Ganesh Ch. Banerjee v. Francy Banerjee6;

(7) Rajendra Kumar Jajodia v. Puja Jajodia1;

(8) Rajesh Kumar Madan v. Mamta @ Venna2;

(9) Pranab Kumar Chakraborty v. Kumkum Chakraborty3;

(10) Arundhati Tripathy v. Durga Prasanna Tripathy4;

(11) Ajay Pratap Singh v. Smt. Amar Bala Singh5;

(12) Narayan Roy v. Smt. Jamuna Dey Roy6;

(13) ML Joshi v. Nirmala Joshi7;

(14) Rakesh Goyal v. Deepika Goyal8;

(15) Smt. Renu v. Sanjai Singh9;

(16) Ram Babu Babelay v. Smt. Sandhya10;

(17) Bahadur Singh v. Smt. Jaswinder Kaur11;

(18) Dr. Tara Charan Agarwal v. Smt. Veena Agarwal, FAFO No. 37 of 1992 (Date 5.7.2011);

(19) Smt. Guru Bachan Kaur v. Preetam Singh12;

(20) Chiranjeevi v. Smt. Lavanya13;

(21) Harish Chander Drall v. Suresh Wati14;

(22) Krishan Kumar v. Shankari15;

(23) K. Palanisamy v. P. Samiathal16;

(24) Ajay Sayajirao Desai v. Mrs. Rajashree Ajay Desai17;

(25) Smt. Bulbul Sharma v. Vijoy Kumar Sharma18;

(26) Prakash Rao v. Smt. Jyoti19;

(27) Goka Kameshwari v. Goka Venkataramaiah20;

(28) Satyajeet Nath v. Smt. Ratna Nath21;

(29) Sri Srikanth v. Smt. P.B Nandhini22;

(30) Smt. Deepika alias Baby v. Naresh Chandra Singhania23.

57. It is not necessary for us to discuss the cases relied upon by the learned Counsel for the appellant, individually. Most of the cases relied upon by him are judgments of different High Courts and they do not lay down and cannot lay down a proposition of law which may be contrary to the judgments of the Apex Court referred to above. So far as the proposition of law is concerned, there is no dispute. The difficulty arises about the application of proposition of law in a given facts and circumstances of the case. In one case mere writing of letter by wifeunder compulsion with an instinct of survival may not amount to cruelty, but in other case like the present one, written with a view to destroy the career of her husband when it is about to take off, will amount to cruelty.

58. Much was argued by the appellant's Counsel that since there is no reaction or action by the authorities concerned on the complaints of the appellant, the letters/complaints may be treated as meaningless. To constitute cruelty that there should be corresponding action. The argument proceeds on wrong footing. Mental cruelty means causing pain and suffering due to intolerable conduct of the other side. It is nature and conduct of the other spouse and it's impact on the complaining spouse in context of their standard of living, which is relevant.

59. Some argument was also advanced on the footing that the appellant is prepared to live with the respondent. It was bounden duty of the Family Judge to have settled the matter by taking recourse to the conciliation proceeding. Attention of the Court was invited towards the fact that an application for conciliation was filed by the wife being 165-Ga dated 1st of July, 2011 which was rejected on the ground that the same is not bona fide and has been filed for the purposes of adjournment. The learned Counsel for the appellant is not right in criticising the Judge, Family Court. It is a matter of record that the re-conciliation proceedings were taken out but without success before the Family Court. Not only that, when the matter had reached at an interlocutory stage at the instance of the appellant in the High Court, an attempt was made for reconciliation but without any success. The record of this appeal shows that the matter was sent to the Mediation Centre, High Court also, in this appeal. The parties could not come to terms. On the asking of the appellant's Counsel we inquired about any possibility of re-conciliation from the respondent's Counsel. The respondent's Counsel stated that there is no possibility of any reconciliation.

60. The argument of the learned Counsel for the appellant that the counter claim filed by the wife for restitution of conjugal rights has been dismissed in one sentence which is not justified, is liable to be rejected. When

the Court was passing a decree ofdivorce, obviously the question of restitution of conjugal rights does not arise.

61. On a reflection of the facts of the case, rekindle of flame of love and affection between the parties is mirage. The prolonged legal battle has eaten away their emotional feelings for each other. It is appropriate to note that inhuman treatment has many facets. It fundamentally can cover such acts which have been inflicted with an intention to cause physical suffering or severe mental pain. Complaints by the appellant revealed her unhappiness, anger and jealousy. William Shakespear's Othello says, "Jealousy cannot make any one happy and betrayal is the ultimate insult of the emotion called love.

62. Torture is not merely physical but may even consist of mental and psychological torture calculated to create fright to submit to the demands of the other spouse.

63. Viewed as above, it is proved that the appellant has treated the respondent with mental cruelty and also permanently deserted the respondent in terms ofsections 13 (1)(i-a) and 13 (1)(i-b) of the Hindu Marriage Act. Since the year 2005 at least.

64. Deliberate and calculated attempts were made by the appellant to cause damage to the reputation of the husband, by making baseless allegations. Recently, in Vishwanath v. Sau. Sarla Vishwanath Agrawal1, while dealing with the aspect of reputation the Apex Court has observed as follows:

"Reputation which is not only the salt of life but also the purest treasure and the most precious perfume of life. It is extremely delicate and a cherished value this side of the grave. It is a revenue generator for the present as well as for the posterity."

65. The appellant joined Law Classes in the year 2005 as admitted by her and obtained the Law Degree of Kanpur University and she got herself enrolled as an advocate with the U.P Bar Council and is now a practising lawyer. Being dissatisfied with the marriage, she took the decision to obtain a professional degree to sustain herself and establish in life.

66. Now, the appellant is a part of legal fraternity where sky is the limit. We take this opportunity to advise her that she should not be disheartened and should now focus her energy, intelligence and devote time to attain the new heights in the profession and the life. Both the parties should keep in mind the two words for each other — "forget and forgive." It will make their lives peaceful and happy and will dissolve all the bitterness which has come in their way due to the present litigation. Both of them are at the beginning of their career. They should pursue it dutifully with a sense of devotion and commitment. This is not an end of life but the beginning of new opportunities.

67. Any other point was not pressed. The appeal is dismissed. But no order as to costs.

68. Appeal Dismissed.

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SMT. MAMTA DUBEY VERSUS RAJESH DUBEY

2009 SCC OnLine All 629 : AIR 2009 All 141 :
(2009) 6 AIR Kant R (NOC 951) 330 : (2009) 4 All LJ 730

Allahabad High Court

(Before Hon'ble Mr. Justice U.K Dhaon & Hon'ble Mr. Justice B.K Narayana, JJ.)

Smt. Mamta Dubey ..... Defendant/Appellant

v.

Rajesh Dubey ..... Plaintiff/Respondent

Sri C.B Pandey, learned counsel for the appellant.

Sri Anil Kumar Tiwari, learned counsel for the respondent.

First Appeal No. 17 of 2003
Decided on May 29, 2009

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 and bound to be a source of greater misery for the parties.

(Delivered by Hon'ble B.K Narayana, J.)

The instant first appeal has been preferred by the defendant-appellant against the judgment and decree dated 04.12.2002 passed by Additional Principal Judge, Family Court, Lucknow decreeing the Original Suit No. 613 of 1998.

Plaintiff-respondent, Rajesh Dubey, who is the husband of the defendant-appellant, Smt. Mamta Debey, filed Original Suit No. 613 of 1998 before the Family Court, Lucknow under Section 13 of the Hindu Marriage Act, 1955, hereinafter referred to as "the Act" filed by the plaintiff-respondent for dissolution of themarriage between the plaintiff and the defendant by a decree of divorce on the allegations interalia, that the plaintiff and the defendant were married in accordance with the Hindu Vedic rites on 23.02.1993 at the residence of father of the respondent at Gorakhpur; that in the very first week after marriage, the defendant expressed her unhappiness over the way, the plaintiff interacted with his sisters and sisters-in-law and the suspicious nature of the respondent caused acute pain to the plaintiff but he was hopeful that she would gain her confidence and trust with the passage of time; that the insistence of the defendant to live separately from the parents of the plaintiff compelled the plaintiff to move into a flat allotted by his employers at 406 Meenaxi "B' Wing Gokuldham Goregaon, East Mumbai; that towards the end of April, 1993 the respondent became pregnant, she insisted upon aborting the child but however due to effective persuasion of the plaintiff and the advice of the Gynaecologist the defendant reluctantly agreed to go through the pregnancy and in the meantime, the defendant realising need for assistance during the pregnancy agreed that the plaintiff's parents should join them at their official residence; that in the month of May, 1993, the plaintiff's mother-in-law and two brothers-in-law visited the plaintiff's house and within a week of their departure, the father-in-law of the plaintiff reached Bombay to fetch defendant back to Gorakhpur alleging maltreatment of the defendant by the plaintiff and

his parents and the defendant went back to Gorakhpur with her father in the third week of June 1993; that the defendant delivered a baby girl on 13.02.1994 at her parents' house in Gorakhpur and when the plaintiff reached Gorakhpur on 27.02.1994 after getting information about the birth of the child, the plaintiff learnt that his daughter was hospitalised on account of high fever coupled with convulsions and after the child was discharged on 03.03.1994, the Doctors attending on her had advised the defendant to take proper care of the child and not to neglect her; that the plaintiff intended to bring the defendant with him to Mumbai along with the child but on insistence of her parents, the plaintiff agreed to leave her behind and returned to Mumbai on 26.03.1994; that the plaintiff again went to Gorakhpur in June 1994 and brought the defendant along with him to Mumbai on 20.06.1004; that after defendant's return to Mumbai, her suspicious nature towards the plaintiff had become more intense and she suspected that the plaintiff was having adulterous affairs with his colleagues in the office and the defendant started indulging in the habit of making phone calls in the office of the plaintiff to find out whether the plaintiff was having adulterous affairs with colleagues; that on one occasion the defendant went to the residence of one of the colleagues of the plaintiff, Ms. Deepti Rawal and accused her of having adulterous relationship with the plaintiff; that on 18.01.1995 defendant left for Gorakhpur accompanied by her youngest brother after accusing the plaintiff that he is living in adultery with his colleagues; that the plaintiff was transferred from Mumbai Office to the Head Office at Lucknow on 24.06.1995; that the defendant came to Lucknow in mid August, 1995 for regular medical check up the daughter whose condition had deteriorated considerably since she had left Mumbai for Gorakhpur in January, 1995; that upon coming to know of the condition of his ailing daughter, the plaintiff took his daughter to S.G.P.G.I, Lucknow for treatment, however, before the medical investigations could be completed, the daughter of the plaintiff passed away on 02.09.1995; that the death of the daughter left the petitioner totally heart broken because the daughter had been utterly neglected by the defendant while staying at Gorakhpur from January, 1995 to mid August, 1995 where the defendant had stayed totally against the wishes of the plaintiff; that the defendant and her parents accused the plaintiff and his parents of having killed the daughter which resulted in great cruelty to the plaintiff; that in February, 1996, the defendant again conceived, however, the defendant continued to accuse the plaintiff of having illicit relationship with another girl; that the second child was born on 22.09.1996 and the defendant left the plaintiff's home on 16.11.1996 on the pretext of visiting her father at Gorakhpur and returned on 25.11.1996 informing the plaintiff that she was leaving for Gorakhpur to complete her studies there and the defendant finally left Lucknow on 26.11.1996 along with her two month old child; that the second child of the plaintiff also passed away on 14.06.1997 after remaining in coma for eight days in Gorakhpur Medical College and when the plaintiff learnt about the illness of his child he immediately rushed to Gorakhpur on 08.06.1997 but only to see his child dead; that the death of the second child of the plaintiff left him totally shattered as it was result of persistent neglect on the part of the defendant which had resulted in the death of both the children while she was residing at Gorakhpur; that the defendant accused the plaintiff of killing the child; that the conduct of the defendant comprising making phone calls to the seniors of the plaintiff in the office as well as at their residence levelling all kinds of frivolous and baseless allegations regarding the character of the plaintiff alleging him to be an adulterous man caused tremendous mental agony to the plaintiff and the behaviour of the defendant constituted cruelty towards the plaintiff who was left with no alternative but to file the suit for divorce.

That the said suit was contested by the defendant wife who filed her written statement on 29.05.2000 denying the plaint allegations in general. The defendant-appellant however in paragraphs-25, 32 and 39 asserted that the plaintiff was living in adultery with his colleague Ms. Deepti Rawal. She also alleged that the plaintiff always displayed undue affection towards his female colleagues. Allegations regarding constant harassment of the defendant immediately after the marriage by the plaintiff and his family members for having brought inadequate dowry and persistent and constant demand of dowry were also made in the written statement. The defendant also stated in her written statement that the plaintiff forcibly turned her out of his house along with her daughter and she had not deserted the plaintiff. The factum of the death of two daughters is not disputed in the written statement. The filing of the divorce petition by the plaintiff has been attributed to the defendant's desire to remarry his colleague Ms. Deepti Rawal after the annulment ofmarriage between the plaintiff and the defendant. The defendant-appellant in her written statement admitted that she had filed three cases against the

plaintiff and his family members under Section 125 Cr.P.C, under Section 498-A IPC and suit for restitution of conjugal rights. The defendant also alleged in her written statement that the plaint does not disclose any ground for passing a decree of divorce and the defendant is still ready to live with the plaintiff.

The plaintiff filed his replica on 18.01.2002

The defendant filed a counter claim in Regular Suit No. 613 of 1998 on 11.01.2002 with a prayer for grant of decree for restitution of conjugal rights. Against the counter claim the plaintiff filed a preliminary objection regarding the maintainability of the counter claim on 18.01.2002

On the basis of the pleadings of the parties, the trial court framed the following issues:-

1. Whether the defendant has treated the plaintiff and his family members with cruelty? If yes then what will be its effect?
2. Whether the defendant had deserted the plaintiff on 26.11.1996? If yes then what will be its effect?
3. Whether the defendant was being harassed by the plaintiff for dowry as pleaded in the written statement? If yes then what will be its effect?
4. Whether the plaintiff has filed the suit against the defendant on the basis of surmises and conjectures as pleaded in the written statement?
5. To what relief, if any, is the plaintiff entitled?

After considering the oral and documentary evidence on record, the trial court decided all the issues in favour of the plaintiff and against the defendant and by the impugned judgment decreed the plaintiff's suit under Section 13 of the Act.

The instant judgment and decree of the trial court has been challenged by the appellant on the grounds interalia, that the trial court erred in law in upholding the allegations of mental cruelty against the appellant while there was no material or evidence on record to prove the same; that the trial court totally misconstrued the meaning and import of cruelty and illegally failed to consider the provisions ofSection 23(1)(a) of the Act while holding that the conduct of the defendant amounted to cruel treatment of the plaintiff by the defendant as there was ample material on record which indicated that the plaintiff himself was responsible for creating the circumstances which compelled the defendant to leave his house and further the defendant did not leave her husband's house willingly but was in fact turned out of her husband's house by her own husband; that the trial court erred in decreeing the suit on the ground of desertion although admittedly the suit was filed within two years of the alleged date of desertion of the plaintiff by the defendant; that the failure of the trial court to decide the counter claim preferred by the defendant along with the suit has vitiated the judgment and decree of the trial court.

Sri Anil Kumar Tiwari, learned counsel appearing for the plaintiff-respondent has submitted that the findings recorded by the court below do not suffer from any infirmity or illegality and being based upon cogent evidence and consideration of the entire facts and circumstances of the case are not liable to be interfered with. Sri Tiwari further submitted that in the case in hand it cannot be said that the requisite ingredients for constituting cruelty have not been satisfied. It is undisputed that the plaintiff and the defendant have been living separately since 26.11.1996 and have not cohabited for the last 13 years and there is sufficient material on record including the own statement of the appellant which indicates that the defendant accused the plaintiff of having adulterous relationship with his colleague Ms. Deepti Rawal, his cousin sister and his other female colleagues and that the defendant has filed several cases including criminal complaint under Section 498-A IPC against the plaintiff and his family members including his parents, sister and sister-in-law and the father of the plaintiff was arrested and was sent to jail along with the plaintiff in connection with the case filed under Section 498-A IPC and the relations between the plaintiff and the defendant have soured to such an extent that themarriage between them has broken down irretrievably and in the circumstances,divorce would be the remedy in the case of both the parties and allowing of the appeal of the defendant and refusing to grant the decree would be

disastrous to them and hence the instant first appeal is liable to be dismissed on the ground that the marriage between the plaintiff and the defendant irretrievably broken down and it is not possible for them to live together alone.

Having heard the learned counsel for the parties, the following points arise for determination in the present first appeal.

1. Whether the finding of the trial court that the conduct of the defendant amounted to cruel treatment of the plaintiff is not based upon any evidence and is vitiated on account of non-consideration of the provisions of Section 23(1)(a) of theHindu Marriage Act?
2. Whether the trial court misconstrued the meaning and import of cruelty while deciding the issue no. 1 in favour of the plaintiff?
3. Whether the trial court committed a manifest error of law in decreeing the suit for divorce, also on the ground of desertion although admittedly the suit was filed within two years from the date of the alleged desertion of the plaintiff by the defendant?
4. Whether the judgment and decree of the trial court is liable to be set aside on the ground that the counter claim preferred by the defendant was not decided by the trial court along with the suit?
5. Whether the marriage between the plaintiff and the defendant has irretrievably broken down leaving the court with no option but to grant divorce.

Points No. 1 and 2.

Points No. 1 and 2 are inter connected and hence they are taken up together.

It has been submitted on behalf of the defendant-appellant that incidents and the instances of the parties' matrimonial life and the material relied upon by the court below while coming to the conclusion that the defendant had treated the plaintiff with cruelty do not constitute cruelty so as to entitle the plaintiff to a decree for divorce. It has further been submitted that the circumstances which were taken into consideration by the trial court while holding that the plaintiff had been treated with cruelty by the defendant were the own creation of the plaintiff and as such he could not be given the benefit of his own wrongful act in view of Section 23(1) (a) of the Act. Learned counsel for the appellant next submitted that unless the counter claim was decided by the trial court along with the suit, the trial court ought not to have relied upon the pleadings contained in the counter claim preferred by the defendant while holding that the defendant had accused the plaintiff of having illicit relationship with his colleague Ms. Deepti Rawal without impleading Ms. Deepti Rawal to the counter claim and this conduct of the defendant amounted to cruel treatment of the plaintiff by the defendant. Learned counsel for the appellant lastly submitted that the suit for divorce could not have been decreed on the ground of desertion as the same was filed within two years of the admitted date on which the defendant allegedly deserted the plaintiff.

On reading of the judgment of the trial court it is clear that the trial court while deciding the issue No. 1 analysed the oral evidence in great detail including the statement of PW-Rajesh Dubey and DW-Smt. Mamta Dubey and found that the accepted stand of the appellant wife regarding her behaviour and conduct amounted to cruel treatment of the plaintiff by the defendant. The trial court further held that the bitterness between the plaintiff and the defendant has increased to such an extent that if they were asked to live together, they may be a threat to each other's life. The trial court further held that although the defendant accused the plaintiff of having adulterous relationship with Ms. Deepti Rawal the defendant neither impleaded Ms. Deepti Rawal in the counter claim nor she led any evidence in support of her allegation that the plaintiff was having an illicit relationship with Ms. Deepti Rawal. Thus, on the basis of aforesaid discUntitled 1 ussion, the trial court found that the allegations regarding the plaintiff having illicit relationship with Ms. Deepti Rawal were false and baseless. The trial court also after considering the entire evidence on record rightly found that the allegations of harassment of the defendant by the plaintiff and his family members on account of having brought inadequate

dowry and constant demand of dowry by the plaintiff and his family members from the parents of the defendant were also not proved.

Submission of the learned counsel for the appellant that the pleadings contained in the counter claim could not have been looked into and relied upon by the trial court while deciding the suit unless the counter claim was also decided along with the suit is also wholly misconceived and untenable. Learned counsel for the appellant has miserably failed to substantiate his aforesaid submission. The trial court has given cogent reasons in its judgment for deciding the issues no. 1 & 3 against the defendant. Learned counsel for the appellant has failed to show any infirmity and illegality in the findings recorded by the trial court on issue Nos. 1 and 3.

Before examining the submissions made by the learned counsel for the appellant that the conduct and behaviour of the defendant as alleged in the plaint do not amount to cruelty and the trial court totally misconstrued the meaning and import of cruelty, it is necessary to examine the law laid down on the subject.

The Apex Court in the case of Shobha Rani v. Madhukar Reddi, (1988) 1 SCC 105held that 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 eqnuiry 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. 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.

In the case of V. Bhagat v. D. Bhagat, (1994) 1 SCC 337, the Apex Court held that mental cruelty means 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, must be of such a nature that the parties could not reasonably be expected to live together. Regard must be had to the social status, education level of the parties and the society they move.

In the case of Shoba Rani (Supra), the Apex Court held that cruelty underSection 13(1)(i-a) if not admitted requires to be proved on the preponderance of probabilities as in civil cases and no beyond a reasonable doubt as in criminal cases.

In the case of A. Jayachandra v. Aneel Kaur, (2005) 2 SCC 22, para-10 & 11, Hon'ble Supreme Court again held that the expression "cruelty" has not been defined in the Hindu Marriage Act, 1055. the said expression 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. Cruelty is a course or conduct of one, which is adversely affecting the other. It 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 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.

In the case of Parveen Mehta v. Inderjit Mehta, (2002) 5 SCC 706, the Apex Court again that under Section 13(1)(i-a) of the Hindu Marriage Act, 1955 cruelty includes both physical and mental cruelty. The legal conception of cruelty and the kind of degree of cruelty necessary to amount to a matrimonial offence has not been defined under the Act. The legislature has refrained from giving a comprehensive definition of the expression that may cover all cases, realising the danger in making such attempt. The accepted legal meaning in England as also in India of this expression, which is rather difficult to define, had been "conduct of such 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". From the pleadings and the evidence led by the parties, the factual position

which emerges is that the defendant has repeatedly and constantly accused the plaintiff of having adulterous relationship with his cousin sister, female colleagues in general and Ms. Deepti Rawal in particular although the defendant had failed to prove the said allegations by any evidence. It is also not in dispute that the defendant has filed three cases against the plaintiff including the case under Section 498-A IPC in connection which which the plaintiff as well as his father had been sent to jail. The record indicates that although it has been alleged in the defendant's written statement that the plaintiff and his family members started harassing the defendant for having brought inadequate dowry immediately after her marriage in the year 1993, there is no explanation as to why no report or complaint in this regard was lodged either by the defendant or by her parents and why the defendant waited till the year 1998 for filing a complaint against the plaintiff and his family members under Section 498-A IPC. Even today, the defendant is not willing to withdraw the criminal prosecution pending against the plaintiff and his family members. Both the daughters born to the defendant have died and there has been no co-habitation between the parties for the last 13 years.

The plaintiff-respondent in his statement recorded on oath has stated that as a result of being subjected to sustained accusation of living in adultery with his female colleagues and Ms. Deepti Rawal by the defendant and her refusal to live with the family members of the plaintiff coupled with the defendant's insistence to prosecute the criminal case instituted by her against the plaintiff and his family members, the death of both the daughters on account of negligence on the part of the defendant and her family members but for which the defendant and her family members held the plaintiff responsible and the humiliating treatment meted out by the defendant to the plaintiff calculated to torture and render his life miserable has caused deep anguish, disappointment and frustration to the plaintiff and has made the married life of the plaintiff absolutely intolerable. The defendant in her statement on oath stuck to her allegations that the plaintiff was having adulterous relationship with his female colleagues and Ms. Deepti Rawal.

Thus upon an overall analysis of the pleadings of the parties and the evidence led by the parties including the cross-examination of the plaintiff conducted on behalf of the defendant and the meaning and import of cruelty as interpreted by the Apex Court in its various pronouncements, it cannot be said that the conduct of the defendant did not constitute cruelty entitling the plaintiff to a decree of divorce. The trial court did not misconstrue the meaning and import of cruelty while holding that the defendant treated the plaintiff with cruelty and in decreeing the suit. Points No. 1 and 2 are decided against the defendant-appellant.

Point No. 3.

The submission of the learned counsel for the appellant that the trial court erred in decreeing the suit for divorce on the ground of desertion without noticing that the same was filed before the expiry of two years from the date of the alleged desertion of the plaintiff by the defendant seems to have force. Section 13(1)(i-b) of the Hindu Marriage Act provides that 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 has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. The date of desertion mentioned in the plaint is 26.11.1996 and the suit was filed on 24.07.1998 i.e before the expiry of two years from the date of alleged desertion. Thus, the finding recorded by the trial court on issue no. 3 being erroneous is set aside. Point No. 3 is decided in favour of the defendant-appellant.

Point No. 4.

The submission of the learned counsel for the appellant that the judgment and decree passed by the trial court is liable to be set aside on the ground of the failure of the trial court to decide the counter claim along with the suit is wholly unacceptable for the reasons, firstly, that there is nothing on record to show that the counter claim was admitted and that the defendant pressed the same before the trial court; secondly, if the counter claim has not been decided along with the suit the same shall be deemed to be pending and cannot be made a ground for setting aside the judgment and decree passed in the suit. The legal position is settled that counter

claim proceeds like a suit and even if the suit in which the counter claim filed is dismissed for default or for some other reason the counter claim shall be tried and decided on merits.

In any view of the matter, the counter claim filed by the defendant for restitution of conjugal rights before the court below was barred by Order XXIII Rule 1(4) of the Code of Civil Procedure as admittedly prior to the filing of the counter claim, the defendant had filed a suit under Section 9 of the Hindu Marriage Act for restitution of conjugal rights before the Principal Judge, Family Court, Gorakhpur and the said suit was withdrawn by the defendant without permission for instituting a fresh suit. Point No. 4 is decided against the defendant-appellant.

Point No. 5.

Now we come to the most relevant aspect of the matter i.e whether themarriage between the plaintiff and the defendant has broken down irretrievably leaving the court with no option but to affirm the decree of divorce granted by the trial court. Although the plaintiff has neither sought divorce on the ground that hismarriage has broken irretrievably nor Section 13 of the Act enumerates any such ground yet the matter requires consideration from this aspect in view of the law laid down by the Apex Court in this regard.

We may first refer to the case of Saroj Rani v. Sudarshan Kumar Chadha, (1984) 4 SCC 90, 98, where it was held that court's satisfaction about permanent breakdown of the marriage may serve as an additional justification for granting divorce. Where on facts the marriage has broken down and the parties can no longer live together the court should have no compunction in granting the divorce.

In Romesh Chander v. Savitri, (1995) 2 SCC 7, Hon'ble Supreme Court again held that when marriage is dead, emotionally and practically, and there is no chance of its being retrieved, continuance of it would be cruelty within the meaning of Section13(1)(i-a) of the Act.

In the case of Naveen Kohli v. Neelu Kohli, (2006) 4 SCC 558, the Hon'ble Supreme Court observed as hereunder:-

"72. 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 and bound to be a source of greater misery for the parties.

73. A law of divorce based mainly on fault is inadequate to deal with a brokenmarriage. Under the fault theory, guilt has to be proved; divorce courts are presented with concrete instances of human behaviour as they bring the institution of marriage into disrepute.

74. We have been principally impressed by the consideration that once themarriage 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 amarriage 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 forever to a marriage that in fact has ceased to exist.

77. Some jurists have also expressed their apprehension for introduction or irretrievable breakdown of marriage as a ground for grant of the decree ofdivorce. 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 that 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 scrutinise its findings in the background of the facts and circumstances of this case, then it becomes obvious that the approach adopted by the High Court in deciding this matter is far from satisfactory.

80. The High Court ought to have considered the repercussions, consequences, impact and ramifications of all the criminal and other proceedings initiated by the parties against each other in the proper perspective. For illustration, the High Court has mentioned that so far as the publication of the news items is concerned, the status of the husband in a registered company was only that of an employee and if any news item is published, in such a situation, it could not, by any stretch of imagination be taken to have lowered the prestige of the husband. In next para 69 of the judgment that in one of the news items what has been indicated was that in the company, Nikhil Rubber (P) Ltd., the appellant was only a director along with Mrs Neelu Kohli who held 94.5% shares of Rs. 100 each in the Company. The news item further indicated that Naveen Kohli was acting against the spirit of the article of association of Nikhil Rubber (P) Ltd., had caused immense loss of business and goodwill. He had stealthily removed produce of the Company, besides diverted orders of foreign buyers to his proprietorship firm M/s Naveen Elastomers. He had opened the bank account with forged signatures of Mrs Neelu Kohli and fabricated the resolution of the board of directors of the Company. Statutory authority underthe Companies Act had refused to register documents filed by Mr Naveen Kohli and had issued show-cause notice. All business associates were cautioned to avoid dealing with him alone. Neither the Company nor Mrs Neelu Kohli shall be liable for the acts of Mr Naveen Kohli. Despite the aforementioned finding that the news item was intended to caution business associates to avoid dealing with the appellant then to come to this finding in the next para that it will by no stretch of imagination result in mental cruelty is wholly untenable."

In Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511, Hon'ble Supreme Court again held that 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. The Apex Court laid down the following guidelines to enumerate some instances of human behaviour, they may be relevant in dealing with the case of mental cruelty. Such instances have been indicated in paragraph 101 of the said judgement which read as under:-

"101. 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 of 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 sterilisation 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."

The Apex Court in the case of Rishikesh Sharma v. Saroj Sharma, (2007) 2 SCC 263, again observed as hereunder:-

"In view of the several litigations between the parties it is not possible for her to prosecute criminal case against the husband and at the same time continue to reside with her husband. In the instant case the marriage is irretrievably broken down with no possibility of the parties living together again."

Thus, the legal position which emerges from the analysis of the entire case law on the subject referred to hereinabove is that it is the duty of the Court to consider and examine while deciding an issue of divorce whether

the marriage between the parties has broken down irretrievably or it is dead emotionally and practically and there is no chance of its being retrieved before compelling the parties to live with each other.

Upon an overall assessment of the facts and circumstances of the case and the perusal of record, we are of the opinion that the marriage between the plaintiff and the defendant has broken down irretrievably. The defendant-appellant is not willing to withdraw the criminal prosecution which is pending against the plaintiff and his family members. On account of the filing of the case under Section 498-A IPC by the defendant against the plaintiff and his family members, the plaintiff and his father were sent to jail and they had to remain there for a considerably long period of time before they were enlarged on bail. There has been no interaction between the parties after 1999. The parties admittedly have not cohabited for the last 13years. The defendant has accused the plaintiff of having adulterous relationship with his female colleagues and Ms. Deepti Rawal and also made these allegations public thereby seriously damaging the plaintiff's reputation and undermining his character. A husband cannot be expected to live with his wife under the same roof who distrusts him, holds him responsible for the death of her daughters and who is prosecuting a criminal case against him and his entire family. Admittedly, there has been a long period of continuous separation in the present case and it may fairly be concluded that the matrimonial bond is beyond repair. Thus we are of the view that the marriage between the plaintiff and the defendant is dead in all respects and has broken down irretrievably.

The submission made by the learned counsel for the appellant that the defendant-appellant is still ready and willing to live with the plaintiff and the plaintiff is refusing to live with her and is making baseless allegations against her and it is the plaintiff who has been at fault and has not allowed the marriage to work and hence the marriage cannot be dissolved on the ground of irretrievable breakdown and the Court should not dissolve the marriage on the ground of irretrievable breakdown ofmarriage is totally unacceptable for the reasons given by us while deciding the points No. 1 and 3. The offer made by the defendant for living with the plaintiff while at the same time refusing to withdraw the criminal prosecution pending against the plaintiff and his family members shows that the offer is not genuine and bona fide.

The decisions of the Apex Court reported in (2001) 4 SCC 125, Hirachand Srinivas Managaonkar v. Sunanda, (2004) 7 SCC 747, Shyam Sunder Kohli v. Sushma Kohli alias Satya Devi and (2001) 4 SCC 250 Chetan Dass v. Kamla Devi are of no help to the appellant and do not apply to the facts and circumstances of the present case. Point No. 5 is decided in favour of the plaintiff-respondent and against the defendant-plaintiff.

The judgment and decree passed by the trial court does not call for any interference.

The instant first appeal has no merit and is accordingly dismissed.

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AJAY LAVANIA VERSUS SMT. SHOBHNA DUBEY

2011 SCC OnLine All 1179 : (2011) 88 ALR 618

Allahabad High Court

(Before Hon'ble Mr. Justice Devi Prasad Singh & Hon'ble Mr. Justice S.C Chaurasia, JJ.)

First Appeal No. - 77 of 2010

Ajay Lavania S/o Late Dr. Jagdish Prasad Lavania (At 2 P.M) ..... Petitioner

v.

Smt. Shobhna Dubey D/o Dr. S.P Dubey W/o Dr. Ajay Lavania ..... Respondent

Petitioner Counsel :— Sudeep Seth

Respondent Counsel :— Pawan Kumar Pandey

connected with

First Appeal No. 78 of 2010

First Appeal No. - 77 of 2010 and First Appeal No. 78 of 2010

Decided on July 28, 2011

There appears to be no dispute over the proposition of law that in the event of cruelty, mental or physical caused by either side, a suit for divorce may be decreed.

However, it should be proved with pleading and evidence on record.

…....in the present case, conduct of the respondent constituting cruelty does not seem to be proved or admitted. Mulla in Hindu Law has given a word of caution to follow blindly the western judgments or the cases decided keeping in view the facts and circumstances of a particular case. To quote :

"There has been such a marked change in the notions of matrimonial duties and obligations of husband and wife in the present generation in India that it will be incumbent on the court to be extremely careful in the matter of seeking assistance and guidance from decisions arrived at under any previous legislation in India or England, even when the rules may be similarly worded. Blind adherence to any of those decisions must be deprecated, particularly when they relate to persons whose customs, manners and mode of life may be different."

…….A decree of divorce under the statutory provision should not be granted merely on the ground of wrongful conduct of spouse or minor incident or incident of violence having taken place at the whisper of moment or either side does not want to live with each other for any reason whatsoever. Irretrievable breakdown ofmarriage cannot be a ground to decree a divorce suit unless specifically pleaded showing the instances enumerating the grounds making out a case beyond the reasonable doubt. Continuing of minor incidents or quarrel during matrimonial life in today's atmosphere when everyone is facing complex problem in day to day life from office to house or in the street shall not constitute cruelty for statutorydivorce. Only a violence which is deliberate, planned and intentional to harm the other side for some extraneous reasons or may be because of some illicit relationship may constitute cruelty and warrant divorce.

The Judgment of the Court was delivered by

DEVI PRASAD SINGH, J.:— Present appeals under Section 19 of the Family CourtsAct, read with Section 28 of the Hindu Marriage Act, 1955 have been preferred against the impugned judgment dated 27.8.2010, passed by Principal Judge, Family Court, Lucknow so far as it relates to decree of Regular Suit No. 2077 of 2007 filed by the respondent under Section 9 of the Hindu Marriage Act. By the said judgment dated 27.8.2010, learned Family Court has also dismissed the suit of plaintiff/appellant filed under Section 13 of the Hindu Marriage Act.

2. Since ages, solemnisation of marriage has been found to be best mode of life to save the human race from animal's living and consequential irreparable injury. The institution of marriage is not only based on thousand years of experience of human race but it is a time tested ceremony which has saved the human race since ages from desertion, prostitution and different forms of agony. Different religions have given importance to marriage in different way. Even, non-believers prefermarriage to save their children or coming generation to become street boy. Non-believers may enter into wedlock under the law framed by the State. In India, particularly among Hindus, ceremony of marriage has been pious bond to unite men and women to work collectively not only for own interest but also for generations to come.

Marriage in Hindu Religion

3. Marriage and sonship constitute some of the unique chapters in the litera legis of ancient Hindu Law. As early as the time of Rig-Veda marriage had assumed the sacred character of sacrament and sanction of religion had heightened the character and importance of the institution of marriage. The Rig-Veda pronounces some impressive texts:

4. After completing the seventh step (Saptpadi) the bridegroom said: "with seven steps we have become friends (sakha). May I attain to friendship with thee: May I not be separated from thy friendship." Satpatha Brahamna speaks of the wife as the half of one's self-Ardho ha va esha atmano.

5. The basal thought was that marriage was a prime necessity for that alone could enable a person to discharge properly his religious and secular obligations. The earliest records shows that rules of inheritance depended on the rules ofmarriage and it was obligatory on the father to give the daughter in marriage as gift are given. The Smiritis deals with the subject of marriage with meticulous care and make fascinating study. Apastamba has stated that from time of marriage the husband and wife were united in religious ceremonies and likewise in rewards of acts of spiritual merit.

6. Marriage a Sacrament: Marriage is necessarily the basis of social organization and foundation of some important legal rights and obligations. The importance and imperative character of the institution of marriage needs no comment. In Hindu Law marriage is treated as a samskara or a sacrament. It is the last of ten sacraments, enjoyed by the Hindu religion for regeneration of men and obligatory in case of every Hindu who does not desire to adopt the life of sanyasi. From the very commencement of Rig-Vedic age, marriage was a well established institution, and the Aryan ideal of marriage was very high. Monogamy was the rule and the approved rule, though polygamy existed to some extent. In Vedic period, the sacredness of the marriage tie was repeatedly declared; the family ideal was decidedly high and it was often realized.

7. The high value placed on marriage is shown by the long and striking hymn ofRig-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".

8. The wife on her marriage was at once given an honoured position in the house. She was mistress in her husband's home and where she was the wife of the eldest son of the family, she exercised authority over her husband's brothers and his unmarried sisters. She was associated in all the religious offerings and rituals with her husband. As the old writers put it," a woman is half her husband and completes him"

9. Manu in impressive verses, exhorted men to honour and respect woman. Woman must be honoured and adorned by their fathers, brothers, husbands, and brothers-in-law who desire their own welfare. Where women are honoured, there gods are pleased; but where they are not honoured, no sacred rite yield rewards." The husband receives wife from gods, he must always support her while she is faithful" "Let mutual fidelity continue until death. This may be considered as the summary of the highest law for husband and wife."

10. Dispute between husband and wife not allowed to be litigated either in the customary tribunals or in the king's courts. Neither bailment nor contracting of debt, neither bearing testimony for one another nor partition of property was allowed between them.

11. According to Hinduism, marriage between two souls is a very sacred affair that stretches beyond one lifetime and may continue to at least seven lives. The relationship between the two does not necessarily have to begin only when they have attained birth as human beings. The gender of the two partners also does not have to the same in all the births. As the stories in purans confirm, two individual souls may come together any time during their existence upon earth, even when they assume a lower life from, such as that of any animal or bird, and carry forward their relationship further into higher life forms such as that of human beings. Once married, a couple is expected to uphold their family names by remaining faithful and truthful to each other and by enacting their respective roles as laid out in the Hindulaw books.

12. As the epic Ramayana and Mahabharata illustrate, a couple ought to stick together through the ups and downs of life, however challenging and arduous the situation may be, taking care of each other and keeping in each other. According to beliefs of Hinduism, marriage is a sacred institution devised by gods for the welfare of human beings. Its primary purpose is procreation and continuation of life upon earth. Sexual union is intended solely for this purpose and should be used as such. Its secondary purpose is upholding of the social order and the Hindu dharma, while its ultimate aim is spiritual union with the inmost self, which is possible when a couple perform their obligatory duties and earn the grace of god through their good karma. A man and woman are believed to come together as husband and wife primarily for spiritual reasons rather than sexual or material, although they may not be mentally aware of the fact. Once married, the couple is expected to carry out their respective traditional duties as house holders and upholders of family traditions and work for the material and spiritual welfare of each other, the members of their family and also society.

13. The concept of divorce is alien to Hinduism, as marriages are meant to last for a life time. Neither men nor women can throw away their martial relationships on some flimsy or selfish or whimsical grounds. Remarriage is permitted only underexceptional circumstances. Polygamy to some extent also was the practice among the Hindus just a few centuries ago. Presently, in India, the Hindu Marriage Actnot only prohibits it but also makes it a punishable offense.

14. However, with the change of time, advent of western philosophy in India and having no research oriented work done at political and judicial forum, gradually the institution of marriage is diluting in this country also. Higher judiciary also in absence of any backup to find out the injury caused by western way of life approved to some extent the matrimonial life professed by western without thinking the consequences which nation may suffer in due course of time.

15. Now, it is well known that more than 50% wedlock breaks in United States of America and sometime divorce takes place in few months of solemnisation ofmarriage leaving the lady or man in solitary state or remarriage again. Change of wife and husband in substantial number is frequent because of "Cake Walks Law" pertained to divorce. The effect of breakage of the institution of marriage cannot be noticed in short span of time but it took centuries and when society awakes it becomes too late.

FACTS OF PRESENT CASE

16. It is unfortunate that present controversy relates to a couple both of whom belongs to intellectual class of the society, meant to serve the people. Both are doctors. The appellant Ajai Lavania is a Surgeon possessing M.S Degree. The respondent Smt. Shobhna Dubey is Ophthalmology doctor.

17. The marriage of the appellant and respondent was solemnised at a very sacred place of the country, i.e Brindavan, district Mathura on 1.12.2001 Both came known to each other through advertisement in the newspaper. At the time whenmarriage was solemnised, the appellant Ajai Lavania was pursuing his M.S Course at Manipal, Karnataka and the respondent was doing her senior Residency at Meerut. After marriage they had gone for honeymoon to Goa for about two weeks. Then went back to their respective place at Meerut and Manipal. In July, 2002, the appellant had completed his M.S Course whereas the respondent had completed her Senior Residency course. It is stated by the appellant that on persuasion of the respondent, the appellant joined a job at Bhairwa Medical College, Nepal where both used to enter into quarrel for small matters. Having no consensus to live together the respondent went to Meerut and joined Senior Residency again. In December, 2002, the appellant went to Manipal along with the respondent and lived there as husband and wife. There too, it is alleged that there was difference of opinion on small matters. The respondent joined Shanti Manglik Hospital Fateha Road, Agra in July, 2007 and started to live there along with the appellant. It is alleged that the respondent instructed the appellant not to bring his grand father and grand mother which has been denied by the respondent.

18. The cause of action arose on 26.9.2007 when it is alleged by the appellant that the respondent assaulted him, broken the furnitures and assaulted him with cutting his body with teeth. The appellant got himself checked up in S.N Medical College, Agra and informed the police and also lodged a First Information Report against the respondent. It is also alleged that the respondent was ousted from Shanti Manglic Hospital by the Committee of Management on account of her short temperament.

19. The appellant has joined Apolo Hospital, Delhi. There too, it has been alleged by the appellant that the respondent visited the hospital on 19.10.2007 and quarreled with the staff of the Apolo Hospital. From the material on record, it is admitted fact that the appellant had gone to attend an ENT conference on 28.9.2007 at Allahabad along with the respondent and while returning from the conference, it has been alleged by the respondent that the appellant left her at Lucknow with demand to pay Rs. 4 lacs so that he may visit Canada. It has been stated by the respondent that the appellant has left her at Lucknow on 30.9.2007 merely in the cloth she was wearing stating that he sill not take her to Delhi unless her guardian pays Rs. 4 lacs to enable him to visit Canada. Under the aforesaid backdrop, the respondent had filed a First Information Report under Crime No. 135/2008 underSections 498-A/506/507 I.P.C read with Section ¾ Dowry Prohibition Act in which the appellant and his family members were convicted and later on released on bail by the appellate court. However, the respondent insisted that she want to live with the appellant and forgives him but it appears that the appellant did not agree with the respondent to live together under the garb of constant tussle between them and lodging of the criminal case from time to time against each other.

20. Subject to aforesaid backdrop, while asserting her right to live together, the respondent has filed a case under Section 9 of the Hindu Marriage Act at Lucknow, registered as Suit No. 2077 of 2007. Thus, the suit was filed in the year 2007 by the respondent for restitution of conjugal rights.

21. On the other hand, the appellant has filed a suit No. 669 of 2009 underSection 13 of the Hindu Marriage Act at Agra on 24.10.2007 for divorce which was transferred to Lucknow. The cause of action has been shown as on 26.9.2007, when he alleged to have suffered injury during quarrel and got himself treated atS.N Medical College, Agra and lodged a First Information Report against the respondent wife. The Family Court, Lucknow clubbed both the suits having common facts and decided by the impugned judgment.

22. While decreeing the petition filed by the respondent under Section 9 of theHindu Marriage Act and dismissing the suit filed by the appellant for divorce, learned Family Court took note of the fact that when

the appellant visited Moti Lal Nehru Medical College, Allahabad to attend 20th National Conference on 29/30.9.2007, both stood together in conference and remained in the hospital as husband and wife. Accordingly, learned trial Court noted the incident of 26.9.2007 as false with finding that in case it would have been taken place, then there was no occasion for the appellant and respondent to attend the conference on 29./30.9.2007 at Allahabad, that too when a First Information Report was lodged by the appellant against the respondent. The trial court took note of the allegation levelled by the respondent that the appellant having illicit relationship with a lady Rashmi and he is a club visitor and habitual drinker and the effort made was to any how to break themarriage to continue with his living relationship. He further observed that it is not a case of cruelty but a case where a defence has been set up to obtain divorce on false ground. The Family Court further noted from the evidence that because of wedlock, the respondent was pregnant but on account of complicated Ectopic Pregnancy, the respondent suffered from abortion after about 8-9 months. Even after the abortion, they lived together with physical relationship. During the course of trial, in the suit No. 2077 of 2007 for restitution of conjugal rights, following issues were framed :

1. Whether Ajay Lavania without any justified cause had deserted the plaintiff Smt. Shobhna Dubey. Hence, he is not discharging his family duty?
2. Whether the plaintiff is entitled for any relief from the Court?

23. In the suit No. 669 of 2009 for divorce, the Family Court on 30.11.2009 had framed following issues :
    1. Whether the plaintiff Ajay Lavania without any justifiable reason had deserted his wife Smt. Shobhna Dubey. In consequence thereof, he is failing his duty towards wife?
    2. Whether the respondent Smt. Shobhna Dubey has behaved cruelty with the plaintiff Ajay Lavania continuously since long time. In consequence thereof, the plaintiff has got reasonable reason to believe that it shall be harmful to live with the defendant as husband and wife.
    3. Whether the plaintiff/defendant is entitled for any relief?
    4. Whether the defendant is entitled for any relief from the Court?

24. Section 9 of the Hindu Marriage Act provides that when either the husband or the wife without any reasonable excuse withdrawn from the society of the other, the aggrieved party may apply for restitution of conjugal rights whereasSection 13 provides various grounds to a person in wedlock to approach the court for dissolution of marriage by decree of divorce. For convenience, Sections 9 and13 (as amended by Act No. 68 of 1976) of the Hindu Marriage Act are reproduced as under :

    "9. Restitution of conjugal rights.-

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

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

    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 solemnisation 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

[(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or]

(ii) has ceased to be a Hindu by conversion to another religion; or

(iii) has been incurably of unsound mind, or has been suffering continuous or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation.- In this clause,-(a) the expression "mental disorder"" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including subnormality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party and whether or not it requires or is susceptible to medical treatment; or]

(iv) has been suffering from a virulent and incurable form of leprosy; or

(v) has been suffering from veneral disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive;

Explanation. In this subsection, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the willful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expression shall be construed accordingly.

(1A) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground, (i) in the case of any marriagesolemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner:

Provided that in either case the other wife is alive at the time of the presentation of the petition; or

(ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality.

(i) in the case of any marriage solemnized before the commencement of thisAct, that the husband had married again before the commencement or that any other wife of the

husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner:

Provided that in either case the other wife is alive at the time of the presentation of the petition;

(ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; or

(iii) that in a suit under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under Section125 of the Code of Criminal Procedure, 1973, (Act 2 of 1974) or undercorresponding Section 488 of the Code of Criminal Procedure, 1898 (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards;or

(iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriageafter attaining that age but before attaining the age of eighteen years.

Explanation.- This clause applies whether the marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976)"

However, in the State of U.P, even prior to Amending Act No. 68 of 1976, ground with regard to cruelty was incorporated by U.P Act No. 13 of 1962 which is reproduced as under :

"STATE AMENDMENTS

UTTAR PRADESH.- In its application to Hindus domiciled in U.P and also when either party to the marriage was at the time of marriage a Hindu domiciled in U.P, in Section 13-(added in Central Act by Amending Act No. 68 of 1976)

(i) in sub-section(1), after clause (i) insert and deem always to have been inserted the following :

[(i-a) has persistently or repeatedly treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party; or" and

(ii) for clause (viii)(since repealed) substituted and deem always to have been so substituted the following.

(viii) has not resumed cohabitation after the passing of a decree for judicial separation against that party, and-

(a) a period of two years has elapsed since the passing of such decree, or

(b) the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of other party, or"

25. Thus, under the Central Act, cruelty was added in the year 1976 but in U.P the word, "persistently or repeatedly" was on the State book earlier to it.

26. A plain reading of Section 13(1)(ia), shows that a decree of divorce may be granted by the court in case either of the party, i.e husband or wife has persistently or repeatedly treated the the other with cruelty causing a reasonable apprehension to the petitioner that it will be harmful or injurious for him to live with the other party. Under Section 13(1)(ib), a suit for divorce may also be filed on the ground that either side has deserted the petitioner for continuous period of not less than two years immediately preceding the presentation of the petition.

27. Thus, keeping in view the U.P Amendment and intent of Legislature, cruelty means persistent or repeated ill treatment of a spouse to other which causes a reasonable apprehension in the mind of plaintiff with regard to harm or injury which may be caused while living with other party.

28. Mr. Sudeep Seth, learned counsel appearing for the appellant has vehemently argued that the respondent had treated the plaintiff appellant with cruelty. Hence he is entitled for divorce. He submits that the learned Family Court has not considered the material evidence on record led by the appellant and the impugned judgment suffers from surmises and conjectures. He further submits that because of subsequent conviction in criminal case, marriage is not revivable, hence divorce is the only remedy to secure the ends of justice.

29. On the other hand, Smt. Shobhna Dubey, respondent appeared in person and argued the case stating that she is ready to live with her husband and also ready to forget whatever happened in the past. She also assures that she is not interested to persecute or prosecute the members of the appellant's family. She also stated that minor quarrels, fractions or disagreement between the husband and wife does not constitute cruelty. The Family Court has recorded the sound finding and the appeal is liable to be dismissed. She further submits that since an amendment application filed by the appellant was kept pending and not allowed by the Family Court, subsequent event could not be taken into account as it would amount to travel beyond the pleading.

30. Both sides submitted the written arguments as well as compilation of case laws to defend their cause.

31. Before the trial court, on behalf of the respondent plaintiff, in suit filed for restitution of conjugal rights, certain documentary evidence was filed. The complaint dated 26.9.2007 along with the applications C-38/95, C-38/96 and C-38/97 shows that while lodging a First Information Report with regard to assault, the appellant also prayed for police security keeping in view the alleged injury in terms of medical report of the same day obtained from Medical College. It was after the incident dated 26.9.2007, both husband and wife went to Allahabad to attend conference on 29/30.9.2007. The injury report prima facie does not reveal the injury caused by teeth bite. It has been observed in the judgment and order dated 31.5.2010 by Special Additional Chief Judicial Magistrate, C.B.I, Lucknow in case No. 3674 of 2008, while convicting the appellant under Sections 498-A, 506, 507 I.P.C read withSection ¾ Dowry Prohibition Act, that the incident dated 26.9.2007 was created to avail divorce (C-40/33 and C-60/33) in the case filed under Section 13 of theHindu Marriage Act. An adverse comment has also been made by the Special Additional Chief Judicial Magistrate, C.B.I, Lucknow while convicting the appellant and other family members. Photographs have been filed with regard to honeymoon at Goa which prima facie shows intimacy between the appellant and the respondent. Emails sent by the appellant, copies of which have been filed in the trial court as C-52/3 to C-52/32 also reveals intimacy between the parties. Email of Shobhna Dubey on record also shows intimacy between them. During cross-examination, in the caseunder Section 9 of the Hindu Marriage Act, the appellant himself stated that he was having cordial relationship with Shobhna before pregnancy and even if all the complaints are taken back, the appellant is not ready to live with Shobhna Dubey. Attention has been invited to certain Email sent by lady Rashmi Rao filed as C-31/16, 17, 18 to establish living relationship between the appellant Ajay Lavania and Rashmi Rao. The appellant has filed copy of bill to show his financial prospects. The documentary evidence on record shows abortion because of complicated Ectopic Pregnancy. In his letter dated 29.4.2007, the appellant has consoled the respondent to ignore the ill treatment imparted by Mrs. Archana Lavania and Mrs. Prabha Lavania. He ensured that he is with his wife against them.

32. Learned counsel for the appellant Shri Sudeep Seth submitted that the incident dated 26.9.2007 was an incident of cruelty. Coupled with the fact that the respondent had alleged extra marital affairs against the appellant with allegation of his being habitual drinker and lead club life and watching of blue films, the conviction in the criminal case creates a ground of irretrievable break down ofmarriage. He submits that the parties have reached to a situation where there is no chance of reunion. Learned counsel for the

appellant has relied upon the cases reported in (2003) 6 SCC 334, Vijay Kumar Ramchandra Bhate v. Neela Vijaykumar Bhate, 2003 (2) AWC 1665 (SC) K.A Abdul Jaleel v. T.A Shahida, 2005 (3) AWC 2093Amar Nath Gupta v. State of U.P and AIR 2007 Andhra Pradesh 201 Sardar Darshan Sngh v. Smt. Surjeeth Kaur.

33. It is also stated that the respondent has tried to make out a case on the basis of false and fabricated document and the Evidence Act is not applicable strictly.

34. In the case of Vijay Kumar Ram Chandra Bhate (supra) while interpreting the word, "cruelty" under the Act, Hon'ble Supreme Court ruled that the character assassination in or during divorce proceedings amounts to cruelty and substantiate the wife's petition for divorce on the ground of cruelty. The allegation against the wife of unchastity, indecent familiarity with another person and extramarital relationship alleged in the written statement by the husband constitute a cruelty. However, the case in hand seems to be based on different facts and circumstances where the allegation of living relationship has been tried to establish on the basis of Emails and other surrounding facts with submission that the appellant had cooked up a false case to dissolve the marriage. It is not a case where character assassination has been made on false or concocted ground; rather facts have been tried to prove on the basis of documentary evidence which does not seem to have been categorically denied.

35. In the case of K.A Abdul Jaleel (supra), Hon'ble Supreme Court held that the Family Court has jurisdiction to adjudicate the question 15 relating to properties of divorced parties.

36. In the case of Jagannath (supra), a Single Judge of this Court held that while filing petition for maintenance against the husband, the Family court has right to take evidence from both side by consolidating two suits and give common judgment.

37. In the case of Sardar Darshan Singh (supra), Hon'ble Single Judge of Andhra Pradesh High Court opined that subsequent event shall be taken into consideration by way of rejoinder. However, rejoinder is impermissible if such subsequent pleadings sets up plea inconsistent with pleading in plaint.

38. The respondent relied upon a case decided on 22.9.2010 by Hon'ble Supreme Court in Civil Appeal Nos. 8196-8197 of 2010 Sanjeeta Das v. Tapan Kumar Mohanty, judgment dated 27.2.2009 delivered in Civil Appeal No. 1330 of 2009 Vishnu Dutt Sharma v. Manju Sharma, (2004) 7 SCC 747, Shyam Sunder Kohli v. Sushma Kohli alias Satya Devi, [2002 (46) ALR 465] Savitri Pandey v. Prem Chandra Pandey, (2001) 4 SCC 250, Chetan Dass v. Kamla Devi, AIR 2005 Bombay 278 Ajay Sayajirao Desai v.Mrs. Rajashree Ajay Desai, AIR 1989 Delhi 121 Ashok Kumar Bhatnagar v. Smt. Shabnam Bhatnagar, AIR 1984 Allahabad 81 Satya Pal Sethi v. Smt. Sushila Sethi, AIR 1964 MP 28 Narayan Prasad Choubey v. Smt. Prabhadevi, (2009) 4 SCC 366, Sipra Bhattacharyya v. Dr. Apares Bhattacharyya, (2005) 3 SCC 313, B.P Achala Anand v. S. Appi Reddy, (2005) 10 SCC 299, Naresh Chandra Singhania v. Deepika Alias Buby and(1997) 7 SCC 7, Jasbir Kaur Sehgal(Smt) v. District Judge, Dehradun.

39. In the case of Sanjeeta Das (supra), Hon'ble Supreme Court has set aside the Division Bench judgment of Orissa High Court holding that a Hindu marriage can be dissolved only on any of the grounds plainly and clearly enumerated undersection 13 of Hindu Marriage Act. A decree of divorce cannot be granted with or without consent of either side for consideration. No court can assume jurisdiction to dissolve a Hindu marriage simply on the basis of the consent of the parties de hors the grounds enumerated under Section 13 of the Act unless of course the consenting parties proceed under section 13B of the Act.

40. In the case of Vishnu Dutt Sharma (supra), Hon'ble Supreme Court declined to interfere where the Delhi High Court had dismissed the appeal filed by the husband whereby the trial Court has declined to grant divorce on the ground of cruelty. Since the husband himself has imparted cruelty, it was not found to be good ground to grant divorce in the petition filed by the husband. Hon'ble Supreme court observed that the wife has successfully demonstrated that in fact, she suffered cruelty at the hands of husband appellant. In such a situation to grant divorce to the husband appellant only on the ground of irretrievable breakdown of marriage would not be proper.

41. In the case of Shyam Sunder Kohli (supra), their Lordships of Hon'ble Supreme Court held that it was the husband who had been at fault and had not allowed the marriage to break. Therefore, the marriage could not be dissolved on the ground of irretrievable break down. To reproduce relevant portion, to quote :—

"12. On the ground of irretrievable breakdown of marriage, the court must not lightly dissolve a marriage. It is only in extreme circumstances that the court may use this ground for dissolving a marriage. In this case, the respondent, at all stages and even before us, has been ready to go back to the appellant. It is the appellant who has refused to take the respondent back. The appellant has made baseless allegations against the respondent. He even went to the extent of filing a complaint of bigamy, under Section 494 IPC against the respondent. That complaint came to be dismissed. As stated above, the evidence shows that the respondent was forced to leave the matrimonial home. It is the appellant who has been at fault. It can hardly be in the mouth of a party who has been at fault and who has not allowed the marriage to work to claim that the marriageshould be dissolved on the ground of irretrievable breakdown. We, thus, see no substance in this contention."

42. In the case of Savitri Pandey (supra), Hon'ble Supreme Court held that cruelty means the acts which are dangerous to life, limb or health and should be distinguished from the ordinary wear and tear of family life. The sanctity ofmarriage cannot be left at the whims of one of the annoying spouses.

43. In the case of Chetan Dass (supra), Hon'ble Supreme Court held that the principle of irretrievable break down of marriage cannot be used as a formula to gain relief of divorce automatically. Hon'ble Supreme Court ruled that where party seeking divorce are found during the course of judicial proceeding to have committed matrimonial offence and has been unable to establish any allegation against the spouse, a decree of divorce on the ground of irretrievable breakdown ofmarriage cannot be granted. Erring party cannot be permitted to break the marital bond by taking advantage of his own wrong. It shall be appropriate to reproduce para 14 of the judgment which is as under :

"14. 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 marriageoccupies an important place and role to play in the society, in general. Therefore, it would not be appropriate to apply any submission of "irretrievably brokenmarriage" 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."

44. In the case of Ajay Sayajirao Desai (supra), Hon'ble Supreme Court held that where the wife at all stages has been ready to go back to husband and it is the husband who refused to take back wife on baseless allegation to the extent of filing false complaint against wife with intention to create evidence against wife, themarriage cannot be dissolved on the ground of irretrievable breakdown.

45. In the case of Ashok Kumar Bhatnagar (supra), a Division Bench of Delhi High Court held that where the husband is harassing his wife for dowry and abandoning her, he cannot be permitted to take benefit of his own wrong and claim divorce on the ground of irretrievable break down of marriage.

46. In the case of Satya Pal Sethi (supra), Hon'ble Single Judge of Allahabad High Court has dismissed the divorce petition where the husband took the plea of cruelty and desertion, but, failed to prove charges against wife and on the other hand, the wife has proved that the husband was living in adultery.

47. In the case of Narayan Prasad Choubey (supra), a Division Bench of M.P High Court held that no judicial separation can be granted against the wife on the ground of his irritating idiosyncrasies and because of

allegation that the wife was frequently picking up petty domestic quarrels with her mother-in-law and thereby rendering the life unhappy for the husband.

48. In the case of Sipra Bhattacharyya (supra), Hon'ble Supreme Court has set aside the order of the High Court where the High Court has rejected the application for enhancement of maintenance keeping in view the facts and circumstances of the case.

49. In the case of B.P Achala Anand (supra), Hon'ble Supreme court ruled that a divorced wife has right to stay in tenancy premises but it shall be dependent upon the terms and conditions in which the decree of divorce has been granted and the provision of maintenance has been made. Hon'ble supreme Court held that right to residence is part and partial of her right to maintenance.

50. In the case of Naresh Chandra Singhania (supra), Hon'ble Supreme Court ruled that in the event of enhancement or increase of husband's income, the maintenance may also be increased.

51. In the case of Jasbir Kaur Sehgal (smt), Hon'ble Supreme Court held that the maintenance pendent lite can be granted not only to wife but also to her dependants whom she is also maintaining under Section 24 of the Hindu Marriage Act.

52. In view of aforesaid case law, cited by other side, there appears to be no dispute over the proposition of law that in the event of cruelty, mental or physical caused by either side, a suit for divorce may be decreed. However, it should be proved with pleading and evidence on record.

53. In the present case, the suit was filed only on the ground of cruelty underSection 13(1)(ib) of the Hindu Marriage Act and not on the ground of irretrievable ground of marriage. On the basis of subsequent events, i.e conviction in the criminal case, learned counsel for the appellant submitted that a divorce may be granted on the ground of irretrievable breakdown of marriage.

54. A perusal of the relief claimed in the suit filed by the appellant, it is evident that the suit was filed on the ground of cruelty and desertion by wife. In absence of specific relief claimed on the ground of irretrievable breakdown of marriage, the dissolution of marriage cannot be considered on this ground. Though subsequent events may be looked into but that too only keeping in view the original pleading on record. Subsequent events supplement the original pleading to make out a case for decree of suit for divorce but it does not empower the courts to decide the suit totally on new ground beyond the issues framed by the trial court.

55. Otherwise also, from the facts, circumstances and evidence on record, there appears to be no over action on the part of the respondent creating a ground for irretrievable breakdown of marriage.

56. The legal conception of cruelty and the kind of degree of cruelty necessary to amount to a matrimonial offence has not been defined by the Hindu MarriageAct. No comprehensive definition can be given to cruelty as it may be fatal to the social structure based on institution of marriage. Prior to Amending Act of 1976, the only ground available for divorce was by way of judicial separation. By amendment, the word added is "treated the petitioner with cruelty" The object seems to give a definition exclusive or inclusive, which may amply meet every particular act or conduct and not fail in some circumstances. Legislature to their wisdom has left the cruelty to be determined by courts on the facts and circumstances of each case as to whether the conduct amounts to cruelty. It is also because since actions of men are so diverse and infinite that it is almost impossible to expect a general definition which could be exhaustive and not fail in some cases. However, it is true that there has been forward march towards liberalisation of thedivorce on the ground of cruelty and the statutory limitations in old Section 10(1)(b).

57. Hon'ble Supreme Court in (1975) 2 SCC 326 : AIR 1975 SC 1534 Dastane v.Dastane, followed by a Full Bench of Bombay High Court in AIR 1984 Bom 413Kesbavrao v. Nisba examined the matrimonial ground of cruelty in view of oldsection 10(1)(b) of the Act. It is held that the provision is to be considered as to 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 the petitioner to live with the respondent. It is also pointed out that it was not necessary under English Law that 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 though, of course, harm or injury to health, reputation, the working character or the like would be an important consideration in determining whether the conduct of the respondent amounts to cruelty or not. What is required is that the petitioner must prove that the respondent has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the respondent.

58. In Hindu Law, by Mulla after considering Indian and foreign judgments, cruelty has been dealt with as under :

"Though the clause does not in terms state so, it is abundantly clear that the application of the rule must depend on the circumstances of each case. Without attempting to define cruelty it may be said that 'cruelty' contemplated is conduct of such type that the petitioner cannot reasonably be expected to live with the respondent. The treatment accorded to the petitioner must be such as to cause such apprehension in the mind of the petitioner that cohabitation will be so harmful or injurious that she or he cannot reasonably be expected to live with the respondent having regard to the circumstances of each case, keeping always in view the character and condition of the parties, their status, environments and social values, as also the customs and traditions governing them. The apprehension contemplated by the above conception is that further cohabitation will be harmful or injurious and not that the same or similar acts of cruelty will be repeated."

59. In a case reported in (1988) 1 SCC 105 : AIR 1988 SC 121 Sbobba Rani v.Madhukar Reddy, Hon'ble Supreme Court examined the sub-s 13(1)(ia) of theHindu Marriage Act and held that there could be cases where the conduct complained of itself may be bad enough and per se unlawful or illegal. Then, in such a situation, the impact or the injurious effect on the other spouse need not enquire and cruelty shall be established if the conduct itself is proved or admitted.

60. However, in the present case, conduct of the respondent constituting cruelty does not seem to be proved or admitted. Mulla in Hindu Law has given a word of caution to follow blindly the western judgments or the cases decided keeping in view the facts and circumstances of a particular case. To quote :

"There has been such a marked change in the notions of matrimonial duties and obligations of husband and wife in the present generation in India that it will be incumbent on the court to be extremely careful in the matter of seeking assistance and guidance from decisions arrived at under any previous legislation in India or England, even when the rules may be similarly worded. Blind adherence to any of those decisions must be deprecated, particularly when they relate to persons whose customs, manners and mode of life may be different."

61. In King v. King, [1953] AC 124 page 130, it has been held that the law has no standard by which to measure the nature and degree of cruel treatment that may satisfy the test. Physique, temperament, standard of living and culture of the spouses and the interaction between them in their daily life and all other relevant circumstances must have a bearing on the question whether the acts or conduct complained of amount to the matrimonial offence which entitles a spouse to reliefunder this clause.

62. The language of Section 13 is comprehensive enough to include cases of physical as well as mental cruelty and the cases where both the elements are present. Where physical violence is proved, the matter may not present any particular difficulty. Even a single act of violence may by itself be of such a grievous and inexcusable nature as to satisfy the test of cruelty. However, on the other hand,isolated acts of assaults committed on the spur of the moment and on some real or fancied provocation may not amount to cruel treatment. The assault or assaults must not be viewed as isolated facts but in the proper setting, as an incident or incidents in a complicated series of marital relations. It would be relevant to have regard

to any physical or mental strain under which the accused spouse may have been labouring. The minor acts of physical violence alleged by either side may not amount to cruelty but may be an incident of life which should be tolerated or adjusted by either side. The domestic life of spouse must be surveyed as a whole before recording a finding on cruelty keeping in view their possible future relations and the reasonableness or otherwise of the apprehension in the mind of the party.

63. The conduct consisting of number of acts should be judged in relation to its attendant circumstances, and the physical or mental condition or susceptibilities of the innocent spouse and the offender's knowledge of the actual or probable effect of his conduct on the other. The acts and incidents complained of along with conduct of the parties should be taken together to form a composite picture to ascertain cruelty.

64. Coming to present controversy in view of aforesaid principles, so far as incident of 26th September, 2007 is concerned, which has been vehemently relied upon by the appellant's counsel does not seem to constitute cruelty for the reason that after the said incident, both the appellant and the respondent attended a conference at Allahabad and the evidence on record shows that they remained at Allahabad for two days as husband and wife in the same room at the hospital. Thus, the incident of 26.9.2007, if assuming to be true, was an incident originated on the spur of moment and was not deliberate and intentional action on the part of the respondent to cause harm to the appellant.

65. Moreover, it was the appellant who had lodged a First Information Report against the respondent with regard to incident of 26.9.2007 and obtained medical certificate. Prima facie, the appellant seems to have created a ground and lodged the First Information Report against the respondent on the one hand and on the other hand, he attended the seminar at Allahabad keeping her in dark with regard to lodging of First Information Report and medical certificate obtained from the Medical College.

66. The statements of Ajay Lavania and Vinod Kumar Rathore also do not make out a case causing cruelty by the respondent. Only because the appellant does not want to live with the respondent for any reason whatsoever shall not be sufficient to constitute cruelty or create a ground for divorce under Section 13 of the Act. In his statement, the appellant stated that the respondent has got no complaint against the petitioner but he has got complaint or grievance against the respondent. No cogent evidence has been led or filed by the appellant before the trial court to make out a case of cruelty.

67. Specific allegation raised by the respondent that on account of living relationship with a lady, namely Rashmi Rao, the appellant wants divorce has not been rebutted by cogent and trustworthy evidence. Email of Rashmi Rao creates a reasonable doubt over the conduct of the appellant. Stating correct fact without any concoction shall not create cruelty or ground to claim divorce.

68. The respondent consistently pleaded and asserted that she wants to live with the appellant and she is still ready to forget all previous incidents and also ready to excuse and take appropriate step for the appellant's acquittal in the appellant's pending appeal seems to be bona fide action of the respondent. In case they unite together, keeping in view the statement given before this Court, the appellate court shall take lenient view and if parties agree, then permit to enter into compromise.

69. From the material and evidence on record, there appears to be no doubt that there has been quarrel between the appellant and the respondent during short span of matrimonial life on trivial issues and either side may be at fault but does not seem to create a ground under Section 13(i)(ib) of the Act to decree the suit fordivorce on the ground of cruelty.

70. A decree of divorce under the statutory provision should not be granted merely on the ground of wrongful conduct of spouse or minor incident or incident of violence having taken place at the whisper of moment or either side does not want to live with each other for any reason whatsoever. Irretrievable breakdown ofmarriage cannot be a ground to decree a divorce suit unless specifically pleaded showing the instances enumerating the grounds making out a case beyond the reasonable doubt. Continuing of minor incidents or quarrel during matrimonial life in today's atmosphere when everyone is facing complex problem in

day to day life from office to house or in the street shall not constitute cruelty for statutorydivorce. Only a violence which is deliberate, planned and intentional to harm the other side for some extraneous reasons or may be because of some illicit relationship may constitute cruelty and warrant divorce.

71. In the present case, there appears to be no evidence which may establish that the quarrel between the appellant and the respondent on some of the dates were outcome of deliberate, planned and intentional decision to harm the appellant; rather the appellant himself has lodged a First Information report against the respondent and thereafter both sides entered into litigation and registration of the criminal cases on one or other ground. Once the appellant himself initiated the criminal proceeding and allegation is against him with regard to demand of dowry, then it shall not constitute cruelty to make out a case for divorce.

72. Before parting with the case, it shall be appropriate to observe that a decree of divorce is an exception and a thing which is an exception should not be granted lightly by courts. The institution of marriage in a civilized society not only amongst Hindus but others also has been established since ages to regulate the society and save the humanity from rule of jungle(forest). It is the matrimonial institution which differentiate a man from beast, meant to transfer its knowledge and culture to posterity. Grant of divorce by the courts leisurely or merely on asking or with the consent of parties or because one does not like, other shall spoil the whole social set up in due course of time.

73. While narrating the importance of marriage and family values, a three times U.S Republican Senator from Missouri, John Danforth in his book, "Faith and Politics" (page 112) observed as under :

"Genesis tells us that a man leaves his father and mother and "cleaves" to his wife. The dictionary definition of cleave is "to adhere to firmly and closely or loyally and unwaveringly." My own mental image of cleaving is the bonding together of two objects, say the gluing of two pieces of wood so that they are as one. All the instructions I have seen on the subject say that it is important to clean the surfaces of the two objects before applying the glue so that external matter does not interfere with the bonding. For me, this is a metaphor formarriage because all sorts of external influences, people as well as interests, interpose themselves between the marital partners. That is the case for every married couple. The external influence may be, as the verse in Genesis suggests, the claims on a husband or wife by demanding parents, or it may be the responsibilities of raising children, or the hours and energy devoted to one's job. The challenge for every married couple is to cleave together and not allow the external influences that insert themselves into the marriage to break the bond between them."

74. Learned author (supra) expresses his sorrow with regard to divorce rate in U.S.A (page 66-67), in the following words :

"I think the reason behind this fervor is an understandable concern about the state of values in our society. When the divorce rate is 50 percent and unwed teen pregnancies are 34 percent, when it seems that family entertainment is impossible to find among the obscene, when children have access to drugs, then there is little wonder that many Americans are desperate to restore some measure of decency to our common life, to return to a world which, at least in our memories, was better than what we have today-a world in which religion seemed to have more force in influencing how people live their lives."

75. Because of soft provisions for divorce, the western countries and U.S.A are facing acute problem. Easy divorce break the families, and in case spouse has children, they are the ultimate sufferer. In young age, ordinarily the temptation for extramarital relationship is high and in case courts are lenient, then there shall always be cause to approach for divorce in the persons of easy virtue. Law is not for those who meditate and lead a spiritual, honest and fair life, but it is to regulate the commoners who become victim of circumstances easily.

76. Moreover, in Hindus, marriage, as observed (supra), is sacred character of sacrament. Statutory provision for divorce is the enabling provision and is an exception, not to be exercised in a routine manner or lightly. Marriage provides hereditary right to a spouse in the event of death of either of them and heredity rights

to the coming generation born from the wedlock and collective social security to spouse and children. It is the marriage which differentiate between a civilized and uncivilized society. Keeping in view the magnitude of benefit and social security available to a spouse, no matter there are some differences and wrangles in a matrimonial life. George Bernard Shaw said, "Marriage is popular because it combines the maximum of temptation with maximum of opportunity" (In Man and Superman).

77. Horald Nicolson advised, to quote, : "The great secret of successful marriageis to treat all disasters as incidents and none of the incidents as disasters"

78. As observed (supra), continuance of marriage is 'rule' and divorce is an exception. Exception cannot become rule by liberal approach. Section 13 ofHindu Marriage Act is enabling provision and enabling provision deal with disability or contingencies in special circumstances but it does not confer power to invoke the provision with regard to divorce as a matter of right. The courts should be conscious to ensure that the statutory provision with regard to divorce or maintenance is not abused by either of the spouse for extraneous reasons or as an instrument to wreak vengeance.

79. Courts have to ensure that the matrimonial life continue to its entirety and the duo husband and wife may consume their natural life, as far as possible. It shall be necessary for the plaintiff/petitioner who approached the Court under Section13 of the Act to establish that he or she has not been at fault and possess impeccable character and made all efforts for continuance of matrimonial life. There shall be dual burden on the plaintiff, first to prove his or her own impeccable character and efforts made for continuity for matrimonial life and secondly, it shall be necessary to establish that the conduct of other side is so impractical and serious that it shall cause irreparable loss and injury warranting dissolution of marriage. Keeping in view the provision contained in Sections 102 and 103 of the EvidenceAct, burden to prove the grounds with regard to divorce shall be on the plaintiff to establish the facts.

80. There may be situation when both side does not possess impeccable character or both are flirt or have been indulged in unethical practice, then in such situation, it is for the court to decide the issue in a just and proper manner to secure the interest of both sides. In case, the defendant in a divorce suit possess impeccable character and discharge her/his obligation in the manner which is expected from a person of common prudence or except some minor violence or incidence at the spur of moment, then in such situation, it shall not be proper for the Court to decree a divorce suit.

81. The case laws referred by other side deals with original provision contained inSection 13 of the Act with regard to cruelty. While interpreting the provision with regard to divorce, every word should be given its meaning. The legislatures were conscious by making U.P Amendment to check the abuse of process of law keeping in view falling standard of life. That is why, they have used the words, "persistently or repeatedly" coupled with reasonable apprehension in the mind of the plaintiff with regard to harm or injury which may sustain while living with other party. Reasonableness should not be based on trivial grounds. It must be based on well founded material and reasoning.

82. Apprehension with regard to harm or injury should also be of such nature which may cause the other side irreparable loss or injury. Meaning thereby, the reasonable apprehension with regard to harm or injury should be such which may not be bearable to lead a normal life.

83. In the present case, there appears to be no material which may create a reasonable apprehension in the mind of the plaintiff appellant resulting into harm or injury in incident which may not be bearable or irreparable because of which the appellant cannot lead a matrimonial life along with the respondent. Liking or disliking shall not be a ground to decree a divorce.

84. Thus to sum up, the allegations on record are all of trivial nature and does not constitute cruelty. Subject to observation made in the body of present judgment, appeals lack merit. Hence dismissed.

85. No order as to costs.

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TITLI ALIAS TEREZA VERSUS ALFRED ROBERT JONES

1933 SCC OnLine All 310 : ILR (1934) 56 All 428 : 1934 All LJ 1129 : AIR 1934 All 273

Allahabad High Court

Matrimonial Jurisdiction

(Before Hon'ble Mr. Justice Shah Muhammad Sulaiman, C.J & Hon'ble Mr. Justice Lal Gopal Mukerji, J.)

Titli alias Tereza … (Respondent);

v.

*Alfred Robert Jones … (Petitioner).**

Appeal No. 69 of 1932, under section 10 of the Letters Patent
Decided on October 30, 1933

Divorce Act (IV of 1869), sections 4, 7, 19 — Nullity of marriage — Idiot — Difference between medical and legal definitions of idiocy — Indian Penal Code, section 84 — Mental Deficiency Act, 1913 (3 and 4 Geo. V., Ch. 28), section 1 — Consent to marriage by person of defective mentality — Christian Marriage Act (XV of 1872), sections 4 and 5 — Validity of marriage according to rules, rites and ceremonies of Church — Essential and non-essential rules — Jurisdiction of High Court to entertain suits under Christian MarriageAct — Letters Patent, clauses 26, 35 — Canon law — Banns — Dispensation.

The High Court has no jurisdiction to entertain a suit, on its original side, under the Christian Marriage Act, 1872. A suit for a declaration that a marriage is null and void,under section 4 of that Act, because it was not solemnised in accordance with the rules, rites and ceremonies of the Church, must be instituted in the appropriate subordinate civil court and can not be entertained by the High Court direct.

The jurisdiction to hear matrimonial matters between Christians was conferred on this High Court by clause 26 of its Letters Patent; but under clause 35 this jurisdiction is subject to the legislative powers of the Governor-General in Council. Section 4 of theDivorce Act, 1869, clearly lays down that such jurisdiction is to be exercised by the High Court in accordance with the provisions of the Divorce Act "and not otherwise".Section 7 of the Act does not confer any additional jurisdiction. No matrimonial suits, other than those which can fall within the scope of that Act on grounds indicated insection 19, can be entertained by the High Court. No section of the ChristianMarriage Act, 1872, confers any jurisdiction on the High Court to entertain a suitunder that Act.

The question did not, in law, arise in the present case as to whether the marriagebetween the parties was void because certain rules, rites and ceremonies required by the Catholic Church were not observed; but it is clear that on such a question a distinction must be drawn between rules which are essential and indispensable, such as their non-observance would entail a nullification of the marriage, and rules which are not so essential. The Church, which lays down the rules, must also be the authority to say which of them are essential in this sense, and which not. It appeared from clear texts in a book of high authority on the Canon law of the Catholic Church that if banns had not been called three times, or if a marriage between a Protestant and a Roman Catholic had been performed without obtaining a dispensation, the breach of such rules would not make the marriage null and void.

The word "idiot" has not been defined in the Divorce Act, 1869, or in any other Indian Act, but undoubtedly idiocy is a form of congenital insanity, due to the absence of development of the mental faculties and intelligence from very childhood. The only standard and test of insanity laid down by the law is according to section 84 of the Indian Penal Code, whether the person was by reasoft of unsoundness of mind incapable of knowing the nature and quality of the act, or that the act was wrong or contrary to law. In England the Mental Deficiency Act, 1913, defines idiots as being persons so deeply defective in mind from birth, or from an early age, as to be unable to guard themselves against common physical dangers, and it distinguishes idiots as being a more aggravated type of defectives than imbeciles or feeble-minded persons. This definition and distinction, although not absolutely binding in India, furnish a good guide to the courts in India. Further, although there has always been a difference between the points of view of a medical man and a lawyer on the question of insanity, the former tending to include any form of abnormality in the term insanity, the classification and distinction contained in the English. Act regarding idiots, imbeciles and merely feebleminded persons is in perfect accord with medical books of high authority, which define idiocy as dementia naturalis or complete amentia, and imbecility as partial amentia. It is, therefore, clear that in order to find that a person is an idiot it is not sufficient to find that he is a mere imbecile; one cannot be an idiot unless his faculties have not at all been developed and he has not acquired any appreciable intelligence.

The mere opinion of a medical man called as an expert on the question whether a certain person is an idiot, so as to have been incapable of contracting a marriage, is no doubt relevant under section 45 of the Evidence Act, but it would carry little weight with a court unless it is supported by a clear statement of what he observed and on what he based his opinion. As indicated in section 51, the expert should put before the court all the materials which induced him to come to his conclusion, so that the court, although not an expert, may form its own judgment on those materials. Medical opinion that a person is an idiot because he is unable to manage his own affairs is useless in an inquiry as to whether the person is an idiot in the eye of the law.

The presence of a small head, or large sticking-out ears, or a prognathous jaw is inconclusive. Binet-Simon tests are mere intelligence tests invented for the purpose of finding out the degree of intelligence of school children, and are utterly useless if a person is examined during the course of a trial when there is the possibility of his pretending to be an idiot in order to prove his case.

Where a man of about fifty years of age had contracted a marriage; and it was found that he could read and took pleasure in reading, could write and could draft a letter for himself, could ride, shoot and fish; that he gave intelligent answers to questions put to him by the court; that he himself went to the Priest and arranged for his marriage; that he knew that by the marriagehe would be making the woman his wife; that he knew that he had lowered himself by the marriage as she was a low caste woman; that he had said to the Priest that themarriage should be kept secret: It was held that he was not an idiot within the meaning of section 19(3) of the Divorce Act, 1869, and was fully able to understand the nature and consequences of his marriage, and was capable of voluntarily consenting to it.

Want of consent, as such, does not find a place in section 19 of the Divorce Act as one of the grounds for nullity of a marriage, and the question of consent outsidesection 19 does not arise. Where consent has been given without any force or fraud, and by a person not a lunatic or an idiot, it can not be said that there was no consent. When lunacy or idiocy is not proved, it can not be said that there has been any lack of understanding or consciousness; when force or fraud has not been established, it can not be said that there has been no real consent. A marriage is not like a mere civil contract which may be voidable at the option of one party on grounds mentioned in the Contract Act; it is either good or entirely void.

Per MUKERJI, J.—In a case which has been tried on the question whether the petitioner for divorce is an idiot or not, it is not open to the trial court to make out a new case based on the ground that although the petitioner was not an idiot he was a feeble-minded man who could not have entered into a contract of marriage.

Mr. K.D Malaviya, for the appellant.

Dr. K.N Malaiya and Messrs K.O Carleton and O.M Chiene, for the respondent.

The Judgment of the Court was delivered by

MUKERJI, J.:— This Letters Patent appeal arises out of a matrimonial suit.

The suit as originally instituted was based on the following allegations. The petitioner is a European domiciled in India, and since his very childhood has been deficient in mentality. He had to be looked after by his relations throughout his life. The respondent is a woman of loose character and has been so from her girlhood. Her brothers and brother's son, in October, 1930, and on other occasions, several times threatened the petitioner that unless he married the respondent he would be visited with "dire consequences"; that the ground on which those threats were held out was a false one, being to the effect that the petitioner had "deprived the respondent of her caste". The respondent was already married and her husband, Muhammad Ali, was still alive. But in spite of this fact the petitioner, on account of the threats and being an "idiot", went through a form ofmarriage with the respondent, on the 10th of November, 1930. On these allegations the petitioner prayed that on the ground of his idiocy and on the ground that his consent to the marriage had been obtained by force and fraud, his marriage with the respondent might be declared null and void.

The respondent contested the petition and alleged that at the time of themarriage she had been converted into Christianity, according to the Roman Church; that she was then a widow; that she had never been married to any Muhammad Ali and, at the time of the marriage, her husband was not alive; that no relation of hers exercised any undue influence or pressure on the petitioner; that the respondent was never a prostitute as alleged in the petition; that the petitioner was not an idiot; that he fully understood the nature of the marriage contract; that the petitioner himself was anxious to marry the respondent and he alone made all the necessary arrangements; that no fraud was ever practised on the petitioner as regards themarriage and that the marriage was valid and lawful in every way. She further stated that the parties had known each other for a long time.

The suit came for a first hearing before one of the learned Judges of this Court who was not the trial Judge, and on the 27th of June, 1932, six issues were framed as noted at page 5 of the printed paper-book. Before the learned Judge (Mr. Justice KING) the petitioner abandoned the plea that the marriage was null and void on the ground that the respondent was married to Muhammad Ali at the time of the marriage in question. On the 7th of November, 1932, after the Reverend Father Livesay, a witness for the respondent, had been examined, a petition was filed on behalf of the petitioner that the plaint might be amended and a ground for the declaration that the marriage was void might be added to the plaint, namely, themarriage had not been solemnised according to the rules, rites and ceremonies and customs of the Roman Catholic Church. This application was granted on the same day by the trial Judge (Mr. Justice YOUNG). The next day, on the 8th of November, 1932, a further application for amendment of the plaint was made by the petitioner, and another ground was sought to be added to the plaint, namely, that themarriage was void because the person performing the marriage was not so authorised under the provisions of the Indian Christian Marriage Act. This was also allowed. The hearing of the evidence in the case was concluded on the 7th of November, 1932, and the judgment was delivered on the 14th of November, 1932.

It appears that on the amendment being allowed, a plea was taken orally on behalf of the respondent that a suit, based on the allegation that the marriage was null and void because the proper rites of the Catholic Church had not been observed and because the person performing the marriage was not authorised to do so, could not be maintained in the High Court. The learned Judge, therefore, first tried the question of jurisdiction. He found that he had jurisdiction to hear the amended case also. On the question of the idiocy of the petitioner the learned Judge found that he was not an idiot. On the question whether the marriage was null and void on the ground of fraud and force the learned Judge found that no case had been established. But he added a new issue in the following language, "Did the petitioner consent to the said marriage?" and on this issue the learned Judge came to the conclusion that the petitioner was incapable of giving his consent and therefore was incapable of contracting a valid marriage. On the question of the observance of the rites and ceremonies of the Church of Rome and the authority of the priest to solemnise the marriage, the learned Judge came to the

conclusion that the necessary rites and ceremonies had not been observed and themarriage was accordingly void. He further held that the Reverend Father Livesay, the priest, having failed to perform the rites enjoined by the Church of Rome and having no authority to perform, a marriage according to the other provisions of the Christian Marriage Act, the marriage was void. In the result the suit was decreed.

The first question that has been argued before us is the question of jurisdiction. The jurisdiction to hear a matrimonial matter was conferred on this High Court by clause 26 of its Letters Patent. This exercise of jurisdiction is subject to any law that the Indian legislature may enact from time to time. This is laid down in clause 35 of the Letters Patent. Such being the case, we have to look to the Acts passed by the Indian legislature for our guidance. The Indian Divorce Act, No. IV of 1869, in pursuance of which the present suit was originally instituted, defines the extent of the jurisdiction of the High Court with respect to matters coming within the purview of the said enactment. It runs, so far as is material for our purposes, as follows (section 4): "The jurisdiction now exercised by the High Courts in respect of divorcea mensa et toro and in all other causes, suits and matters matrimonial, shall be exercised by such Courts and by the district courts subject to the provisions in thisAct contained, and not otherwise …" From this clear language of section 4 it follows that the jurisdiction in matrimonial matters conferred on this High Court by clause 26 of its Letters Patent is to be exercised in accordance with the provisions of the Divorce Act of 1869 and in accordance with that Act alone. So far as the suit is based on the grounds that the petitioner was an idiot at the time of his marriage and that the consent of the petitioner was obtained by force or fraud, the jurisdiction of the High Court exists, because of the provisions of section 19 of the Divorce Act, 1869. This Act does not empower the High Court to declare a marriage null and void on the ground that the ceremonies necessary for a marriage enjoined by the Church have not been performed. The reason is simple and is this. Section 4 of the Divorce Act does not allow the High Court to exercise its matrimonial jurisdiction otherwise than under the rules laid down in theAct. The Act nowhere confers on the High Court a jurisdiction to hear a case for a declaration that a certain marriage is void because of non-observance of the essential rites of the Church. A suit based on the ground of non-observance of essential ceremonies must, therefore, be instituted in an ordinary court of original civil jurisdiction, namely in the court of a Munsif or a Subordinate Judge, according to the pecuniary and territorial jurisdiction of such court.

The Indian Christian Marriage Act (Act XV of 1872) lays down rules as to how a Christian marriage is to be solemnised in India. Section 5 of the Act lays down the rule on the point, and section 4 says that any marriage not solemnised in accordance with the provisions of section 5 shall be void. The Act (of 1872) does not specify the court in which a relief is to be sought by a petitioner. This means that he or she must seek such refief in an ordinary court of original civil jurisdiction in India and such a court would be the court of a Munsif or a Subordinate Judge, as stated above, in the province of Agra. It is no doubt open to the High Court, when such a suit is instituted in the court of a Munsif or a Subordinate Judge, to transfer it to itself and to try it under its extraordinary original civil jurisdiction. But no such suit is permitted by the law (section 4 of the Divorce Act, 1869) to be instituted directly in the High Court. It follows that the learned trial Judge of this Court was not authorised by the law to hear the suit, so far as it was based on the plea subsequently added by the petitioner.

The view of the law that has been taken by me was taken in the High Court of Calcutta in the case of Gasper v. Gonsalves(1), and the same view was taken in Patna in Adelaide Christiana Lish v. David Lish(2). So far as we are aware, only one court, namely that of Lower Burma, in Consterdine v. Smaine(3), took a contrary view; but I am not prepared to accept that view as the correct one. I may point out that the learned counsel for the petitioner could not make any satisfactory answer to the line of reasoning advanced on behalf of the appellant and accepted in this judgment. In one or two cases heard in this Court by WALSH, J., a suit like the present one was heard and decided. But in those cases no question of jurisdiction was ever raised or decided. These are therefore no authority for a contrary view. I hold that portion of the suit which is based on the ground that the marriage is void because certain ceremonies required by the rules and customs of the Catholic Church have not been observed, must be dismissed.

In this view, the question of the capacity of Father Livesay to celebrate amarriage does not arise. The priest never professed to be authorised to celebrate the marriage otherwise than as a marriage solemnised in

a Church. He did solemnise such a marriage, although he did not observe certain of the rules. Themarriage, therefore, cannot be held to be void on the ground that the person who celebrated it was not authorised to do so.

As the case may go before His Majesty in Council, I may make a few remarks on the merits, on this part of the petitioner's case also.

To start with, the amendment sought, for was a belated one and could be allowed only on condition of payment of costs by the petitioner to the opposite party. The appellant was, further, entitled to an opportunity to adduce evidence on the new case adopted for the petitioner. The appellant properly takes exception to the procedure of the learned Judge, in objection No. 4 of the memorandum of appeal.

The facts on which the case for the petitioner is based are told by Father Livesay, whom I have no reason to disbelieve, and appear to be as follows. The petitioner went to the Reverend Father Livesay, a secular priest of the Roman Catholic Church at Bhawali. He, at his second visit, proposed that he should be married to the appellant and that the appellant should be converted to Christianity by Father Livesay. It was arranged that the appellant should receive instructions into the doctrine and teachings of the Church of Rome before she was converted and that on her conversion she should be married to the petitioner. The appellant thereupon took up her residence in the out offices of the Church and there received instructions in Christianity for two to three weeks. On Monday, the 10th of November, 1930, during the morning service the appellant was baptised and in the same afternoon she was married to the petitioner according to the form of the Roman Church. On the 9th of November the banns were published. The flaws that are alleged to exist in the marriage of the parties consist of these. First, the rules of the Roman Church require that the banns should be published thrice before the marriage, and once at a time, either on a Sunday or any other sacred day, and at intervals of a week. The second flaw is that as it was going to be a mixed marriage, namely between the petitioner, a follower of a Protestant Church, and the appellant, a Roman Catholic, dispensation of the Bishop should have been obtained prior to the performance of the ceremony of the marriage. The learned trial Judge has held that owing to these flaws the marriage was void, because it was not performed in accordance with "the rules, rites, ceremonies and customs of the Church". That Father Livesay is an ordained priest is not denied; nor is it denied that if the banns had been proclaimed properly and if the dispensation of the mixed marriage had been obtained, the marriage would be otherwise flawless. The Roman Catholic Bishop of Allahabad, within whose diocese the marriage was performed, has sworn that according to the doctrines of the Roman Church the marriage is a good one, although the flaws mentioned above exist. The Bishop has supported his opinion with a quotation from "Legislation in the New Code of Canon Law" by Ayrinhac in support of his opinion. The learned trial Judge, however, was of opinion that although the marriage might be good according to the Roman Church, it was voidunder the statute law.

I fear there is a fallacy in this view. All rules are framed with the ultimate object of doing an act effectively and in such a manner that possible serious defects may be avoided. But there exists always a distinction between rules which are essential and rules which are not essential. The non-observance of essential rules will entail a nullification of the act itself; while the non-observance of non-essential rules need not lead to the same result. For example, under the Hindu law certain ceremonies including the recitation of certain mantras are enjoined for the due performance of an adoption or a marriage. But it has been repeatedly held that the non-observance of certain rules will not render the marriage or adoption invalid; while the non-observance of others will lead to a contrary result. In the case of a Hindu adoption what is essential is the giving and taking, provided of course that the boy adopted is eligible for adoption. The religious ceremony may not have been performed according to the strict rules of the religion. Similarly, instances may be quoted from rules of Muhammadan law. In modern times, statutes of procedure make a clear distinction between an essential and non-essential rule. The Civil Procedure Code of 1908 by section 99 lays down that "No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the court" A similar rule will be found in the Criminal Procedure Code in section 537.

The question whether the omission of the banns and the omission of the dispensation will make a marriage, otherwise valid, void is a question which must be decided according to the "rules, rites, ceremonies and customs of the Church". The Church, which lays down the rules, rites, ceremonies and customs, must necessarily also lay down which of such rules, etc. are essential and which are not essential. If the Church says that certain rules should be observed but that non-observance will not render the marriage void, there is nothing in section 5 of the Indian Christian Marriage Act, 1872, which says that such a marriage is to be declared void by a court.

According to the book, "Legislation in the New Code of Canon Law" by Ayrinhac, the banns are meant to discover if there is any "impediment" in the proposedmarriage. Want of banns does not invalidate a marriage celebrated by the Catholic Church; see article 44 and the note of the said book. The only impediment that existed in this case was that it was going to be a mixed marriage, i.e of a Protestant to a Roman Catholic. Article 127 tells the pastor not to celebrate a mixed marriage if he can dissuade the party following the Catholic Church from entering into it. If he cannot he is told to celebrate the marriage according to the rites of the Church. Article 129 indicates that a marriage of persons of different, but Christian, faiths, celebrated without a dispensation, is not void, but allows the parties to live together. At page 74 of the book is quoted the rule that a marriage with an impediment that is merely "prohibitive" is not void. There is no evidence before the court to contradict the Bishop or to show that the book he relies on does not disclose the correct law.

In this view of the situation, in my opinion the marriage in this case is not voidunder section 4 of the Act of 1872.

The next question that requires determination is whether the marriage is null and void because "the petitioner did not consent to the said marriage".

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Although the learned counsel for the petitioner tried to support the decree of this Court on the basis of allegations of fraud and force, he could not lay before us any evidence worth acceptance to lead us to the conclusion that any force or fraud had been practised. * * * I agree, therefore, with the court below in holding that neither any fraud nor any force was used to induce the petitioner to contract the marriagein question.

The main question of fact to be decided in this appeal is whether the petitioner is an idiot. To the question of idiocy the learned Judge has added the question whether the petitioner gave his free consent to the marriage. Before I consider this latter aspect of the case, I have to make, a few observations. First, the question of consent was never raised in the petition of the plaint and the question of consent is one of fact and could not be treated as a question of law. If, therefore, the question of consent was raised in the mind of the learned Judge, the proper course for him to adopt was to frame an issue, although the case had already closed, and to give the parties an opportunity to adduce evidence on the point. This was not done. The learned counsel for the parties could not point to any portion of the record to show that the learned Judge ever indicated, before he wrote his judgment, his intention of trying an issue as to the question of consent.

The next observation that I have to make is that in a case which has been tried on the question whether the petitioner is an idiot or not, it is not open to a trial court to make a new case based on the ground that although the petitioner was not an idiot, he was a feeble-minded man who could not have entered into a contract ofmarriage. The case of Durga Bakhsh Singh v. Muhammad Ali Beg(1), decided by their Lordships of the Privy Council, is entirely pertinent to the present case. There the plaintiff brought a suit on the allegation that he was a lunatic, and the mortgage bond in suit had been taken from him while he was suffering from lunacy. The case of lunacy altogether failed, but the learned Subordinate Judge drew the inference, on the basis of the evidence given to prove his lunacy, that the plaintiff was a man of weak intellect who could be easily influenced improperly to enter into the transaction he sought to dispute in the suit. Their Lordships of the Privy Council said that this could not be permitted, and they upheld the decree of the Judicial Commissioner of Oudh by which the plaintiff's suit had been dismissed.

The next observation that I want to make on the point is that want of consent, as such, does not find place in section 19 of the Divorce Act, 1869, as one of the grounds for declaring a marriage null and void. The reason why any state of mind which falls short of lunacy or idiocy has not been allowed to be a ground for annulment of a marriage is clear. A marriage is no doubt described as a civil contract, but it is far from being in the nature of an ordinary contract. A contract which is induced by fraud or force or coercion or misrepresentation is voidable at the instance of the party whose consent has been obtained by such influence and is not void in itself; see section 19 of the Indian Contract Act. In the case of amarriage it is either void or good. It would be impossible to talk of a marriage as "voidable" at the option of one of the parties while it should be binding on the other party. The observations to be found in the well known case ofMoss v. Moss(1) are very pertinent on the point. Persons differ from one another in the degree of intelligence possessed by them. It would be a dire calamity if it could be said as a matter of law that a marriage entered into by a person who is neither a lunatic nor an idiot is void simply because one of the parties lacks in intelligence, although he is able to understand the nature of the bonds of matrimony into which he is entering. As observed by HANNEN (PRESIDENT) in Durham v. Durham(2), the contract of marriage is a very simple one, which, does not require a high degree of intelligence to comprehend.

In dealing with the question whether the petitioner is an idiot or not I shall show that the petitioner was fully able to understand the nature of the ceremony that was performed at the Church of Bhawali, and thereby gave his consent to the marriagewithin the meaning of the Indian Contract Act.

I will now take up the question of the idiocy of the petitioner. On behalf of the petitioner his next friend, a sister four to six years older than himself, the petitioner himself and two medical gentlemen who appear to have been examined as experts, were examined to establish the plea of idiocy. I will first consider the evidence of the petitioner's sister, Miss Edith Jones.

Miss Edith Jones says that the petitioner is now 54 years of age. Miss Jones gives her own age as 60, while the petitioner himself gave his age to the court as 56. Even if we accept Miss Jones' information as the correct one, she is only six years older than the petitioner. She says that her mother and father were first cousins and both were healthy people, and there was no disease in the family. The petitioner was the ninth and last child of the parents and was not a normal child mentally. The abnormality showed itself in cruelty towards animals such as horses, chicken and dogs. She further says that the petitioner could not be taught in school and he had to be taken away. He was sent as an apprentice to a tea garden at the age of 15, but he came back home. Miss Jones further says that when her mother was carrying the petitioner, she used to take alcohol heavily and used to be sometimes unconscious. Without entirely disbelieving Miss Jones on the last mentioned point, I do find some difficulty in accepting her testimony as to the habit of her mother in drinking excessive beer or alcohol (at one place Miss Jones mentions beer and at another place she mentions alcohol). It is not very likely, that Miss Jones will have a clear memory as to her mother's habits at a time when she was only a child of five years. It is more probable that having seen her mother taking to drink excessively at an older age, Miss Jones is induced to believe that the mother drank heavily also when she was carrying the petitioner. From the mere fact that the peritioner was born of parents who were first cousins it cannot follow that the petitioner should be born an idiot. Evidently his elder brothers and sisters were not idiots.

Miss Jones' evidence has been read by me more than once, but I am not satisfied that she has been able to lay before us any facts which would induce us to believe that the petitioner is an idiot or even that his sister considers him to be an idiot. The facts which Miss Jones gave to the court to enable it to form its own opinion are these. The petitioner cannot carry on a sensible conversation, his words were not intelligible and he does not know the value of money. On the other hand, we find from the evidence of Miss Jones herself that the petitioner can read and write; that he writes a tolerably good hand; that he can draft a letter for himself; that he uses a fret-work machine for his amusement and that he rides, shoots and sometimes goes about fishing. Miss Jones in the course of the cross-examination repeated a statement of his brother which clearly shows that the petitioner is not at all an idiot, although there can be no doubt that he is a man of somewhat weak intellect and is dominated by his sister Miss Jones. Miss Jones mentions the following incident that took place soon after themarriage in

question was known to her: "I spoke to my brother about it and he went down on his bended knees and said he was sorry that such a thing had happened but that he was forced to it. They said it would not be good for him if he did not contract marriage and on point of honour he did it."

The petitioner, according to Miss Jones, stated two things as the cause of hismarriage. One was that he was forced to it by threats, a story which has not been accepted by the trial court and which cannot be accepted by me, and the other was that he married "on point of honour". When we know the history of the relations between the parties, we can understand how the question of "honour" came in. The appellant swore that she contracted intimacy with the petitioner when she was only a girl of 15. She was then already married. The learned trial Judge has accepted the story of the appellant substantially, by saying that the intimacy between the parties had been in existence for 25 years. The appellant being now 40 years of age, the intimacy must have begun when she was a girl of 15. The petitioner himself says that his intimacy with the appellant has been of long standing. According to the appellant the intimacy began at the age of 15, continued for some time and then her first husband left her on account of that intimacy. The intimacy was renewed after some year when the parties again met, the petitioner having come back from Dinapore where he had gone. It is possible, therefore, nay probable, that either of his own accord or being induced by the appellant herself the petitioner thought that he was in honour bound to make the appellant his wife. The petitioner knew that at his age he was not likely to have a wife from his own Anglo Indian community and if he did not marry the appellant, he must continue the illegal intimacy that had been going on. There is abundant evidence on the record to show (see the evidence of Father Livesay who gives the whole story clearly and honestly, and the statement of the petitioner himself) that the petitioner himself wanted that his marriage with the appellant should take place regularly, that is to say, after the appellant had been converted to Christianity, and that the marriage should be kept a secret. It was never the petitioner's intention that his wife should be received into the family by his sisters. These facts undoubtedly go to show that the petitioner is not an idiot but is a man who understands what he does. In the circumstances, it is impossible to accept Miss Jones' statement that "possibly the petitioner knows a funeral, but he never knows what a marriage ceremony is". Miss Jones, however, was forced to admit that she gathered from the petitioner that he knew that he had married Titli (the appellant) and further that he also knew that he had gone through a marriageceremony with her.

Coming to the statement of the petitioner Jones, it is important to note that while in the witness-box he was entirely in the hands of the learned trial Judge, who took care that counsel for the parties should not have any hand in Mr. Jones' examination, so that whatever he might say should come on the record unaffected by any taint (if I may say so) of the cleverness or the intelligence of the counsel.

Apparently the learned Judge asked Jones what had broughthim into court and why the learned Judge was there in court. In answer to these questions the petitioner replied: "I am here to say what I know about what I have done. Your Lordship is here to settle things about what has been done in connection with mymarriage with this woman." Probably in answer to a further question on the part of the learned Judge, namely "What do you want?" the petitioner replied: "I want themarriage set aside because it has lowered me." The learned trial Judge was satisfied, as he says in his judgment, that the petitioner knew what swearing was and he was allowed to be sworn. The petitioner himself said: "I know what swearing is". Now I ask the plain question—Can anybody say as to a man who gave these intelligent answers that he is an idiot? The only possible answer to such a question would be that he is not.

The petitioner's statement is recorded in over four printed pages of the record, and reading through and through this statement in connection with the questions that have been taken down, it is impossible to say that Jones is an idiot, and it is very difficult to say that Jones had not that amount of intelligence which would permit him to contract a valid marriage in law. The learned counsel for the petitioner was asked to point out the answers which could be taken as the answers of an idiot. The only answer that he was able to point to was "About four days", which Jones stated in answer to the question how long it would take one to get from here (probably Allahabad) to Bhim Tal. The next question that was put to him was, "Do you remember how long it took coming down?" The answer was "No." No further question was put to the petitioner as to why he thought

that it would take him four days to perform a journey from Allahabad to Bhim Tal. He might have been able to give some answer which was satisfactory. The learned trial Judge asked Jones why he married the appellant, and in answer to that he said as follows: "Because her brothers kept on worrying me and saying 'Ab jaldi honi chahiye' (i.e it should be hurried up). I know I was making her Mrs. Jones when I married her. I knew that after the ceremony she would be my wife." Can it be said in respect of the petitioner, who stated that he was making the woman "Mrs. Jones" and that after the ceremony was over she would be his wife, that the petitioner did not understand the nature of the act that he was performing? The petitioner in answer to another question relating, to how he was amusing himself at Allahabad said that he was looking at books and was going out for walks. He added that he did not go to the pictures and he did not like them. This was not the answer of an idiot. Further, a man who takes delight in books and in a healthy walk cannot be an idiot. His dislike for pictures (Cinemas) cannot be described as due to his mental deficiency. Many intellectual people do not like the pictures. It will be remembered that early in his deposition Jones said that he wanted the marriage to be set aside because it had lowered him. Long after he had said that, he was asked "What makes you think that you have lowered yourself by marrying this woman?". He answered "Because she is a low caste woman and I am of the Church of England." This is not an idiot's answer. He knows that was the view that had been taken by his sister, and he also knows that the fact of his marriagehaving been discovered, it would be well for him if he could get out of the difficulty. Miss Jones has told us that she told her brother (the petitioner) that he had disgraced the family by bringing such a woman into it and that she also told him that she and her sister would have nothing to do with him if he had her with him and that he would have to choose between the woman (the appellant) and the family. She further told the court that after this threat the petitioner went away very penitent and that he, the petitioner, was in the same state of health at the time of this conversation as he had been in previously for a month or two. It is, therefore, not the case for the petitioner that it was in a weak moment and at a time when he was suffering in health that he entered into the marriage.

Having read the evidence of the petitioner through and through and having read the evidence of his sister, I am clearly of opinion that the petitioner is not only not an idiot, but that he was quite capable of understanding the nature of the ceremony that he went through with the appellant, namely the marriage.

There is evidence of two witnesses, whom I have already mentioned, on behalf of the petitioner, and it is necessary to deal with that evidence before the case can be finally decided. Captain Aitchison, the Civil Surgeon of Allahabad, was examined as an expert. He kept the petitioner under his observation for sixteen days and talked to him occasionally, and he expressed the opinion that the petitioner was an idiot and that he was deficient in reasoning power. The witness further stated: "The term (idiot) varies medically from a man completely a plant to a man who though able to profit a little from education is still unable to manage his own affairs. The petitioner is deficient in reasoning power." Later on, the learned doctor told the court that he had applied Binet and Simon tests and that he had come to the conclusion stated above. At the end of the questions put by the petitioner's counsel the learned doctor said: "I do not think he (the petitioner) can give evidence. If the questions put to him are simple, he may answer them, but I do not think he would understand them." As I have said, the petitioner did give his evidence, and intelligently too; that the questions put to him were not always quite simple and that he did understand them and did answer them like a man who understood the questions.

Now the question arises. What is the value of the evidence of Captain Aitchison? I may mention before going further that according to Mr. Aitchison's estimate the petitioner has the mentality of a child of six. The trial Judge rejected his (Captain Aitchison's) opinion that the petitioner was an idiot and came to the conclusion that the petitioner was not an idiot. The learned trial Judge however thought that the petitioner had the mentality of a child of nine, that is to say, was much more intelligent than a child of six.

Captain Aitchison was apparently examined as an expert, and we have to consider what is the nature of the evidence that an expert may give and what is the weight which a court should give to such evidence. The Indian Evidence Act deals with the case of expert witnesses in section 45. It runs as follows: "When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting or finger

impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts." Then section 51 says: "Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant." I take it that Captain Aitchison was called as a man of medical science to express an opinion as to whether the mentality of the petitioner was that of an idiot or not. Accepting for the moment, though not deciding, that the word "idiot" is a term of medical significance, according to the witness the term is used medically in a large variety of cases, it being applied to a man who is completely a plant and to a man who though able to profit a little from education is still unable to manage his own affairs. This is a definition which would indeed cover a large variety of cases, and if we apply this definition we shall have probably to include in the term spendthrifts, who having partly run through their estates apply to the Court of Wards for taking over the managements of their estates on the ground that they are unable to manage their own affairs. These spendthrifts may be unable to manage their own affairs, but it is difficult to say that, if they are Christians and if they are governed by the Divorce Act, their marriages are also liable to be declared null and void owing to their being idiots. Evidently such a definition would not do for our purposes and would not at all fit in as an interpretation of the word "idiot" as used in section 19 of the Divorce Act. It is true that Captain Aitchison later on stated in his evidence before the court that his final diagnosis was that the petitioner's was "a case ofamentia amounting to idiocy in its more minor form, and is definitely more than feeble-mindedness." I have already mentioned that in the opinion of Mr. Aitchison the petitioner could not give evidence and that he might be able to answer simple questions, though the learned doctor thought that the petitioner would not be able to understand even simple questions.

The opinion of an expert by itself may be relevant but would carry little weight with a court unless it is supported by a clear statement of what he noticed and on what he based his opinion. The expert should, if he expects his opinion to be accepted, put before the court all the materials which induced him to come to his conclusion, so that the court, although not an expert, may form its own judgment on those materials; section 51 of the Evidence Act. In the evidence of Captain Aitchison the materials on which his opinion was formed are, generally speaking, wanting. If he had given the questions which he put from time to time and the answers he got to those questions, if he had told us that he observed the petitioner from time to time without the petitioner knowing that he was being watched and if we had been told what Captain Aitchison observed, we might have been in a position to say whether the opinion of the expert should be accepted or not. The mere mention that a certain kind of tests, known as Binet and Simon tests, were applied and certain results were obtained might be relevant as a piece of evidence but would not be conclusive.

As is well known, the Binet and Simon tests are applied to children to test their intelligence and they are in the shape of questions which a child of a certain age may be expected to answer. If a child of five answers questions meant for a child of five, it will be taken that it has the intelligence of its age. Similarly a youth of ten may not be able to answer the questions meant for a youth of his age and may be able to answer questions meant for a child of seven only. In that case he would be supposed to have the intelligence of a child of seven only. We do not know what questions were put by Captain Aitchison to Mr. Jones and what answers he received.

On the other hand, as I have pointed out, the evidence of the petitioner himself, covering a large area, itself nullifies the opinion of Captain Aitchison that the petitioner has the mentality of a child of six and that he is an idiot. The meaning of the term "idiot", according to Murray's English Dictionary, is stated to be "a person so deficient in mental or intellectual faculty as to be incapable of ordinary acts of reasoning or rational conduct." The petitioner, who has a license to hold a gun for shooting, who does go about shooting, who rides a horse, who sometimes goes about fishing, who can compose a letter for himself and write it in a tolerably good hand, who reads books to pass time, who is invited to tea parties, who knows the nature of the transaction in which he entered with the appellant and indeed who arranged for it with Father Livesay, cannot be called an idiot in the ordinary acceptance of the word, namely as "a person so deficient in mental or intellectual faculty as to be incapable of ordinary acts of reasoning or rational conduct."

We find that the word "idiot" has been used in the Mental Deficiency Act, 1913. The object of this Act is to control persons who cannot manage themselves. Four classes of mentally deficient persons are mentioned

and the fourth and worst of these is described as an "idiot". The others are "imbeciles", "feeble-minded persons" and "moral imbeciles". The fact that the legislature chose the word "idiot" to indicate the worst kind of mentally deficient person goes to show that it was the fittest word to signify the idea. In this Mental Deficiency Act, 1913, idiots are defined as "persons so defective in mind from birth or from an early age as to be unable to guard themselves against common physical dangers". Certainly this definition cannot be applied to the petitioner.

Then we find in the book "Clinical Handbook of Mental biseases" by Lt. Col. Shaw,I.M.S, that mental diseases are placed under four categoies, namely (1) feeble-mindedness, (2) imbecility, (3) moral imbecility and (4) idiocy. Idiocy is said to be that state of the mind in which there is a profound mental defect and the person is unteachable.

Captain Aitchison has described the petitioner as an idiot of the microcephalic type with a monkey face and ears sticking out. This, no doubt, is a description of some kinds of idiots, to be found in medical books; for example, see "A Text Book of Practice of Medicine" edited by F.W Price, 11th edition, pages 1738-41. Having seen the petitioner in court, I find myself unable to say that he has the face of a monkey or that his head is so small in proportion to his body as to attract attention. His ears, no doubt, do stick out. But no authority has been quoted to us from medical books that a man with a small head and a monkey face and sticking out ears mustnecessarily be an idiot. As I have observed, however, the petitioner has neither a monkey face nor has a head which is noticeably small in proportion to his body. His head was measured with a tape and the measurement was 20 inches. The inside of the hat measured 19½ inches. Surely this is not an unusually small head.

We are not bound by the definition of an "idiot" as found in medical literature. We have to read the word "idiot", used in section 19 of the Divorce Act, as a word used in its ordinary significance. But even if we apply to the word its medical meaning, the petitioner cannot be called an idiot; much less can he be called an idiot if we treat the word "idiot" as having been used in its ordinary sense in the English language.

I must hold and do hold that I should not allow Captain Aitchison's evidence to override the inference to be drawn from the remaining evidence on the record.

The other witness on the point is Dr. Rahmat Ilahi Siddiqi. He is not a man of any great qualification, having obtained his license, which he wrongly calls his "degree", from the Agra Medical School. He saw the petitioner in 1930-1931 and a part of 1932, and he is of opinion that "Mr. Jones is suffering from amentia or congenital idiocy." He does not tell us that he treated Mr. Jones for anything which would indicate any mental deficiency. Indeed he does not tell us what for he treated Mr. Jones. He did not treat him in 1930 and says that "piobably he treated him in 1931". He talked to the petitioner only twice, once when he went to see the petitioner for an illness and then again when the petitioner went to him to his hospital with a gun. The witness does not remember what was the subject on which he and the petitioner talked or what sort of conversation they had, on the first occasion. On the second occasion the witness says that he and the petitioner had a talk about "shikar" or sport. These are not sufficient data for arriving at any adverse conclusion as to the mentality of the petitioner. The witness ended by saying: "His peculiar look, his small head in proportion to his body, his manners and his habits gave me the general impression that Mr. Jones is an idiot." This will hardly do. In cross-examination the witness did not fare better and I leave him there.

I come to the conclusion that the petitioner is not an idiot within the meaning ofsection 19 of the Indian Divorce Act, that he understood the nature of themarriage transaction in which he entered and that the marriage cannot be declared as a nullity on any of the grounds mentioned in section 19 of the DivorceAct, or on the ground of want of intelligent consent. In the result, I would allow the appeal, set aside the decree of this Court and dismiss the petitioner's suit with costs throughout.

SULAIMAN, C.J:— I concur in the order proposed. It is only in deference to the opinions expressed by two learned Judges of this Court, with considerable experience of matrimonial cases, whom we are overruling, that I wish to add a few words separately.

Quite apart from the question whether the issue as to the want of necessary ceremonies was properly raised at a late stage in the case, I fully agree that the High Court has no jurisdiction to entertain the suit under the Indian Christian MarriageAct (Act XV of 1872) on its original side.

No doubt under clause 26 of the Letters Patent the matrimonial jurisdiction between persons professing the Christian religion was conferred upon this Court. But under clause 35 the provisions of the Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council. Whatever wider powers might have been vested in the High Court, section 4 of the Indian DivorceAct (Act IV of 1869) considerably curtailed them. The jurisdiction then exercised by the High Courts in respect of divorce a mensa et toro, and in all other causes, suits and matters matrimonial, was to be exercised thereafter subject to the provisions of that Act "and not otherwise". Section 7 of the Act did not confer any additional jurisdiction, but merely provided what principles and rules were to be followed when a suit was properly entertained. It is therefore quite clear that no matrimonial suit, other than those which can fall within the scope of the Divorce Act, can be entertained by the High Court. The grounds on which a suit can be entertainedunder the Divorce Act are indicated in section 19. The principles and the rules which are to be followed may, under section 7, be as nearly as may be conformable to the principles and, rules on which the Courts in England act.

The Indian Christian Marriage Act, inter alia, lays down how and by whom marriages are to be solemnised. No section in this Act confers any jurisdiction on the High Court to entertain a suit for a declaration that a marriage is null and void for want of necessary ceremonies. In the absence of any specific provision to that effect, obviously a suit for a declaration that a marriage is null and void on account of nonconformity with any of the indispensable conditions laid down for its solemnisation would lie in the subordinate civil court. If a suit were pending in such court, the High Court may in the exercise of its extraordinary jurisdiction transfer it to its own file; but the High Court has no jurisdiction to entertain a suit under this Act direct. Indeed, it seems that a suit for a declaration that a marriage is null and void on grounds other than those mentioned in section 19 of the Indian Divorce Act would be a suit under the Specific Relief Act only.

It is unnecessary in this case to consider whether the marriage in dispute was null and void on account of the omission of any rules, rites, ceremonies or customs. The Indian Christian Marriage Act does not lay down what such rules, rites, ceremonies and customs are. The burden would lie on any party, who asserts that any such rules, rites, ceremonies and customs were not observed, to prove not only the omission but also that such rules, rites, ceremonies or customs were absolutely essential and indispensable in the sense that on account of their not being duly performed the marriage itself was void.

In the present case the Bishop of Allahabad has stated as his opinion that the non-observance of certain requisites was a mere irregularity and was not fatal. Of course, a court is not bound to accept the opinion of a religious expert, however high he may be placed in the Churph. The duty is on the court itself to decide as between the parties before it as to whether the marriage was void or not. But a decision cannot be given merely because in some religious text books certain things are enjoined or certain other things are prohibited. The question would still remain whether their non-observance is fatal. This question can be answered only if clear texts in religious books of high authority were to lay down in express terms that the non-compliance with any such provision would render the marriage null and void. It is not a mere matter of an opinion of an expert or a Judge, but a matter depending entirely on the authority of the texts relied upon. I may add that the learned advocate for the respondent has drawn our attention to passages in Ayrinhac's "Marriage Legislation in the New Code on Canon Law" which show what things are forbidden and what are major and minor impediments tomarriage. But our attention has not been drawn to any passage where it is said that where a marriage between a Roman Catholic and a Protestant has been performed the marriage is null and void, or that if banns have been called less than three times the marriage is a nullity. It has been subsequently brought to my notice thatsection 77 of the Indian Christian Marriage Act would cover some irregularities. As the question does not arise in this case, I am not called upon to express any final opinion on this point.

The petition in this case was based on four grounds out of those mentioned insection 19 of the Divorce Act. The case that the appellant had a husband living at the time of marriage was abandoned at the trial. The learned Judge has found that no force or fraud has been established in this case. He has also recorded a finding that "I do not think that it can be said that he (the respondent Mr. Jones) is an idiot within the meaning of section 19(3) of the Indian Divorce Act, which classes lunatics and idiots together." The issue of idiocy has been decided in favour of the wife. But these findings are challenged on behalf of the husband.

It is nobody's case that Mr. Jones is a lunatic, but it is said that he is an idiot. An "idiot" is not defined in the Divorce Act or the General Clauses Act or in any other Indian Act, but undoubtedly idiocy is a form of congenital insanity. It is a form of insanity due to the absence of development of the mental faculties and intelligence from very childhood.

So far as the definition of an insane person, i.e a man of unsound mind, is concerned, there has always been a difference between the points of view of a medical man and a lawyer. I had occasion to point out this difference in the case ofPancha v. Emperor(1). There are many persons who would be considered insane by medical men who do not come up to the standard of insanity as prescribed by law. The law has set up a very high standard and the only test which has been laid down is as to whether the person was "by reason of unsoundness of mind incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law": section 84 of the Indian Penal Code. This, in a sense, is the definition borrowed from the opinions of the fifteen Judges in Daniel McNaghten's case(2) who unanimously laid down that "to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, he did not know he was doing what was wrong." The learned Judges further pointed out that if a person labours under a delusion, he must be considered to be in the same situation as if the fact with respect to which the delusion exists were real, that is, the delusion must have reference to the fact in issue. Anything short of this standard, however much it may be regarded to be a case of insanity according to the medical science, is not insanity as recognized by law. The medical science has a long category of various degrees of abnormality which are thought to be insanity. They include idiocy, imbecility, feeble-mindedness and subjectivity to stupor, exaltations, delusions, impulses, etc. Indeed, abnormality in one form or another is considered according to medical books as a species of insanity, but that is not the legal view.

It has been argued before us that the word "idiocy" in section 19 should be taken in a wider sense than insanity.

The only Act in England in which idiocy has been defined appears to be the Mental Deficiency Act of 1913 (3 and 4 Geo. V., ch. 28). Section 1 contains the definition of "defectives" who are classified into four categories:

"(a) Idiots; i.e, persons so deeply defective in mind from birth, or from an early age, as to be unable to guard themselves against common physical dangers;

"(b) Imbeciles; i.e, persons in whose case there exists from birth or from an early age mental defectiveness not amounting to idiocy, yet so pronounced that they are incapable of managing themselves or their affairs;

"(c) Feeble-minded persons; i.e, persons in whose case there exists from birth or from an early age mental defectiveness not amounting to imbecility yet so pronounced that they require care, supervision and control for their own protection and for the protection of others;

"(d) Moral imbeciles; i.e, persons who from an early age display some permanent mental defect coupled with strong vicious or criminal propensities on which punishment has had little or no deterrent effect."

No doubt this definition of idiots and the distinction from imbeciles, feeble-minded persons and moral imbeciles is not absolutely binding upon us. All the same this Act furnishes a clue to the underlying distinction and is a good guide to us.

Furthermore, this classification and distinction is in perfect accord with medical books of high authority.

In Taylor's Medical Jurisprudence, volume I (6th Edition), at page 812 it is stated:—"Idiocy is the dementia naturalis of lawyers. The term 'idiot' is applied to one who from original defect has never had mental power. Idiocy differs from the other states of insanity in the fact that it is marked by congenital deficiency of the mental faculties. There is not here a perversion, or loss of what has once been acquired, but a state in which, from defective structure of the brain, the individual has never been able to acquire any degree of intellectual power to fit him for his social position. It commences with life and continues through it, although idiots are said rarely to live beyond the age of 30." He then goes on to point out that a perfect idiot recognises no one, remembers no one and his mind seems to be blank, he has a mere nominal instinct without any will. He also points out that this perfect state of idiocy is often accompanied with great bodily deformity He, however, does not mention prominent ears as any sign. The learned author then goes on to distinguish from this complete form of idiocy, a state called imbecility, i.e, idiocy in a minor degree. He says: "There is a state, scarcely separable from idiocy, in which the mind is capable of receiving some ideas and of profiting to a certain extent by instruction. Owing, however, either to original defect, or to a defect proceeding from arrested development of the brain as a result of disease or other causes operating after birth, the minds of such persons are not capable of being brought to a healthy standard of intellect, like that of an ordinary person of similar age and social position." Then there are still more minor forms of abnormality with which we are not concerned. It is clear, therefore, that although the precise boundary between idiocy and imbecility cannot be defined, for imbecility when it reaches a high order may verge on idiocy, there is a well-marked distinction between the two and there can never be a doubt except as regards those just on the boundary line.

The same distinction has been accepted by Lyon and Waddell in their Medical Jurisprudence. In giving the various forms of insanity at page 333 (fifth edition) they give the first group as amentia or congenital insanity due to the arrest of development of the nerve centres. This is sub-divided into: (1) "Idiocy or complete amentia, where the arrest of development not only affects the higher or intellectual nerve centres but appears also to affect the centres of sensorial perception. Hence in the fully developed form of complete amentia the individual carries on a mere vegetable existence, not having the sense even to eat or drink. In the more common and less developed form there is a certain amount of intelligence; the individual recognises his friends, is capable with extreme difficulty of acquiring a certain amount of education, and is able to make his wants known by signs, or imperfectly articulated words." (2) "Imbecility or partial amentia, where there is not that marked want of development of the centres of sensorial perception which is present in idiocy …. Imbecility takes two forms: (a) Intellectual imbecility and (b) Moral imbecility. We are not in this case concerned with any other forms which medical science may regard as a species of insanity."

Price on Practice and Medicine (page 1737) draws the same distinction between idiots, imbeciles and feebleminded persons. An idiot is one unable to guard against common physical danger and in him there is a total or almost complete absence of intelligence. An imbecile has rudimentary intelligence; whereas a feeble-minded person has a yet larger amount of intelligence.

It is, therefore, clear that in order to find that a person is an idiot it is not sufficient to find that he is a mere imbecile. One cannot be an idiot unless his faculties have not at all been developed and he has not acquired any appreciable intelligence.

The answer to the fifth question given by the learned Judges in McNaghten's case(1) related to medical opinion. As it is very often overlooked by courts when examining a medical expert, it is necessary to quote here both the questions and answers:

"Q.—Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial but who was present during the whole trial and the examination of the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law or whether he was labouring under any, and what, delusion at the time?"

"A.—We think the medical man under the circum stances supposed cannot, in strictness, be asked his opinion in the terms above stated, because each of those questions involved the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not questions upon a mere matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."

Section 45 of the Indian Evidence Act equally lays down limits within which expert evidence can be taken.

Considerable difficulty is always experienced because of the vast difference in the two points of view. A medical man's conception of an insane, a lunatic or an idiot is utterly different from the legal conception. Accordingly, when a medical man makes a bald statement that in his opinion a particular person is an insane or an idiot, his statement is inconclusive. To give an instance in the present case, Capt. Aitchison, after stating that he thought "as a medical officer that he (Mr. Jones) is an idiot", proceeded: "The medical definition of an idiot is very wide. The term varies medically from a man completely a plant to a man who, though able to profit a little from education, is still unable to manage his own affairs. The petitioner is deficient in reasoning power." It is at once apparent how wide is the divergence. Medical opinion that a person is an idiot because he is unable to manage his own affairs is useless in an inquiry as to whether the person is an idiot in the eye of the law. A mere opinion that a certain person was not fit to enter into a contract of marriage does not carry us very far. The development of the plaintiff's faculties of seeing, speaking and hearing have not in the least been arrested. The three symptoms pointed out by the Civil Surgeon, namely (1) small head, (2) large sticking-out ears and (3) prognathous jaw, are equally inconclusive. The Civil Surgeon did not mention the measurements of the head of the respondent: We have had them taken. The circumstance of Jones's head is 20 inches. The inner circumference of the hat which he wears is of the dimension of 19½ inches. No medical authority has been cited before us to show that a person with so small a head must be an idiot. Much less is there any indication in what percentage of cases with small heads of this size idiocy is found. As regards the large sticking-out ears there is still less any authority to support it. Except among a particular hill tribe, the prominence of ears does not appear to have been noted as any sure sign of idiocy. Indeed, our common experience would point to the contrary. Much less is there any material to show in what percentage of cases prominent ears are found to exist among idiots. Prognathous jaw has been considered to be a symptom of criminality, and as it may be a sign of abnormality it may also be some indication of insanity. But there are no materials before us to show in what percentage of cases prognathous jaw is found among insanes. These physiological tests laid dorwn by the Italian School of Anthropology are not accepted as any test worthy of consideration by courts of law. Differences in physical appearance vary considerably from race to race and country to country, and they cannot be laid down as any unmistakable guidie to the mental capacity of the person concerned.

With regard to the Binet-Simon tests, it is quite sufficient to say that these are mere intelligence tests invented for the purpose of finding out the degree of intelligence of school children. They are utterly useless if a person is examined during the course of a trial when there is the possibility of his pretending to be an idiot in order to prove his case. The only possible way is to watch him when he does not suspect that he is observed. Unfortunately the Civil Surgeon has not rioted what tests the respondent did not come up to. These mental tests are purely eliminative in their nature. One can say what an individual is not fit for; what he cannot do. It was therefore necessary to place on the record what Mr. Jones was found to be unfit for or incapable of doing. Unfortunately we have no such record. There are only certain answers given to certain questions which undoubtedly show a very deficient intelligence and memory. But the curious thing is that there is a marked

contrast between those answers and the statement made on oath by Mr. Jones at the trial. The questions and the answers given by Mr. Jones in the witness-box cover about four pages and a half of printed matter. With the one solitary exception when Mr. Jones wrongly stated that it would take about 4 days to go from Allahabad to Bhim Tal, there is not a single answer which can even be suggested not to have been intelligent, rational or to the point. They bean not even the remotest resemblance to the talk that took place during the private examination of Mr. Jones by the Civil Surgeon. The contrast is so striking that one cannot help feeling that there had been simulation. My learned brother has discussed that statement at length and it is not necessary for me to cover that ground over again. All that I can say is that having read the entire statement carefully I cannot possibly come to the conclusion that the development of Mr. Jones's intelligence has been arrested to such an extent that he is not able to understand what a marriage is and what its consequences are or is incapable of voluntarily consenting to his marriage.

As Captain (now Major) Aitchison was examined before the statement of Mr. Jones was recorded, that statement was not placed before the Civil Surgeon and he could not be asked whether in view of the statement which he made in court he would not change his opinion. The learned doctor admitted that there was a distinction between absolute idiocy and imbecility, but explained that the latter was a less severe form of idiocy. According to his medical notions he no doubt stated that in his opinion Mr. Jones was an idiot with the intelligence of a child of six years, and that he would be prepared to certify that Mr. Jones was of unsound mind. But obviously he was using this phraseology in a rather loose way and in the medical sense only, as his attention was not drawn to the standard of idiocy or unsoundness of mind required by law. And this is why the learned Judge himself could not endorse his opinion and had to record a finding that idiocy within the meaning of section 19(3) of the Indian Divorce Act had not been established.

It is unnecessary to examine in detail the opinion of the Sub-Assistant Surgeon who has based his opinion on his general impression and also because on one occasion instead of his answering a question about his health satisfactorily, his sister replied on his behalf, and on another occasion when asked whether he had sound sleep he replied in the affirmative while his sister intervened and said "no". The only other thing which he can remember is that Mr. Jones once said that he was not constipated while the doctor when feeling his stomach thought that he was. The Sub-Assistant Surgeon apparently overlooked that during the interval of time between the rise from sleep and the question by the doctor he might have had his breakfast or a drink. His statement that Mr. Jones is not capable of managing his business affairs is of hardly any significance.

My learned brother has dealt with the omission to frame an issue as regards want of consent. There seems to be no doubt that the learned Judge had this issue in his mind, as he has referred to it in his judgment, but as no such issue existed on the record the respondent's counsel might well have understood that no such issue had in fact been framed. This plea was not raised in the petition nor in any of the two applications for amendment filed by the petitioner. It raised a question of fact which, without having been made the subject-matter of an issue, could not properly be raised at the trial, as it would take the opposite party by surprise. Even if, therefore, the question were necessary, I would be compelled to send down an issue on this point for determination after taking evidence of both the parties. But I agree that the question of consent outside section 19 of the Divorce Act hardly arises. Where a person is a lunatic or an idiot he is, of course, incapable of understanding the true nature of the transaction and knowing its consequences. Any consent given by such a person is a consent in form and appearance only and not in substance. On proof of lunacy or idiocy a want of consent follows. Similarly where force or fraud has been established the consent obtained by such means is hardly a real consent. It is vitiated as not being a voluntary and free consent. But where consent has been given without any force or fraud and by a person not a lunatic or idiot, it can hardly be said that there was no consent at all.

The grounds on which a marriage can be declared null and void are set forth insection 19. It may also be conceded that under section 7 of the Divorce Act the court has to follow the rules and principles accepted by the English Courts. But there is no English authority for the proposition that a consent knowingly and consciously given is not a consent so as to make the marriage binding. In Durham v. Durham(1)the President accepted the definition which had been substantially agreed upon by the counsel that there should be "a capacity

to understand the nature of the contract and the duties and responsibilities which it creates." Of course, a mere comprehension of the words of the promises exchanged at the time of the marriage is not sufficient. The mind must not only be capable of under standing the language used but must also not be affected by such delusions or other symptoms of insanity as may satisfy the tribunal that there was not a real apprehension of the engagement apparently entered into. The learned counsel for the respondent has strongly relied on the case of Moss v. Moss(1). But there too, although the learned Judge noted that the voluntary consent of the parties is required, he also observed that no marriage is held void merely upon proof that it had been contracted on false representations; unless the party imposed upon has been deceived as to the person, and thus has given no consent at all, there is no degree of deception which can avail to set aside the contract of marriage knowingly made; and that in English law when fraud is spoken as a ground for avoiding a marriage this does not include such fraud as induces a consent but is limited to such fraud as procures the appearance without the reality of consent. Even in cases of men who are partially insane the basis was either a perpetration of fraud by taking advantage of his weakness or an involuntary consent procured by pressure and coercion.

Not even any early English case has been cited before us in which a marriage was actually declared to be null and void when the want of consent was held to be due to something short of lunacy, idiocy, force or fraud. Much less is there any such case after the exposition of the law relating to unsoundness of mind in Daniel McNaghten's case(2). A later case of Harrod v. Harrod(3) is very instructive. At page 8 the VICE-CHANCELLOR explained the two species of unsoundness of mind as follows: "Unsoundness of mind may be occasioned either by perversion of intellect, manifesting itself in delusions, antipathies, or the like; or it may arise from a defect of the mind. There is no allegation here of anything like a perversion of the mind, or what is more properly called mania. With respect to defects of the mind, they are of two kinds: The mind may be originally so deficient as to be incapable of directing the person in any matter which requires thought or judgment, which is ordinarily called idiocy; or the defect may arise from the weakening of a mind, originally strong, by disease, or some accident of a physical nature, by which memory is lost and the faculties are paralysed, although there is no perversion of the mind, nor any species of that insanity which is ordinarily called mania." The defendant in that case had tried to put forward a casent simple idiocy invalidating the marriage of a lady, who was shown to have been deaf and dumb and of extremely dull intellect. Other people could not make her comprehend anything, she had never been taught to talk with fingers, nor could she read or write; her mother never allowed her to leave the house alone; she was also unable to cell the value of money and she did not know how to give change. The VICE-CHANCELLOR held at page 9: "It is clearly the law that the presumption is always in favour of sanity, and there is no exception to this rule in the case of a deaf and dumb person; but the onus of proving the unsoundness of mind of such a person must rest on those who dispute her sanity." Even on the evidence for the defence alone he remarked that he should not have been disposed to direct an issue on the question. At page 14 the learnedVICE-CHANCELLOR observed: "I am, therefore, of opinion that there is nothing in this case to show that the plaintiff's mother was of unsound mind; and as no case of fraud is alleged, there is nothing more to be done." In the result he held that her marriagewas not invalid.

It is certainly possible that coercion or fraud may be practised on an imbecile who has a very weak mind. But this has to be established affirmatively. When lunacy or idiocy is not proved, it cannot be said that there has been any lack of understanding or consciousness. When force or fraud has not been established, it cannot be said that there has been no real consent. A marriage is not like a mere civil contract which may be voidable at the option of one party on grounds mentioned in the Indian Contract Act. It is either good or void; there is no middle course.

I agree with my learned brother that on the evidence in this case, which has been discussed by him at length, it is impossible to hold either that Mr. Jones was an idiot within the meaning of section 19 of the Divorce Act or that he was incapable of giving consent and did not voluntarily consent owing to force or fraud having been practised upon him after taking advantage of any imbecility of his mind. According to his own statement he understood what he was doing and realised what a marriagemeant, and we also know the reason why he now wants to have it set aside.

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SMT S SANGEETA VERSUS K R HARI

Chattisgarh High Court

HIGH COURT OF CHATTISGARH AT BILASPUR

First Appeal M No 2 of 2006

Smt S Sangeeta ...Petitioners

v.

K R Hari ...Respondents

Smt Indira Tripathi counsel for the appellant

Shri Prafull Bharat counsel for the respondent

(Hon'ble Mr. Justice Dhirendra Mishra & Hon'ble Mr. Justice R N Chandrakar, JJ.)

Decided on 18/03/2010

JUDGMENT

The appellant/wife has categorically denied the allegations made by the respondent/husband and deposed that her husband was suffering from paranoid schizophrenia since 2002 for which she took him to Doctor Ravi Prasardi in Kerala and thereafter to Doctor Pramod Gupta at Durg but he was not regular to his treatment and as soon as he gave up the medicine, he started committing marpit with her and once he tried to pour hot oil over her. Therefore, she left the house of the respondent/husband and made complaint against her husband in Mahila Thana, which is Ex.D/6. Thereafter, she sent notices Ex.D/7 & D/8 to the respondent/husband through her counsel and filed divorce petition against the respondent which was subsequently withdrawn vide Ex.D/9, looking to the welfare of their children. Thereafter she along with her daughter went to live with the respondent/husband, but he was not willing to live with her wife and threw her out of his house in the night. The other allegation regarding watching obscene movies and enjoying wine by the respondent/husband with his friends is concerned, it is corroborated by Suresh Pillai (DW/2) and their evidence remained unrebutted. Thus, it is clear that the counter allegations made by the appellant/wife are not vague but well founded and the same do not amount to cruelty.

…….For the aforesaid analysis, we are of the opinion that the learned Family Court erred in reaching to the conclusion that the appellant/wife treated the respondent/husband with cruelty by leading adulterous life and granted a decree of dissolution of marriage in favour of the respondent/husband. Accordingly, the appeal is allowed and the judgment and decree for dissolution of marriage between the appellant and respondent is hereby set aside.

Per Rangnath Chandrakar, J.

By this appeal, the appellant has challenged the legality and propriety of the judgment and decree dated 2-8- 2006 passed by the learned Principal Judge, Family Court, Durg (CG) in Civil Suit No. 512-A/2005, whereby the application filed by the respondent herein under Section 13 (1) of the Hindu Marriage Act, 1955 (for short, the Act, 1955) for dissolution of marriage between the respondent and the appellant was allowed. The decree is impugned on the ground that without any proof of adultery the court below has passed the decree of divorce and thereby committed illegality.

2) The facts of the case, in brief, as projected before the Family Court are that the marriage between the appellant and respondent was solemnized on 21-5-1989 according to Hindu rites and rituals in Kerala. Both the appellant and respondent are government servants. After marriage they resided together at Durg and out of their wed-lock two children (son and daughter) were born namely Shreyash and Shruti. The appellant/wife and respondent/husband were successfully leading the married life but in the year 2002 the respondent/husband received excessive telephone bill and on verification it was found that the most of calls were made from Korba and Bilaspur. On this, the respondent/husband enquired from the appellant who told him that she used to telephone her old friend namely Chandrahash Dewangan. This act of the appellant was objected by the respondent but the appellant did not heed his words which caused the respondent grievous mental agony and taking benefit of the status of mind of the respondent, the appellant/wife took him to one Psychiatrist namely Dr. Pramod Gupta for medical treatment. Thereafter, the appellant/wife in collusion with Dr. Pramod Gupta tried to declare him mental patient by providing improper treatment. On this, the respondent consulted the Psychiatrists at AIMS, New Delhi as also in Sector 9 Hospital, Bhilai, who opined that the respondent was not suffering from any mental disorder. The respondent further pleaded that the appellant/wife was a woman of easy virtue and accustomed to make relations with other persons and to fulfill her desire she used to torture the respondent/husband with a view to live separately. In the year 2004 the appellant developed intimacy with one Vinay Dewangan who was called by the appellant in absence of respondent and despite the objection of respondent she continued her relations with him. All the efforts made by the respondent/husband for making good relation with the appellant went in vain. Ultimately, the appellant by giving threats of divorce and implication in a false case of cruelty for dowry, started living separately from the respondent and son. Thereafter, the appellant/wife got issued notices to the respondent and filed a divorce petition (Petition No. 424- A/2004) against the respondent/husband in Family Court, Durg, which was subsequently dismissed on 20-6-2005 as withdrawn. The respondent further pleaded that despite the dismissal of divorce petition, the appellant/wife never made any attempt to reconcile the dispute and to discharge her marital obligations. Thus, the appellant was leading adulterous life avoiding cohabitation with the respondent which led him to file the petition for dissolution of marriage under Section 13 (1) of the Act, 1955.

3) The appellant/wife denied the allegations made by the respondent/husband in her written statement and alleged that the respondent grabbed her income and jewelleries as also the whole amount received by selling out the house which was built from the income of the appellant/wife. She specifically denied the allegation of adultery and stated that she was not having any illicit relation with any one and was discharging her marital obligations. The appellant/wife specifically alleged that the respondent/husband was suffering from mental disorder "paranoid schizophrenia" for which she took him to Doctor Pramod Gupta at Durg for medical treatment. She further pleaded that the respondent/husband used to call her friends to enjoy wine and share obscene movies and he also used to force the appellant/wife to apply the techniques of obscene movies in their private life, to which she objected. It was further alleged that once in the year 2004 the respondent/husband tried to kill the appellant by throttling due to which she left the house of the respondent/husband and made complaint against him to Mahila Thana, Durg and started living separately from him. Thereafter, being harassed and tortured by the respondent/husband, appellant/wife filed a petition for dissolution of marriage in the Family Court, Durg which was subsequently withdrawn by the appellant/wife at the request of the respondent/husband after reconciliation for welfare of their children. She specifically pleaded that the respondent/husband published the advertisement through internet for his second marriage and he also took away the daughter Shruti with him from appellant/wife.

4) On the basis of averments made by the parties, issues were framed and after affording an opportunity of hearing to the parties, the marriage between the appellant and respondent was dissolved by a decree of divorce on the ground of adultery by the court below.

5) We have heard Smt. Indira Tripathi, learned counsel for the appellant and Shri Prafull Bharat, learned counsel for the respondent, perused the judgment & decree and record of the Family Court.

6) Learned counsel appearing for the appellant submits that the impugned judgment and decree passed by family court is contrary to law and material available on record. The family court failed to appreciate that the respondent failed to establish the ingredients of cruelty. Learned counsel further submits that the burden to prove the factum of adultery was solely on the respondent but the respondent has not discharged the burden although he was required to prove the same by preponderance of probabilities. Learned counsel further submits that the Family Court committed grave error in passing the impugned decree of divorce merely on the basis of the evidence adduced by child witness Ku. Shruti (PW/5) who was the student of Class 5th and her statement ought to have been scrutinized cautiously while placing reliance upon her evidence. Therefore, the ground of adultery has not been proved on the basis of the evidence available on record. She further submits that the evidence of Ku. Shruti has not been corroborated by other witnesses. In view of the above submission it cannot be held that the appellant/wife treated the respondent with cruelty but it was the respondent/husband who was not willing to live with the appellant/wife and therefore, the respondent is not entitled to obtain a decree of divorce. The next submission of learned counsel for the appellant is that the family court reached to a wrong conclusion by mis-appreciating the material evidence available on record. The findings recorded by the family court are perverse and bad in the eyes of law. In absence of any proof of adultery the decree of divorce is not sustainable under the law. Therefore, the impugned judgment and decree dated 2-8-2006 passed by the Family Court be set aside.

7) On the other hand, learned counsel appearing for the respondent vehemently opposed the appeal and submitted that the respondent has established his case. His evidence is duly corroborated by his daughter Ku. Shruti. Learned counsel further submits that the Family Court after considering all the facts and circumstances of the case and the evidence available on record has rightly allowed the divorce petition in favour of the respondent/husband. Learned counsel further submits that the counter allegations made in the written statement by the appellant and questions to that effect put by her counsel at her instructions in the cross examination also amount to mental cruelty.

8) In order to appreciate the arguments advanced on behalf of the parties, we have examined the evidence available on record. On the basis of pleadings of the parties issues were framed and the Family Court allowed the petition of the respondent on the ground of adultery amounting to mental cruelty. The Family Court further held that the respondent was not suffering from any mental disorder. The burden to prove the issue of adultery was solely on the respondent. The respondent examined himself, his daughter, Ku. Shruti, Shriniwas D. Deshmukh, Rajendra Kumar Chaube and Sandeep Ban Sutre whereas the appellant/wife examined herself, Suresh Pillai and Doctor Pramod Gupta and produced the document Ex.D/1 to Ex.D/19 in her support.

9) The respondent/husband deposed that in the year 2002 one Deputy Collector Dewangan used to visit his house and thereafter he was transferred to Korba from where he used to telephone to his house. Whenever he received the call, Dewangan used to disconnect the same. On verification of STD calls, he found that several calls were made to Deputy Collector, Dewangan from his house and for that there was some altercation between him and his wife. Thereafter, he went to Kerala with his wife where counseling took place between them. After returning from there to Borsi (Durg), he was taken to Doctor Pramod Gupta (DW/3) by his wife for treatment as he was not getting proper sleep for two days. Doctor Pramod Gupta (DW/3) gave him treatment for two years. He further deposed that in the month of January, 2004 one Vinay Dewangan came to his house and his wife developed intimacy with him for which he objected but his wife did not heed his words. Thereafter, in the month of September, 2004, she started residing with daughter Shruti separately from respondent/husband and son. Once he met his daughter at the temple, who told him that she did not want to live with her mother. Thus, it is clear that he has not stated a single word about the adultery of the appellant/wife or any illicit relation with anybody.

On the contrary, he admitted in his cross examination that the relation between him and the appellant/ wife was good for 14 -15 years and they were blessed with two children out of their wedlock. He also admitted in para 4 of his cross examination that the appellant/wife had filed a divorce petition which was subsequently withdrawn. He further admitted that when he went to Kerala he had visited Doctor Ravi, a Psychiatrist, thereafter, he was taken by his wife to Doctor Pramod Gupta at Durg where he continued his treatment for 1 + years. He stated that he was forcibly administered injections and given medicines by the appellant/wife in collusion with Doctor Pramod Gupta but he admitted in para 7 that he never made any complaint against Doctor Pramod Gupta before any authority. He admitted Ex.D/1 which is the prescription slip of Doctor Pramod Gupta. In para 9 he admitted the documents Ex.D/2, D/3, D/4 which are proposals for marriage through e-mail received by him in response to his advertisement through internet (Ex.D/5). Apart from this he has neither produced the telephone bill which gave rise to the dispute nor has examined Deputy Collector Dewagan and Vinay Dewangan in his support.

10) Ku. Shruti (PW/5) deposed that at present she is residing with her father and when she was living with her mother (appellant), one Vinay Dewangan used to visit the house of the appellant/wife, to which she objected. One day her mother and Vinay Dewangan were in a room bolted from inside. When she went to Cinema with her mother, Vinay Dewangan also used to accompany them. Seeing her mother in the company of Vinay Dewangan she felt bad. Once there was altercation between her mother and Vinay Dewangan also. On going through the evidence of this witness, it does not appear that she stated anything about adultery of her mother or she ever found her mother in objectionable/compromising position with anybody by which it can be held that the appellant/wife was leading adulterous life in any manner. On the contrary, she admitted in para 5 of her cross examination that she was willing to live with her mother and father both and she used to talk with her mother on telephone /mobile while residing with her father. She also admitted the fact that she has told her father and Rajendra Kumar Chaube about the visit of Vinay Dewangan to the house of her mother as also about the altercation took place between her mother and Vinay Dewangan but this fact is neither corroborated by her father (the respondent) nor by Rajendra Kumar Choube.

11) The other witnesses Shrivas D. Deshmukh, Rajendra Kumar Choube and Sandeep Ban Sutre have also not corroborated the version of Ku. Shruti and respondent/husband and they have not stated a single word about adulterous life of the appellant/wife. From the evidence of Rajendra Kumar Choube, the only fact reveals that the relation between the appellant/wife and the respondent/husband was not good. Thus, on re-appraisal of the evidence adduced by the respondent/husband it is evident that he failed to prove the factum of adultery either by direct or by circumstantial evidence.

12) So far as the argument advanced by learned counsel for the respondent/husband regarding counter allegations made in the written statement by the appellant/wife and questions to that effect put by her counsel at her instructions in the cross examination also amount to mental cruelty, is concerned, admittedly the counter allegations against the respondent/husband were made and questions to that effect were also put by her counsel but it is clear from the evidence of Doctor Pramod Gupta (DW/3), Suresh Pillai (DW/2) and the appellant/wife that the counter allegations are not vague. Doctor Pramod Gupta has clearly deposed in his evidence that the respondent/husband was suffering from `divisional disorder' in which the patient thinks beyond reality. He further deposed that the person suffering from the aforesaid disease also suspects about the character of his life partner. He categorically denied the suggestion that he had thrust the disease upon the respondent/husband in collusion with the appellant/ wife.

13) The appellant/wife has categorically denied the allegations made by the respondent/husband and deposed that her husband was suffering from paranoid schizophrenia since 2002 for which she took him to Doctor Ravi Prasardi in Kerala and thereafter to Doctor Pramod Gupta at Durg but he was not regular to his treatment and as soon as he gave up the medicine, he started committing marpit with her and once he tried to pour hot oil over her. Therefore, she left the house of the respondent/husband and made

complaint against her husband in Mahila Thana, which is Ex.D/6. Thereafter, she sent notices Ex.D/7 & D/8 to the respondent/husband through her counsel and filed divorce petition against the respondent which was subsequently withdrawn vide Ex.D/9, looking to the welfare of their children. Thereafter she along with her daughter went to live with the respondent/husband, but he was not willing to live with her wife and threw her out of his house in the night. The other allegation regarding watching obscene movies and enjoying wine by the respondent/husband with his friends is concerned, it is corroborated by Suresh Pillai (DW/2) and their evidence remained unrebutted. Thus, it is clear that the counter allegations made by the appellant/wife are not vague but well founded and the same do not amount to cruelty.

14) For the aforesaid analysis, we are of the opinion that the learned Family Court erred in reaching to the conclusion that the appellant/wife treated the respondent/husband with cruelty by leading adulterous life and granted a decree of dissolution of marriage in favour of the respondent/husband. Accordingly, the appeal is allowed and the judgment and decree for dissolution of marriage between the appellant and respondent is hereby set aside. .

15) Decree be drawn up accordingly.

16) No order as to costs.

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ASFAQ QURESHI VERSUS AYSHA QURESHI

2010 SCC OnLine Chh 63 : (2010) 96 AIC 444 : AIR 2010 Chh 58 (DB)

Chhattisgarh High Court

(Before Hon'ble Mr. Justice T.P Sharma & Hon'ble Mr. Justice R.N Chandrakar, JJ.)

Asfaq Qureshi ..... Petitioners

v.

Aysha Qureshi ..... Respondents

First Appeal M 47 of 2008 and First Appeal M 128 of 2008
Decided on March 19, 2010

The appellant has challenged legality & propriety of the judgment & decree on the ground that the parties are Muslim legally wedded spouses, the Family Court was not having jurisdiction to entertain suit for declaration of marriage to be void under the provisions of the Hindu Marriage Act, 1955. The Family Court has also erred in holding that marriage has not been solemnized between the parties.

….The respondent has denied the allegations and has specifically pleaded that she is Hindu, she has never converted into Islam and registration of Muslim marriage under the Hindu Marriage Act, 1955 was not legally possible. She has already filed petition for declaration of marriage void. She has specifically pleaded that there was no marriage or lawful marriage between the parties and therefore, restitutionof conjugal rights would not be legally permissible.

…...In the present case, the respondent by filing suit for declaration of marriage null & void has challenged her marital status and validity of marriage certificate issued by the Marriage Officer. On the other hand, the appellant has challenged maintainability of the suit before the Family Court in accordance with the provisions of the Hindu law. It is needless to say that in absence of any claim and allegation by any party relating to solemnization of marriage in accordance with the Hindu law, the marriage certificate issued by the Marriage Officer does not confer any right upon the parties relating to their marital status. The marriage certificate otherwise issued by the competent authority only proves pre-existence of marriage between the spouses. However, issuance of certificate itself is not solemnization or performance of marriage between the spouses.

…...In case of non-existence of valid marriage in any form between the parties, theFamily Court has not committed any illegality by declaring the marital status of the parties and dismissing the suit for restitution of conjugal rights filed by the appellant.

JUDGEMENT

First appeals under Section 19 of the Family Courts Act 1984

The following judgment of the Court was passed by T.P Sharma, J: -

1. F.A(M) Nos. 47/2008 & 128/2008 arising out of the common judgment & decree dated 6-2-2008 passed by the 2nd Additional Principal Judge, Family Court, Durg (for short 'the Family Court') in Civil Suit Nos. 157A/2007 & 158A/2007 are being disposed of by this common judgment.

2. Vide F.A(M) No. 128/2008, the appellant has challenged legality & propriety of the judgment & decree dated 6-2-2008 passed by the Family Court in Civil Suit No. 157A/2007 whereby the petition for restitution of conjugal rights filed by the appellant has been dismissed.

3. Vide F.A(M) No. 47/2008, the appellant has challenged legality & propriety of the judgment & decree dated 6-2-2008 passed by the Family Court in Civil Suit No. 158A/2007 whereby the Family Court has decreed the suit, filed by the respondent against the appellant, for declaration of marriage void.

4. The appellant has challenged legality & propriety of the judgment & decree on the ground that the parties are Muslim legally wedded spouses, the Family Court was not having jurisdiction to entertain suit for declaration of marriage to be void under the provisions of the Hindu Marriage Act, 1955. The Family Court has also erred in holding that marriage has not been solemnized between the parties.

5. Brief facts necessary for the disposal of these appeals, as per pleadings of the parties in Civil Suit No. 158A/2007, are that the respondent is a Hindu woman and never converted into Islam. The appellant is a member of Islam. The respondent was working as Shiksha Karmi at Village Badepurda and she used to travel from Durg to Litia Chowk by mini bus of Zia Travels. The appellant was working as Checker in Zia Travels. During the course of travel, they came in contact. On 3-8-2006 while the respondent was travelling in the mini bus of Zia Travels, the appellant provided one chocolate of Dairy Milk to the respondent which she accepted and ate, and she became unconscious. In the evening the respondent came back to her house. She used to travel by the same bus till 20-11-2006. On 22-11-2006, the appellant for the first time told the respondent that he has married her on 3-8-2006 at madarsa situate at Gandai and also showed the certificate relating to nikah. The appellant threatened her and compelled her for registration of marriage at Durg. He also showed photographs. Under duress, the respondent went with the appellant to the Office of Collector, Durg where 3-4 other persons were present. The appellant took signatures of the respondent on some papers and detained her till 3 p.m The appellant also took some photographs of the respondent. On 22-11-2006, with a view to avoid to go to the Collectorate, Durg, the respondent went to Dhamdha to attend strike, but the appellant reached there at 2 p.m by motorcycle and forcefully took her to the Marriage Officer at Durg who issued certificate of marriage. The respondent was under duress. Lastly, on 23-11-2006, she narrated the entire incident to her parents. She claims that she never converted into Islam and never consented for marriage with the appellant. The alleged marriage between the parties is void ab initio and the marriage certificate issued by the Marriage Officer is also void. On the aforesaid ground, suit for declaration of marriage & marriage certificate void was filed by the respondent under Section 34 of the Specific Relief Act, 1963 read with Sections 11 & 12 of the Hindu Marriage Act, 1955.

6. The appellant has denied the allegations made in the plaint and has specifically alleged that the respondent used to travel by Zia Travels and during the course oftravel, the appellant & the respondent came in contact during which period their relation developed. The respondent used to send SMS and talk with the appellant from her mobile phone No. 98279-20460 on his mobile phone Nos. 93028-36432 & 94255-64469. On 3-8-2006, the respondent herself came to the appellant near Kachehri Chowk and she herself willfully went to Gandai by Scorpio vehicle along with the appellant where she converted herself into Islam and filed affidavit for marriage with the appellant, before other persons. Marriage between the appellant & the respondent was performed at Gandai. The respondent herself has decided not to inform the factum of marriage to her parents till registration of marriage. The respondent was party to the marriage and marriage of the respondent with the appellant was well within her knowledge since 3-8-2006. On 21-11-2006, the respondent along with the appellant went to the Collectorate for registration oftheir marriage. Both the parties presented application for registration of marriage and next date of 22-11-2006 was fixed by the Marriage Officer. On 22-11-2006, the respondent was present at Dhamdha in connection with strike from where she called the appellant from STD booth and she came from Dhamdha to Collectorate for registration of marriage where marriage was registered and registration certificate was issued to them. The appellant has specifically alleged that the respondent herself has converted into Islam willfully and

after her conversion, she had married the appellant under her free consent, therefore, she is not entitled for declarationof marriage to be void.

7. On the basis of averments, issues were framed and after affording opportunityof hearing to the parties, the Family Court has allowed the suit for declaration ofmarriage and marriage certificate as null & void.

8. Vide Civil Suit No. 157A/2007, the appellant has filed petition for restitution ofconjugal rights under Chapter VIII of the Muslim law. The appellant has specifically alleged that the respondent is legally married wife of the appellant under the Muslim law. Marriage was performed on 3-8-2006 at Gandai madarsa. Parties had agreed that they will enjoy their marital life peacefully after registration ofmarriage. On 22-11-2006, marriage between the parties was registered, but even after registration of marriage, parents of the respondent are not permitting the respondent for discharging her marital obligations and have detained her. The respondent has filed petition for declaration of marriage null & void at the instance and under the pressure of her parents. The appellant is ready & willing to discharge his marital obligations. On the aforesaid basis, suit for restitution of conjugal rights was filed on behalf of the appellant.

9. The respondent has denied the allegations and has specifically pleaded that she is Hindu, she has never converted into Islam and registration of Muslim marriage under the Hindu Marriage Act, 1955 was not legally possible. She has already filed petition for declaration of marriage void. She has specifically pleaded that there was no marriage or lawful marriage between the parties and therefore, restitutionof conjugal rights would not be legally permissible.

10. On the basis of averments of the parties, issues were framed and after affording opportunity of hearing to the parties, the Family Court by common judgment & decree dated 6-2-2008 passed in Civil Suit Nos. 157A/2007 & 158A/2007, has dismissed the suit for restitution of conjugal rights and allowed the suit for declaration of marriage null & void.

11. We have heard learned counsel for the parties, perused the judgment & decree impugned and records of the Family Court.

12. Mrs. Fouzia Mirza, learned counsel for the appellant, vehemently argued that the appellant has married the respondent, both are majors and competent to give consent. The respondent was previously known to the appellant, they were having cordial terms and had decided to marry. The respondent voluntarily and willfully went with the appellant to Gandai, she converted herself into Islam and after her conversion she contracted marriage with the appellant in accordance with Muslim law (nikah) on 3-8-2006. After solemnization of marriage, both the parties applied for registration of marriage before the Registering Officer at Durg, finally, the marriage was registered on 22-11-2006 and marriage certificate was issued, but parents of the respondent are not permitting the respondent to discharge her marital obligations and have unnecessarily detained her with them. Learned counsel further argued that in the present case, marriage (nikah) has been performed in accordance with Muslim law, therefore, any petition under the provisions of Hindu law for declaration of marriage null & void is not maintainable and until the marriage solemnized in accordance with the Muslim law is declared null & void in accordance with the provisions of the Muslim law, the parties would still be legally wedded spouses and the respondent is under obligation to discharge her marital obligations.

13. By filing written arguments, the appellant has substantiated the aforesaid grounds and has specifically submitted that marriage solemnized in accordance with the Muslim law cannot be regulated or declared null & void under the Hindu law or the Hindu Marriage Act. Parties are required to file appropriate petition for dissolution of marriage or comply the procedure prescribed in the Muslim Personal Law. The Muslim Personal Law does not observe any rituals or ceremonies for conversion to Islam, one who professes Islam and believes in Islam becomes Muslim.

14. Mrs. Fouzia Mirza, learned counsel for the appellant, placed reliance in the matter of Smt. Neeta Kirti Desai v. Bino Samuel George1 in which the High Court ofBombay has held that in case of husband being a Christian, any petition under the Hindu Marriage Act, 1955 would not be maintainable. Learned counsel further placed reliance in the matter of Sarla Mudgal, President, Kalyani v. Union of India2 in which the Apex Court has held that marriage between Muslim & non-Muslim spouses should be decided according to justice, equity and good conscience. Learned counsel also placed reliance in the matter of Lily Thomas, etc. etc. v. Unionof India & Ors.3 in which the Apex Court has held that change of religion does not dissolve the marriage performed under the Hindu Marriage Act or between two Hindus. Married Hindu contacting second marriage after professing Islam, despite his conversion would be guilty of offence punishable under Section 17 of the Hindu Marriage Act read with Section 494 of the I.P.C, because mere conversion does not automatically dissolve his first marriage. Learned counsel relied upon the matter of Smt. Jacintha Kamath v. K. Padmanabha Kamath4 in which the High Courtof Karnataka has held that petition for dissolution of marriage solemnized between Christian & Hindu is not maintainable under the provisions of the Hindu Marriage Act, 1955.

15. On the other hand, Dr. N.K Shukla, learned Senior Advocate appearing on behalfof the respondent, vehemently opposed the appeals and submitted that undisputed facts reveal that prior to the alleged claim of marriage with the respondent, the appellant & the respondent were Muslim & Hindu, respectively. According to claimof the appellant, while the respondent used to travel by Zia Travels, they came in contact and they could know each other, but both the parties have not claimed that their relation became so close that they married. Both the parties have not claimed/pleaded or adduced evidence to show that prior to 3-8-2006 they have ever decided, proposed or agreed to marry, after conversion of the respondent to Islam. Pleadings & evidence of the appellant clearly reveal that on 3-8-2006, suddenly, the appellant took the respondent to Gandai, Distt. Rajnandgaon far away from Durg where the respondent & the appellant were residing, the respondent converted herself into Islam and married the appellant in accordance with the Muslim law. But even after her marriage, the respondent had not gone to house of the appellant or both the parties had not gone anywhere to reside together. Their marriage has not been consummated and they continued their previous life till 20-11-2006. According to the case of the appellant, on 20-11-2006 both the parties filed application for registration of marriage and marriage was registered on 22-11-2006 in accordance with the Hindu Marriage Act which was not legally permissible. Learned Senior Advocate further argued that according to the claim of the appellant, both the parties have filed joint application for registration of marriage on 21-11-2006 and their marriage was registered on 22-11-2006. Documents i.e proceeding of Marriage Officer Ex.P-1 reveal that both the parties had filed application on 20-11-2006, the case was fixed for 22-11-2006 and notice was issued to guardians of both the parties. However, the application filed on behalf of the parties reveals that affidavit has been executed on 21-11-2006, marriage officer has received application on 22-11-2006, but proceeding was initiated on 20-11-2006 prior to filing of application for registration of marriage and prior to execution of affidavit in support of the application for registration of marriage. Even if it is admitted that parties have filed application on 22-11-2006, record reveals that on the date of filing of application, the marriage was registered showing that sufficient opportunity has been provided to the guardians of the parties, though no notice has been issued or served, or possible to be issued or served. This shows that the appellant who was in dominating position has tampered the document in connivance with the Marriage Officer and has succeeded in obtaining marriage certificate which patently reveals that the same is tampered and forged document. Except this material, nothing has been adduced by the parties to show that valid marriage has been performed between the parties either in accordance with the Hindu law or in accordance with the Muslim law. In absence of any evidence and in the aforesaid circumstances, no valid or voidable marriage was performed between the parties and the Family Court has rightly decreed the suit by declaring the marriage void and also dismissed the petition for restitution of conjugal rights. Learned Senior Advocate also argued that although the Family Court has mentioned in the judgment impugned that the civil suit filed by the respondent herein was under Section 34 of the Specific Relief Act, 1963 read

with Sections 11 & 12 of the Hindu Marriage Act, 1955, but virtually the suit was under Explanation (b) to sub-section (1) of Section 7 of the Family Courts Act, 1984 under which the Court was competent to declare the matrimonial status ofany person. Learned Senior Advocate contended that taking benefit ofunconsciousness of the respondent, the appellant had taken her signatures on some papers. The respondent had never consented for marriage or for her conversion into Islam. The respondent, at the time of alleged marriage, was major and was competent to contract, and in absence of free consent and the alleged performance of marriage by fraud, there subsists no marriage at all, between the parties. Therefore, the appellant was not under obligation to file petition for dissolution of marriage/nikah under the provisions of the Dissolution of Muslim Marriages Act, 1939 and the alleged suit under Explanation (b) to sub-section (1) ofSection 7 of the Family Courts Act, 1984 for declaration of matrimonial status was competent.

16. Dr. N.K Shukla, learned Senior Advocate for the respondent, placed reliance in the matter of Sarla Mudgal (supra) in which the Apex Court has held that a marriage which is in violation of any provisions of law would be void in terms of the expression used under Section 494 of the I.P.C In such cases the Court shall act and the Judge shall decide according to justice, equity and good conscience. Learned Senior Advocate further placed reliance in the matter of Lily Thomas (supra) in which the Apex Court has held that change of religion does not dissolve the marriage performed under the Hindu Marriage Act or between two Hindus. Married Hindu contacting second marriage after professing Islam, despite his conversion he would be guilty of the offence punishable under Section 17 of the Hindu Marriage Act read with Section 494 of the I.P.C, because mere conversion does not automatically dissolve his first marriage. The appellant has also relied on this authority. Learned Senior Advocate also placed reliance in the matter of Shaji v. Gopinath5 in which the Madras High Court has held that in absence of marriage any certificate issued at the instance of husband is null and void. Learned Senior Advocate relied upon the matter of Abdur Rahim v. Padma6 in which the Bombay High Court has held that the presence of two witnesses of Mohammedan faith, cannot ipso facto convert any civil marriage into any other form of marriage much less a 'Nikah Fasid'.

17. In order to appreciate the arguments advanced on behalf of the parties, we have examined the evidence adduced on behalf of the parties in both the cases.

18. As per pleadings & evidence of the parties, marriage between the parties has not been solemnized in accordance with the Hindu law. The appellant is Muslim and the respondent was Hindu at the time of alleged marriage. Both the parties have relied upon the matter of Sarla Mudgal (supra) in which while dealing with the question of matrimonial dispute between Muslim & Hindu (convert to Islam), the Apex Court has held that "in such cases the Court shall act and the Judge shall decide according to justice, equity and good conscience". The Apex Court has further held that

"A matrimonial dispute between a convert to Islam and his or her non-Muslim spouse is obviously not a dispute "where the parties are Muslims" and, therefore, the rule of decision in such a case was or is not required to be the "Muslim Personal Law". In such cases the Court shall act and the Judge shall decide according to justice, equity and good conscience. The second marriage of a Hindu husband after embracing Islam being violative of justice, equity and good conscience would be void on that ground also and attract the provisions of Section 494, I.P.C"

19. In the present case, the respondent by filing suit for declaration of marriage null & void has challenged her marital status and validity of marriage certificate issued by the Marriage Officer. On the other hand, the appellant has challenged maintainability of the suit before the Family Court in accordance with the provisions of the Hindu law. It is needless to say that in absence of any claim and allegation by any party relating to solemnization of marriage in accordance with the Hindu law, the marriage certificate issued by the Marriage Officer does not confer any right upon the parties relating to their marital status. The marriage certificate otherwise issued by the competent authority only proves pre-existence of marriage

between the spouses. However, issuance of certificate itself is not solemnization or performance of marriage between the spouses.

20. Civil Suit No. 158A/2007 was filed by the respondent under Section 34 of the Specific Relief Act, 1963 read with Sections 11 & 12 of the Hindu Marriage Act, 1955. The law is settled on this point that misnomer or misquoting of provisions would not be treated as a ground for non-maintainability of suit or petition otherwise maintainable before the Court of competent jurisdiction.

21. As per the pleadings of the appellant, the respondent has solemnized marriage with the appellant after converting her to Islam. Marriage under the Mahomedan law is a civil contract and attracts all the incidents of contract. An idolatress or a fire-worshipper is not competent to marry a Muslim person in accordance with clause 259 of the Mulla's Principles of Mahomedan Law. Clause 259 (1) of the Mulla's Principles of Mahomedan Law reads as follows: -

"259. Difference of religion.-(1) 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."

22. As provided in clause 259 (1) of the Mulla's Principles of Mahomedan Law, a Mohammedan male is not competent to contract marriage with an idolatress or a fire-worshipper i.e Hindu, but after conversion of a female to Islam, a Mohammedan male may contract marriage with the said female. The Muslim law does not provide any ritual or ceremony for the purpose of conversion into Islam. It is sufficient if he professes the Mahomedan religion in the sense that he accepts the unity of God and the prophetic character of Mahomed.

23. Marriage under the Muslim law is a contract. Clause 251 of the Mulla's Principles of Mahomedan Law provides capacity for marriage which reads as under: -

"251. Capacity for marriage.-(1) Every Mahomedan of sound mind, who has attained puberty, may enter into a contract of marriage.

24. Section 10 of the Indian Contract Act, 1872 deals with the word 'contract' which reads as follows: -

"10. What agreements are contracts.-All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents."

In accordance with Section 10 of the Indian Contract Act, 1872, the free consent ofparties competent to contract is sine qua non.

25. The term 'free consent' is defined in Section 14 of the Indian Contract Act, 1872 which reads as follows: -

"14. 'Free consent' defined.-Consent is said to be free when it is not caused by-

(1) coercion, as defined in section 15, or

(2) undue influence, as defined in section 16, or

(3) fraud, as defined in section 17, or

(4) misrepresentation, as defined in section 18, or

(5) mistake, subject to the provisions of sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake."

26. As per pleadings of the appellant, this is a marriage between members of two different religions i.e Muslim & Hindu. The appellant has alleged that the respondent has converted her to Islam and after her conversion she has solemnized marriage with the appellant and therefore, any suit for dissolution of marriage solemnized between the parties in accordance with the Muslim law may be dissolved in accordance with the provisions of the Dissolution of Muslim Marriages Act, 1939. In the matters of Smt. Neeta & Smt. Jacintha (supra), the High Court of Bombay & the High Court of Karnataka have held that petition for dissolution of marriage solemnized between Christian & Hindu is not maintainable under the provisions ofthe Hindu Marriage Act, 1955.

27. In the present case, the respondent has not filed any suit for dissolution of her marriage solemnized in accordance with the Muslim law or the Hindu law, but has filed suit for declaration of marriage null & void. Her detailed pleadings reveal that according to her suit, she had never married the appellant, but fraud has been played upon her and therefore, she had filed the aforesaid suit. The pleadings substantially reveal that virtually the suit was for declaration of her marital status.

28. The respondent has filed suit for declaration of marriage null & void under Section 34 of the Specific Relief Act, 1963 read with Sections 11 & 12 of the Hindu Marriage Act, 1955. Admittedly, declaration of such character was not maintainable under Sections 11 & 12 of the Hindu Marriage Act, 1955, but claim of the parties cannot be denied only on the ground of misnomer, quoting wrong provisions, thecourts are required to see the pleadings and relief claimed by the parties. While dealing with the question of misnomer/quoting wrong provisions, the Apex Court in the matter of J. Kumaradasan Nair & Anr. v. IRIC Sohan & Ors.7 has held that it is also now a well-settled principle of law that mentioning of a wrong provision or non-mentioning of any provision of law would, by itself, be not sufficient to take away the jurisdiction of a court if it is otherwise vested in it in law. While exercising its power, the court will merely consider whether it has the source to exercise such power or not.

29. Both the parties have filed suits before the Family Court under the FamilyCourts Act, 1984. Section 7 of the Family Courts Act, 1984 deals with jurisdictionof the Family Courts. Explanation (b) to sub-section (1) of Section 7 of theFamily Courts Act, 1984 empowers the Family Court to declare as to the validityof a marriage or as to the matrimonial status of any person. Explanation (b) to sub-section (1) of Section 7 of the Family Courts Act, 1984 reads as follows: -

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

(a) *** *** ***

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

30. In accordance with Explanation (b) to sub-section (1) of Section 7 of theFamily Courts Act, 1984, the Family Court is competent to give declaration as to the validity of a marriage or as to the matrimonial status of any person.

31. As per the dictum of the Apex Court in the matter of Sarla Mudgal (supra), in case of marriage between members of two different religions, the Court is required to act and the Judge is required to decide the case according to justice, equity and good conscience, but not in accordance with their personal law.

32. Admittedly, both the parties were members of two different religions before the alleged claim of marriage. The respondent has specifically pleaded & adduced evidence that she has never converted to Islam, she never married the appellant, while she used to travel in Zia Travels' bus in which the appellant was Checker, she came in contact with the appellant, on 3-8-2006 the appellant gave her some chocolate,

after eating the chocolate she became unconscious and in the evening, she regained her consciousness. According to the claim of the appellant, the respondent has converted to Islam and solemnized marriage with him in accordance with the Muslim law which requires pre-consent for contract of marriage under the Muslim law. By adducing evidence, the respondent has discharged her initial onus that she has not given pre-consent for marriage or she has not converted herself to Islam. Onus is shifted upon the appellant to prove her valid conversion to Islam and solemnization of marriage in accordance with the Muslim law.

33. In the present case, according to pleading and evidence of the appellant in both the appeals, the respondent who was Hindu before the alleged marriage went with the appellant to Village Gandai, far away from Distt. Durg, the respondent went to Gandai madarsa before Mohd. Riyasat Noori (AW-2) along with the appellant where they expressed their intention to marry. According to the evidence of Mohd. Riyasat Noori (AW-2), the appellant & the respondent filed application along with affidavit for their nikah, the respondent was not Muslim, therefore, she again filed application for her conversion into Islam on which she was interrogated by him whereupon she told that they love each other and they want to marry in accordance with the Muslim law. This witness has further deposed that other responsible persons of jamat were present, he interrogated respondent Nivedita on which she showed her intention that she is willing for nikah with the appellant and she want to convert herself into Islam, whereupon he instructed kalma to her and converted her into Islam. Thereafter, he administered nikah and also filled nikahnama vide Ex.D-10. He has also deposed that Mohd. Asir Qureshi was the guardian of Nivedita in the proceeding of nikah. Mohd. Khan & Shakeel Niyaji were witnesses of nikahnama. Yusuf Bhai was Advocate for the appellant. This witness has further deposed that Mohd. Ayub Qureshi, who is an Advocate by profession and practicing at Gandai, has translated the nikahnama into Hindi. According to his evidence he is Urdu teacher and also works as moulvi. The appellant herein has corroborated the evidence ofMohd. Riyasat Noori (AW-2).

34. According to para 1 of the pleading of the appellant, marriage between the parties was performed on 3-8-2006 at Gandai madarsa, Distt. Rajnandgaon. But the evidence of Mohd. Riyasat Noori (AW-2) clearly shows that the alleged nikah was performed at Gandai, Police Station Gandai, Distt. Durg and not at Gandai, Distt. Rajnandgaon. Mohd. Riyasat Noori (AW-2) has stated in his evidence that he is resident of Village Gandai, Police Station Gandai, Distt. Durg. According to the evidence of this witness, marriage was performed at Gandai, Distt. Durg, but according to the pleading of the appellant, marriage between the parties was performed at Gandai, Distt. Rajnandgaon. Persons present at the time of alleged marriage were not Hindus but were members of Islam.

35. Evidence of the appellant on affidavit in Civil Suit No. 158A/2007 reveals that the respondent went with the appellant from Durg to Gandai by Scorpio vehicle. Evidence of Mohd. Asir Qureshi (NAW) reveals that he was also present at the timeof nikah. This witness is resident of Thakur Para, Khairagarh, Distt. Rajnandgaon. Ex.D-9, the alleged affidavit, reveals that it has been executed at Chuikhadan/Gandai, Distt. Rajnandgaon, before notary, by Mohd. Ashfaque Qureshi. Nikahnama Ex.D-10 (copy of Hindi version Ex.D10C) reveals that nikah was administered by Mohd. Riyasat Noori, R/o Gandai, Pandaria, Distt. Rajnandgaon.

36. Entire evidence on affidavits, pleadings and documents reveal that the appellant has taken the respondent to Gandai, Distt. Rajnandgaon, but the alleged marriage has been performed at Gandai, Distt. Durg and nikah was administered by Mohd. Riyasat Noori. Gandai, Distt. Durg and Gandai, Distt. Rajnandgaon are not one and the same. Except the respondent and Mohd. Asir Qureshi (NAW), other persons were not resident of Durg, they were R/o Khairagarh, Gandai and other places. The respondent has specifically pleaded and adduced evidence that the appellant gave some chocolate to her on 3-8-2006 and after eating the chocolate she became senseless. In these circumstances, burden to prove solemnization of marriage with free consent of the respondent was heavily on the appellant, but the evidence adduced on behalf of the appellant is completely self-contradictory. Conduct ofthe appellant and conduct of other witnesses

are unnatural. Evidence of Mohd. Riyasat Noori (AW-2) reveals that the respondent converted to Islam only for the purpose of performing marriage, she herself has not converted into Islam, but this witness has converted her to Islam. Relevant part of his evidence (para 1) reads thus,

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37. After the alleged nikah/marriage, the respondent came back to her house, she has not resided with the appellant even for a single day and her alleged marriage has not been consummated. She again used to go to her duty in usual course.

38. Mohd. Riyasat Noori (AW-2) has admitted in para 8 of his evidence that he is not having any certificate to show that any mosque has appointed him as moulvi. Evidence of this witness is full of suspicion. He is not resident of village Gandai, Distt. Rajnandgaon, but resident of village Gandai, Distt. Durg, he is not having any certificate for moulvi work and he has not been appointed as moulvi. According to his evidence, both the parties went to marry and for the purpose of marriage, the respondent wanted to convert herself into Islam, therefore, after administering kalma, he converted her into Islam. No specific ritual is necessary for conversion into Islam, but conversion must be voluntary and conversion must be with a view to convert herself into Islam accepting the unity of God and the prophetic characterof Mohammed, but not for other purpose including the purpose of marriage.

39. While dealing with the question of propriety of conversion from one religion to another religion, the Apex Court in the matter of Lily Thomas (supra) has held that any conversion by non-Muslim to Islam without any real change and belief merely with a view to avoid any earlier marriage or enter into second marriage, is void. Paras 38 & 40 of the said judgment read thus,

"38. Religion is a matter of faith stemming from the depth of the heart and mind. Religion is a belief which binds the spiritual nature of man to a supernatural being; it is an object of conscientious devotion, faith and pietism. Devotion in its fullest sense is a consecration and denotes an act of worship. Faith in the strict sense constitutes firm reliance on the truth of religious doctrines in every system ofreligion. Religion, faith or devotion are not easily interchangeable. If the person feigns to have adopted another religion just for some worldly gain or benefit, it would be religious bigotry. Looked at from this angle, a person who mockingly adopts another religion where plurality of marriage is permitted so as to renounce the previous marriage and desert the wife, cannot be permitted to take advantageof his exploitation as religion is not a commodity to be exploited. The institution ofmarriage under every personal law is a sacred institution. Under Hindu law, marriage is a sacrament. Both have to be preserved.

40. I also agree with brother Sethi, J. that any direction for the enforcement ofArticle 44 of the Constitution could not have been issued by only one of the Judges in Sarla Mudgal case (supra). In fact, Sarla Mudgal case was considered by this Court in Ahmedabad Women Action Group (AWAG) v. Union of India {(1997) 3 SCC 573} and it was held that the question regarding the desirability of enacting a uniform civil code did not directly arise in Sarla Mudgal case. I have already reproduced the order of this Court passed in Sarla Mudgal case on 23-4-1980 in which it was clearly set out that the learned counsel appearing in that case had, after taking instructions, stated that the prayers were limited to a single relief, namely, a declaration that where a non-Muslim male gets converted to the Muslim faith without any real change of belief and merely with a view to avoid any earlier marriage or to enter into a second marriage, any marriage entered into by him after conversion would be void."

40. Although the evidence of Mohd. Riyasat Noori (AW-2) is full of suspicion, but even according to his evidence, the respondent requested him that she want nikah with the appellant, therefore, she wants to convert to Islam, then he administered kalma and converted her to Islam and also administered her nikah. Relevant portionof para 1 of the evidence of Mohd. Riyasat Noori (AW-2) reads thus,

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41. The respondent or the appellant has not adduced any evidence to show that the respondent converted herself to Islam and accepted the unity of God and the prophetic character of Mohammed or has never shown faith in Islam. Evidence ofthe respondent reveals that she had never stayed with the appellant even for a single day which further reveals that marriage has not been consummated. Evidence ofMohd. Riyasat Noori (AW-2) relating to conversion of the respondent to Islam is sufficient to establish that even if it is admitted, then also, conversion was only for the purpose of marriage and not for faith in the unity of God and the prophetic character of Mohammed. As held by the Apex Court in the matter of Lily Thomas (supra), such conversion was void.

42. Even nothing is on record to otherwise substantiate the respondent's faith in the unity of God and the prophetic character of Mohammed. Thus the alleged nikah suffers from vice of one of the parties being a non-Muslim idolatress and claiming to be under the effect of intoxication during the period in which the nikah is alleged to have been solemnized. The effect of one party being under intoxication would be that there was no contract marriage as a person under intoxication is undisputedly incompetent to give consent.

43. Material produced on behalf of the parties does not make out that the appellant has been able to meet out the pleadings and discharge of onus by the respondent relating to her state of intoxication. The onus lied heavily on the appellant particularly in the backdrop of his dominant position. Even in case that the respondent was not under intoxication, then also the alleged nikah would be fasid nikah and such marriage has no legal effect unless the marriage is consummated. While dealing with the question of validity of marriage, the Apex Court in the matter of Chand Patel v. Bismillah Begum and another8 has held that an irregular marriage has no legal effect before consummation and such marriage is not unlawful in itself but unlawful for something else. Paras 29 & 30 of the said judgment read thus

"29. Para 264 which deals with the distinction between void and irregular marriages reads as follows:

"264. Distinction between void and irregular marriages.-(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, affinity, or fosterage, 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 ofwitnesses. Thus the following marriages are irregular, namely-

(a) a marriage contracted without witnesses;

(b) a marriage with a fifth wife by a person having four wives;

(c) a marriage with a woman undergoing iddat;

(d) a marriage prohibited by reason of difference of religion;

(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.

The reason why 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.

30. Para 266 deals with the effects of a void (batil) marriage and provides that a void marriage is no marriage at all. It does not create any civil rights or obligations between the parties. The offspring of a void marriage are illegitimate. Para 267 which deals with the effects of irregular (fasid) marriages reads as follows:

"267. Effects 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;

(ii) she is bound to observe the iddat, but the duration of the iddat both on divorce and death is three courses;

(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 (Baillie, 694, 710)."

44. In this case, neither the parties claim that marriage was consummated nor is it born by the circumstance that they had any opportunity to consummate the marriage. In absence of such circumstance or absence of consummation ofmarriage, we have no hesitation in holding that there was no nikah between the parties and even in the remote possibility of inferring fasil nikah, the same has been sufficiently relinquished by the respondent and also it is without legal effect in absence of consummation.

45. Another set of evidence relating to marital character is the alleged registration proceeding of marriage.

46. The respondent has deposed in her evidence that she was under pressure and the appellant succeeded in registration of marriage at Durg. The Family Court has examined Marriage Officer Amrit Xalxo, Deputy Collector, as Court witness. He has deposed in his evidence that he has registered the marriage of the parties on 22-11-2006 under the Hindu Marriage Act. He has also deposed that Exs.P-2 & P-3 are copies of record of marriage. Order sheet of marriage proceeding reveals that both the parties have filed application for registration of marriage along with affidavits on 20-11-2006, but the affidavits Exs.P-4 & P-5 reveal that the affidavits have been prepared on 21-11-2006. Application for registration of marriage also reveals that they have filed application on 21-11-2006, but the certificate ofMarriage Officer reveals that he has received the application for registration ofmarriage along with copy of challan on 22-11-2006. Copy of order sheet Ex.P-1 reveals that the case was fixed for 22-11-2006 and notices were issued to parents ofthe parties. Back portion of the document Ex.P-1 reveals that on 22-11-2006, parents of the parties were not present and any objection was also not filed, therefore, marriage was registered and certificate was issued. However, this document does not show as to when the notices were issued to parents of the parties.

47. When the application was not filed on 20-11-2006 and was filed only on 22-11-2006, why the date of presentation of the application in Ex.P-1 was written as 22-11-2006, why the case was fixed for 22-11-2006, why the notices were not issued & served upon parents of the parties and why the marriage certificate was issued in so hasty manner, especially by tampering the document? In absence of answers to the aforesaid questions/queries, the alleged registration of marriage and issuanceof marriage certificate cannot be held to be genuine as it is full of suspicion. Exs.P-1 to P-5 clearly reveal that application for registration of marriage along with affidavits was filed on 22-11-2006 and on the same day the marriage was registered by making false entry. The Marriage Officer was not competent to register marriage between a Muslim & a Hindu under the Hindu Marriage Act, therefore, registrationof marriage is per se illegal and does not give any marital status to the parties. Even otherwise, in absence of any claim and allegation by any party

relating to solemnization of marriage in accordance with the Hindu law, the marriage certificate issued by the Marriage Officer does not confer any right upon the parties relating to their marital status.

48. On examination of pleadings & evidence, in the light of law propounded for deciding the case of claim of marriage between members of different religions in the case of Sarla Mudgal (supra), pleadings & evidence of the parties clearly establish the fact that the respondent has not converted into Islam, she has not married the appellant and therefore, she was not under obligation to discharge the marital obligation. Her suit for declaration of marriage void and declaration of her marital status was maintainable under Explanation (b) to sub-section (1) of Section 7 of the Family Courts Act, 1984.

49. On close scrutiny of pleadings & evidence, we hold that

(a) in case of claim of marriage between members of two different religions, the personal law of any party would not be applicable and as held in the matter ofSarla Mudgal (supra), the Court is required to decide the case according to justice, equity and good conscience;

(b) the appellant & the respondent are not legally wedded spouses under the Muslim law and no valid nikah was solemnized between the parties;

(c) the respondent has never converted her to Islam; and

(d) the Family Court is competent to declare the marital status of the parties.

50. In case of non-existence of valid marriage in any form between the parties, theFamily Court has not committed any illegality by declaring the marital status of the parties and dismissing the suit for restitution of conjugal rights filed by the appellant.

51. For the foregoing reasons, both the first appeals {F.A(M) Nos. 47/2008 & 128/2008} are liable to be dismissed and are hereby dismissed. The appellant shall bear his own cost and cost of the respondent.

52. In the present case, alleged registration of marriage under the provisions ofthe Hindu Marriage Act, 1955 appears to be full of suspicion and independent inquiry would be necessary into the matter. Therefore, the District Magistrate, Durg is directed to hold an independent inquiry relating to the manner in which the alleged marriage was registered in so hasty manner, after providing full opportunityof hearing and observing the principles of natural justice without being influenced by this judgment, and take suitable action against the erring officer.

53. Advocate fees as per schedule.

54. Decree be drawn accordingly.

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MANIK BHOWMICK VERSUS SMT. SARITA BHOWMICK (BURMAN)

2016 SCC OnLine Jhar 1315 : (2016) 162 AIC 778

In the High Court of Jharkhand at Ranchi

(Before Hon'ble Mr. Justice Virender Singh, C.J & Hon'ble Mr. Justice Shree Chandrashekhar, J.)

Manik Bhowmick, son of-Late Sudhanshu Sekhar Bhowmick, resident of-Ward No. 13, near Binod Transport, Chakradharpur, P.O & P.S Chakradharpur, District West Singhbhum ..... Appellant

v.

Smt. Sarita Bhowmick (Burman), Daughter of-Jitendra Prasad Burman, wife-Manik Bhowmick, at present resident of-at Village Punasi, Chakradharpur P.O & P.S Chakradharpur, District West Singhbhum ..... Respondent

For the Appellant: Mr. Sudhir Sahay, Advocate

For the Respondent: Mr. Mutul Kumar, Advocate

F.A No. 106 of 2015
Decided on April 1, 2016

Aggrieved of judgment and order dated 08.06.2015 in Matrimonial Suit No. 16 of 2008 whereby, the suit filed by the appellant for a decree of dissolution of the marriage has been dismissed with cost, the appellant has filed the instant First Appeal.

...the appellant alleged that from the very beginningof the marriage the respondent-wife started behaving irrationally. On the pressure of the respondent, the appellant separated from his mother and sister however, subsequently, the respondent started raising suspicion against the appellant of his having extra-marital affairs with other lady. The respondent also started abusing, assaulting and humiliating the appellant. Complaining assault by the respondent, the appellant was constrained to lodge a complaint, on which proceeding u/s 107 Cr.P.C was started. The appellant alleged that the father and brother of the respondent are anti-social elements who are involved in several criminal cases and at their instigation she has inflicted physical and mental cruelty upon the appellant.

...."Even petitioner has admitted in clear terms in his pleading that petitioner believes that the respondent wants money and for this she is doing all these nuisance acts against the petitioner. Thus, whatever act of mental cruelty has been alleged against the respondent appears to be outcome of financial dispute between the parties which is an ordinary wear and tear of life and happens in each family. The petitioner has also admitted in his rejoinder dated 07.11.09 against the application of the respondent dated 17.03.2009 for interim maintenance and cost of proceeding that he hardly earns Rs. 5,000/- to Rs. 6,000/- per month. Thus, there appears no mental cruelty of such a nature and extent to reasonable cause any apprehension in the mind of petitioner that it is not safe for him to continue the matrimonial relationship with the respondent."

...On the question of desertion, the stand of the appellant that the respondent left the house in the month of June, 2008 takes out the ground of desertion from the purview of Section 13(1)(i-b) of the Hindu Marriage Act, 1955. For seeking divorce on the ground of desertion, it must be for a continuous period

of not less than 2 years immediately on presentation of the petition whereas, the appellant instituted the matrimonial suit on 30.06.2008 itself.

In view of the evidence led by the appellant in Matrimonial Suit No. 16 of 2008, it can safely be concluded that the appellant failed to produce evidence, which on a preponderance of probability may prove his case. The trial court has rightly dismissed the matrimonial suit seeking a decree of dissolution of marriage on the ground of cruelty and desertion.

1. Aggrieved of judgment and order dated 08.06.2015 in Matrimonial Suit No. 16 of 2008 whereby, the suit filed by the appellant for a decree of dissolution of themarriage has been dismissed with cost, the appellant has filed the instant First Appeal.

2. The appellant instituted Matrimonial Suit No. 16 of 2008 u/s 13(1)(i-a) and 13(1)(i-b) of the Hindu Marriage Act, 1955 seeking divorce on the ground of cruelty and desertion. The marriage of the appellant with respondent was solemnized on 19.07.1996 at village-Punasi. On the basis of the pleadings of the parties, the trial court framed the following issues:

   "(i) Whether the present suit is maintainable in its present form?

   (ii) Whether the petitioner has been treated with cruelty by the respondent from the very inception of marriage till now?

   (iii) Whether the respondent has deserted the petitioner?

   (iv) Whether the petitioner is entitled to the relief/reliefs as prayed for?"

3. During the trial the appellant examined 9 witnesses and produced certain documents. Contesting the matrimonial suit, the respondent-wife also examined 3 witnesses. The appellant examined himself as PW6 and the respondent-wife examined herself as O.P.W 2.

4. The trial court upon consideration of the evidence led by the parties came to a conclusion that the appellant has failed to prove mental and physical cruelty at the hands of respondent-wife and the ground of desertion taken by the appellant was pre-mature.

5. Heard the learned counsel for the appellant and perused the documents on record.

6. The learned counsel for the appellant submits that in view of the written agreement signed between the parties on 09.06.2008 whereunder, the appellant agreed to pay Rs. 1,00,000/- to the respondent-wife and the evidence of the neighbours who all in unequivocal terms deposed in the court that the respondent-wife abused and assaulted the appellant-husband, the trial court committed serious error in law in dismissing the matrimonial suit. It is contended that the trial court proceeded to examine the evidence of the parties, as if, it was conducting a criminal trial. The basic principle of "preponderance of probability" for deciding the matrimonial suit was forgotten by the trial court and the said suit has been dismissed in a manner which discloses, as if, the appellant was required to produce evidence establishing his case beyond all shadows of doubt.

7. From the materials brought on record, it appears that the appellant alleged that from the very beginning of the marriage the respondent-wife started behaving irrationally. On the pressure of the respondent, the appellant separated from his mother and sister however, subsequently, the respondent started raising suspicion against the appellant of his having extra-marital affairs with other lady. The respondent also started abusing, assaulting and humiliating the appellant. Complaining assault by the respondent, the appellant was constrained to lodge a complaint, on which proceeding u/s 107 Cr.P.C was started. The appellant alleged that the father and brother of the respondent are anti-social elements who are involved in several criminal cases and at their instigation she has inflicted physical and mental cruelty upon the appellant.

8. The respondent-wife filed written statement denying ill-treatment or torture by her to the husband. The respondent was taking training of Homoeopathic Medicines from the appellant and, during the course of training the appellant expressed his deep love to the respondent and proposed marriage with her. The respondent alleged that on 07.06.2008 she was abused and mercilessly beaten by her husband and on 09.06.2008, he got her signature on some papers and thereafter, she was forcibly ousted from the matrimonial home.

9. The appellant, during the cross-examination, admitted that after the marriagein the year 1996 till 2008, his wife lived with him. Other witnesses examined by the appellant have also deposed in the court that the behaviour of the respondent-wife was not good with her husband and she used to abuse and assault the appellant. However, the witnesses produced by the appellant failed to give specific instance of abuse or assault by the respondent. The appellant also failed to narrate the manner in which the respondent behaved with his family members. He has also failed to give details of any particular instance of respondent's behaviour. Even the proceeding u/s 107 Cr.P.C was instituted about 8 years after the marriage. The dispute which arose in the month of June, 2008 led to separation of the respondent from her matrimonial home and obviously thereafter, there could not have been any incident of assault, abuse etc. by the respondent. Noticing the averment in the plaint and the evidence produced on record, the trial court has recorded as under:

"Even petitioner has admitted in clear terms in his pleading that petitioner believes that the respondent wants money and for this she is doing all these nuisance acts against the petitioner. Thus, whatever act of mental cruelty has been alleged against the respondent appears to be outcome of financial dispute between the parties which is an ordinary wear and tear of life and happens in each family. The petitioner has also admitted in his rejoinder dated 07.11.09 against the application of the respondent dated 17.03.2009 for interim maintenance and cost of proceeding that he hardly earns Rs. 5,000/- to Rs. 6,000/- per month. Thus, there appears no mental cruelty of such a nature and extent to reasonable cause any apprehension in the mind of petitioner that it is not safe for him to continue the matrimonial relationship with the respondent."

10. In so far as, physical cruelty upon the appellant allegedly committed by his wife is concerned, no injury report was produced by him nor any witness claimed that he has seen the respondent assaulting her husband. On the issue of physical cruelty, the trial court has noticed that all the witnesses are hearsay witnesses. The trial court has observed thus;

"There is no averment in the petition showing any date, day, time and year of assault given by respondent to the petitioner. The petitioner himself has admitted that he started sleeping alone after bolting the door from inside which is sufficient to cause mental and physical agony to the respondent. Thus, the petitioner has also failed to prove any physical cruelty caused to him by the respondent."

11. On the question of desertion, the stand of the appellant that the respondent left the house in the month of June, 2008 takes out the ground of desertion from the purview of Section 13(1)(i-b) of the Hindu Marriage Act, 1955. For seeking divorce on the ground of desertion, it must be for a continuous period of not less than 2 years immediately on presentation of the petition whereas, the appellant instituted the matrimonial suit on 30.06.2008 itself.

12. In view of the evidence led by the appellant in Matrimonial Suit No. 16 of 2008, it can safely be concluded that the appellant failed to produce evidence, which on a preponderance of probability may prove his case. The trial court has rightly dismissed the matrimonial suit seeking a decree of dissolution of marriage on the ground of cruelty and desertion.

13. We find no merit in the instant appeal and resultantly, it is dismissed.

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TULSI MAHTO VERSUS RENU DEVI & ANR.

2016 SCC OnLine Jhar 2050

In the High Court of Jharkhand at Ranchi

(Before Hon'ble Mr. Justice D.N Patel & Hon'ble Mr. Justice Ananda Sen, JJ.)

Tulsi Mahto ..... Appellant

v.

Renu Devi & anr. ..... Respondents

For the Appellant: M/s. K.K Singh, Advocate

For the Respondent No. 1: Mr. Rajesh Kr. Mahata, Advocate

For the Respondent No. 2: J.C to Mr. Mahesh Tiwari

F.A No. 71 of 2013 With I.A No. 3685 of 2014 With I.A No. 3609 of 2015
With I.A No. 3616 of 2015
Decided on May 18, 2016

This First Appeal has been preferred by the original applicant of Title Matrimonial Suit No. 118 of 2007. Appellant is the husband who had preferred an application under Section 13(1)(b) of the Hindu Marriage Act, 1955 for dissolution of the marriage between this appellant and the respondent-wife mainlyon the ground of desertion by wife and her illicit relationship with several persons who were residing in the nearby house of the appellant.

...The marriage was solemnized between this appellant and the respondent on 31st July, 1987. As this appellant was serving in Indian Railways at Howrah, State of West Bengal, the respondent had started living with this appellant at Howrah for 20 long years. It is alleged by this appellant that the respondent started developing illicit relationships with persons who were residing in the nearby vicinity. For proving this allegation, this appellant has examined three witnesses who are Kunti Devi, Munshi Mahto and the appellant himself. We have gone through the evidences of these three witnesses with their cross-examination. This appellant has failed to prove the allegation of illicit relationship of the respondent with several persons in the nearby vicinity at the residence of this appellant. Looking to the cross-examination of these witnesses, they were unable to given name of any of these persons, though, the appellant was staying at that place since last 20 years long. Bare assertion has got no value in the eyes of law.

...Further, it appears from the evidences on record, that the respondent was staying with the appellant since last 20 years after the marriage was solemnized. There was no reason for the respondent to leave the appellant-husband. On the contrary, it appears from the evidences of the case that this appellant brought the respondent from Howrah (West Bengal) to Kasmar (Bokaro) in the State of Jharkhand and thereafter husband returned to Howrah leaving his respondent-wife at Village Kasmar (Bokaro). This proves that this appellant has deserted the respondent.

...this appellant cannot be given premium to own wrong, as he has deserted his respondent-wife and, hence, the ratio of the aforesaid judgment is not applicable to the facts of the present case.

... As a cumulative effect of the aforesaid facts and reasons and the evidences on record, no error has been committed by the Principal Judge, Family Court, Bokaro in dismissing Title Matrimonial Suit No. 118 of 2007. Therefore, there is no substance in the First Appeal and the same is hereby dismissed.

D.N PATEL, J.

F.A No. 71 of 2013

1. This First Appeal has been preferred by the original applicant of Title Matrimonial Suit No. 118 of 2007. Appellant is the husband who had preferred an application under Section 13(1)(b) of the Hindu Marriage Act, 1955 for dissolution of the marriage between this appellant and the respondent-wife mainlyon the ground of desertion by wife and her illicit relationship with several persons who were residing in the nearby house of the appellant.

2. Counsel for the appellant submitted that the marriage between this appellant and the respondent was solemnized on 31st July, 1987 and as this appellant was serving at Howrah in Railway, the respondent was also staying with him at Howrah (West Bengal) and they continued to stay together for approximately 20 long years, but, thereafter, she developed illicit relationship with several persons who were residing in the neighbourhood and when this fact was brought to her notice, she left the house of this appellant. Thus, the desertion was by the respondent-wife since there were illicit relationships of this respondent with several persons who were residing nearby the house of this appellant. Three witnesses have been examined by the appellant and they all supported these two facts. This aspect of the matter has not been properly appreciated by the Principal Judge, Family Court, Bokaro while dismissing the application preferred by this appellant. Counsel for the appellant has also relied upon the decision rendered by Hon'ble Supreme Court in the case of K. Srinivas Rao v. D.A Deepa reported in (2013) 5 SCC 226 and has submitted that if this separation has created an unbridgeable distance, or, has irretrievably broken down, or, if the marriage is beyond repair on account of bitterness, or, where themarriage is dead for all the purposes, then it cannot be revived by the Court's verdict and, hence, the judgment and order passed by Principal Judge, Family Court, Bokaro, deserves to be quashed and set aside and the divorce application preferred by this appellant may kindly be allowed.

3. Counsel for the respondent submitted that for 20 long years the respondent has resided with this appellant at Howrah after the marriage between the two. As the appellant was staying at Howrah and as he was serving in Railway, there was no reason for the respondent to leave the house of this appellant, but, as this appellant had developed illicit relationship with his Bhabhi, she was brought at Village Kasmar, District Bokaro, and the appellant also left Village Kasmar (Bokaro) leaving the respondent at the village. This phenomenon has taken place and she stayed at Village Kasmar (Bokaro) for some times and, thereafter, as the husband had gone back to Howrah leaving the respondent at Village Kasmar (Bokaro), she had no option but to return to her parental house. Thus, there is no desertion by the respondent, rather, the appellant has deserted this respondent. These facts have been proved from the evidence on record. Moreover, it is submitted by the counsel for the respondent that this appellant has already solemnized one more marriagewith another lady during the subsistence of the first marriage with the respondent. This evidence has also been given by the witnesses of the respondent. It is also submitted by the counsel for the respondent that the appellant cannot be paid premium for desertion of his wife. In fact, this appellant has deserted the respondent and, therefore, the ratio of the decision cited by the counsel for the appellant is not applicable to the facts of the present case. It is also submitted by the counsel for the respondent that the allegations levelled by the appellant have not been proved by any of the witnesses. These aspects of the matter have been properly appreciated by the learned Principal Judge, Family Court, Bokaro while dismissing the application preferred by this appellant and no error has been committed by the learned trial Court in dismissing the said application and, hence, this First Appeal may not be entertained by this Court.

REASONS

4. Having heard learned counsels for both sides and looking to the evidences on record, we see no reason to entertain this First Appeal No. 71 of 2013 mainly for the following facts and reasons:-

(i) The marriage was solemnized between this appellant and the respondent on 31st July, 1987. As this appellant was serving in Indian Railways at Howrah, State of West Bengal, the respondent had started living with this appellant at Howrah for 20 long years. It is alleged by this appellant that the respondent started developing illicit relationships with persons who were residing in the nearby vicinity. For proving this allegation, this appellant has examined three witnesses who are Kunti Devi, Munshi Mahto and the appellant himself. We have gone through the evidences of these three witnesses with their cross-examination. This appellant has failed to prove the allegation of illicit relationship of the respondent with several persons in the nearby vicinity at the residence of this appellant. Looking to the cross-examination of these witnesses, they were unable to given name of any of these persons, though, the appellant was staying at that place since last 20 years long. Bare assertion has got no value in the eyes of law.

(ii) Further, it appears from the evidences on record, that the respondent was staying with the appellant since last 20 years after the marriage was solemnized. There was no reason for the respondent to leave the appellant-husband. On the contrary, it appears from the evidences of the case that this appellant brought the respondent from Howrah (West Bengal) to Kasmar (Bokaro) in the State of Jharkhand and thereafter husband returned to Howrah leaving his respondent-wife at Village Kasmar (Bokaro). This proves that this appellant has deserted the respondent.

(iii) It further appears from the facts of the case that once the respondent was left at Village Kasmar (Bokaro) by the appellant-husband and the appellant-husband had returned at Howrah (West Bengal). Now, the respondent, being deserted by her husband was living without her husband and therefore, she had gone at her parental house. Thus respondent had no option but to stay at her parental house.

(iii) It further appears from the evidences on record that this appellant has married with another lady, namely Sitara Devi @ Sita Devi, daughter of Narayan Prajapati of Village Tulmul, District-Bokaro. These facts have been stated by the witnesses examined by the respondent.

(iv) It further appears from the evidences of the case that the appellant has failed to prove the desertion, nor this appellant could prove the illicit relationship of the respondent with anyone. Thus, both the grounds for getting divorce are not proved. Therefore, no error has been committed by the Principal Judge, Family Court, Bokaro in dismissing the application preferred by this appellant for getting divorce with the respondent under Section 13(1)(b) of the HinduMarriage Act, 1955.

(v) Counsel for the appellant has relied upon a decision rendered by Hon'ble Supreme Court in the case of K. Srinivas Rao v. D.A Deep reported in (2013) 5 SCC 226 especially in paragraph 30 thereof. Looking to the facts of the present case it appears that this respondent had stayed with the appellant for 20 long years after the marriage and she had no reason to leave the house of the appellant-husband. Also it appears from the facts of the case that this appellant brought the respondent from Howrah (West Bengal) to Village Kasmar (Bokaro), State of Jharkhand and, thereafter, the appellant returned to Howrah leaving his wife-respondent at Village Kasmar. This reflects that this appellant has deserted the respondent. Moreover, this appellant has married another lady during subsistence of the first marriage with this respondent. These three facts are remarkably different from the facts of the the aforesaid reported decision and, hence, this appellant cannot be given premium to own wrong, as he has deserted his respondent-wife and, hence, the ratio of the aforesaid judgment is not applicable to the facts of the present case.

5. As a cumulative effect of the aforesaid facts and reasons and the evidences on record, no error has been committed by the Principal Judge, Family Court, Bokaro in dismissing Title Matrimonial Suit No. 118 of 2007. Therefore, there is no substance in the First Appeal and the same is hereby dismissed.

I.A No. 3685/2014

6. This Interlocutory Application has been preferred by the respondent-wife under Section 24 of the Hindu Marriage Act, 1955 for ad-interim maintenance flatly at the rate of Rs. 25000/- per month from the month January, 2007 and the cost of litigation at Rs. 30000/- and journey expenses at Rs. 5000/-.

7. In view of the reasons stated herein above for dismissal of the First Appeal No. 71 of 2013 and also looking to the interim order passed by this Court dated 8th April, 2015, this Court has already directed Senior Divisional Commercial Manager, Eastern Railways, Howrah (West Bengal) to deduct Rs. 10000/- from the salary of this appellant and to deposit the same in the bank account of the respondent in a nationalized bank viz. Bank of India, Kasmar branch, District Dhanbad, State of Jharkhand, having bank account No. 480710110004421. The interim relief granted is made absolute. It appears that the said Senior Divisional Commercial Manager, Eastern Railways, Howrah has deducted Rs. 10000/- from the salary of this appellant only for one month i.e September, 2015. It further appears that the order dated 8thApril, 2015 clearly mentioned in paragraph 8 that this arrangement will continue till further order. Therefore, every month the aforesaid amount of Rs. 10000/- was to be deducted from the salary of this appellant to be deposited in the bank account of the respondent, but, the said Senior Divisional Commercial Manager has failed to obey this order of the Court. Railway authorities have not filed any Interlocutory Application for modification of the order. The Railway authorities cannot favour this appellant-husband. The Railway authorities cannot give a stay upon the order passed by the Division Bench of this Court on their own. The Railway authorities have grossly violated the order of this Court deliberately.

8. I.A No. 3685 of 2014 stands disposed of.

I.A No. 3609 of 2015

9. This Interlocutory Application has been filed by the appellant for modification of the order dated 8th April, 2015 passed by this Court.

10. Counsel for the appellant submitted that in a maintenance application preferred by the respondent, the learned trial Court has passed an order of monthly payment at Rs. 7000/-. Counsel for the appellant accepted that only for the month of June, 2015 that amount has been paid and nothing beyond this has been paid by this appellant, as stated by the counsel for the respondent-wife. Thus, this appellant is not obeying the order of this Court regarding payment of Rs. 10000/- per month nor he is obeying the order of the trial Court also.

11. We, therefore, dismiss I.A No. 3609 of 2015. At this stage, it is submitted by the counsel for the appellant that it was not the duty of the appellant to make payment of Rs. 10000/-, but, the Railway authorities were liable to deduct of Rs. 10000/- per month. He was ordered to make payment of maintenance to his own wife. The facility was given by this Court that from salary the amount must go directly to the bank account of the respondent, but, the appellant was aware that the Railway authorities have stopped deducting the amount of Rs. 10000/-. In that eventuality, the appellant shall have to make payment of the monthly maintenance as per the order of this Court. I.A No. 3609 of 2015 is dismissed.

12. The respondent No. 2 shall explain to this Court why action should not be taken for breach of an order dated 8th April, 2015.

13. As this matter has been disposed of, Registrar General of this Court is directed to enlist this matter only for the purpose of taking action against respondent no. 2 on 12th February, 2015.

I.A No. 3616 of 2015

14. This Interlocutory Application has been filed by the respondent for immediate implementation of the order dated 8th April, 2015 whereby the appellant was directed to make ad interim maintenance of Rs. 10000/-.

15. In view of the aforesaid orders passed in this case, this I.A No. 3616 of 2015 stands disposed of.

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RAJENDRA KUMAR SINGH MUNDA VERSUS SMT. MAMTA DEVI

2015 SCC OnLine Jhar 3735

(Before Hon'ble Mr. Justice D. N. Patel & Hon'ble Mr. Justice Ratnaker Bhengra, JJ.)

Rajendra Kumar Singh Munda Son fo Late Mangal Singh Munda resident of Village Sonahatu, P.O & P.S Sonahatu and District Ranchi (Now Khunti) ..... Appellant/Petitioner

v.

Smt. Mamta Devi w/o Sri. Rajendra Kumar Singh Munda, D/o Late Bishwanath Singh Munda residing at Village Amlesha, P.O & P.S Tamar District Ranchi (Now Khunti) ..... Respondent/Opp. Party

For the Appellant: M/s Jai Prakash, Sr. Advocate

For the Respondent: Satish Kumar Deo, Advocate

F.A No. 186 of 2008

Decided on August 20, 2015

This appeal has been preferred against the judgment and order dated 26th August, 2008, passed by the Principal Judge, Family Court, Ranchi in Matrimonial Title Suit No. 246 of 2007, whereby an application preferred by this appellant for divorce under Section 13 of the Hindu Marriage Act, 1955 has been dismissed and therefore, original applicant has preferred this appeal.

....Having heard counsel for both sides and looking to the facts and circumstances of the case, it appears that this appellant is a member of a tribal community, viz.Munda and, therefore, looking to Section 2(2) of the Hindu Marriage Act, 1955, this act is not applicable to the appellant as the appellant is a member of a Scheduled Tribe within the meaning of Article 366(25) of the Constitution of India. For the ready reference Section 2(2) of the Hindu Marriage Act, 1955 is quoted as under:

"2. Application of Act.-(1)…

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) …"

3. In view of the aforesaid provisions and as this appellant is a Member of a Scheduled Tribe within the meaning of Article 366(25) of the Constitution of India,Hindu Marriage Act, 1955 is not applicable to him.

4. For ready reference, Sub-Clause 25 of the Article 366 is quoted hereunder:

"366. Definitions.- In this Constitution, unless the context otherwise requires, the following expression have the meanings hereby respectively assigned to them, that is to say-

...(25) "Scheduled Tribes" means such tribes or tribal communities or parts of or groups within such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution;

...Synchronizing the aforesaid, i.e the notification issued by the President of India to be read with Article 366(25) of the Constitution of India to be read with Sub-Section 2 of Section 2 of the Hindu

Marriage Act, 1955, it appears that Mundasare Scheduled Tribes and Hindu Marriage Act, 1955 is not applicable either to them or to their marriages, much less for dissolution of the same, and hence, no error has been committed by the Principal Judge, Family Court, Ranchi in dismissing the Matrimonial Title Suit No. 246 of 2007 vide Order dated 26th August, 2008 as not maintainable.

D.N PATEL, J.:— This appeal has been preferred against the judgment and order dated 26th August, 2008, passed by the Principal Judge, Family Court, Ranchi in Matrimonial Title Suit No. 246 of 2007, whereby an application preferred by this appellant for divorce under Section 13 of the Hindu Marriage Act, 1955 has been dismissed and therefore, original applicant has preferred this appeal.

2. Having heard counsel for both sides and looking to the facts and circumstances of the case, it appears that this appellant is a member of a tribal community, viz.Munda and, therefore, looking to Section 2(2) of the Hindu Marriage Act, 1955, this act is not applicable to the appellant as the appellant is a member of a Scheduled Tribe within the meaning of Article 366(25) of the Constitution of India. For the ready reference Section 2(2) of the Hindu Marriage Act, 1955 is quoted as under:

"2. Application of Act.-(1)……

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) ……."""

3. In view of the aforesaid provisions and as this appellant is a Member of a Scheduled Tribe within the meaning of Article 366(25) of the Constitution of India,Hindu Marriage Act, 1955 is not applicable to him.

4. For ready reference, Sub-Clause 25 of the Article 366 is quoted hereunder:

"366. Definitions.- In this Constitution, unless the context otherwise requires, the following expression have the meanings hereby respectively assigned to them, that is to say-

(1) …….

(2) …… ……

(25) "Scheduled Tribes" means such tribes or tribal communities or parts of or groups within such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution;

……

(30)……." (Emphasis supplied)

5. In view of the Article 366(25) of the Constitution, Scheduled Tribe means such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of Constitution of India.

6. It further appears that by the Notification (The Constitution (Scheduled Tribes) Order, 1950), the President of India, in exercise of the powers conferred under Article 342(1) of the Constitution of India, has declared the tribes or tribal communities under Article 342(1). For ready reference, relevant part of The Constitution (Scheduled Tribes) Order, 1950, especially for erstwhile State of Bihar reads as under:

"THE CONSTITUTION (SCHEDULED TRIBES) ORDER, 1950

In exercise of the powers conferred by clause (1) of Article 342 of the Constitution of India, the President, after, consultation with the Governors and Rajpramukhs of the States concerned, is pleased to make the following Order, namely:

1. This Order may be called the Constitution (Scheduled Tribes) Order, 1950.

2. The tribes or tribal communities, or parts of or groups within, tribes of tribal communities, specified in Parts 1 to XVI of the Scheduled to this Order shall, in relation to the States to which those parts respectively relate, be deemed to be Scheduled Tribes so far as regards member thereof resident in the localities specified in relation to them respectively in those Parts of that Schedule.

   Any reference in this Order to State or to a district or other territorial division thereof shall be construed as a reference to the State, district or other territorial division as constituted on the 1st day of May, 1976.

THE SCHEDULE "PART III-BIHAR

1. Asur [Agaria]
2. Baiga
3. Bhanjara
4. Bathudi
5. Bedia
6. Bhumij (In North Chotanagpur and South Chotanagpur divisions and Santhal Parganas districts)
7. Binjhia
8. Birhor
9. Birjia
10. Chero
11. Chik Baraik
12. Gond
13. Gorait
14. Ho
15. Karmali
16. Kharia, [Dhelki Kharia, Dudh Kharia, Hill Kharia]
17. Kharwar
18. Khond
19. Kisan, [Nagesia]
20. Kora, Mudikora
21. Korwa
22. Lohara, Lohra
23. Mahli
24. MalPaharia, Kumarbhag Paharia
25. Munda, Patar
26. Oraon, [Dhangar (Oraon)]
27. Parhaiya
28. Santhal
29. Sauria Paharia
30. Savar
31. Karwar
32. Kol
33. Thare]

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(Emphasis supplied)

7. Synchronizing the aforesaid, i.e the notification issued by the President of India to be read with Article 366(25) of the Constitution of India to be read with Sub-Section 2 of Section 2 of the Hindu Marriage Act, 1955, it appears that Mundasare Scheduled Tribes and Hindu Marriage Act, 1955 is not applicable either to them or to their marriages, much less for dissolution of the same, and hence, no error has been committed by the Principal Judge, Family Court, Ranchi in dismissing the Matrimonial Title Suit No. 246 of 2007 vide Order dated 26th August, 2008 as not maintainable.

8. It has been held by the Hon'ble Supreme Court in the case of Surajmani Stella Kujur v. Durga Charan Hansdah reported in AIR 2001 SC 939 in paragraph no. 6 as under:

   "6. In this appeal the parties are admittedly tribals, the appellant being a Oraon and the respondent a Santhal. In the absence of a notification or order under Article 342 of the Constitution they are deemed to be Hindus. Even if a notification is issued under the Constitution, the Act can be applied to Scheduled Tribes as well by a furgther notification in terms of sub-section(2) of Section 2 of the Act. It is not disputed before us that in the Constitution (Scheduled Tribes) Order, 1950 as amended by Scheduled Castes and Scheduled Tribes Order (Amendment Acts) 63 of 1956. 108 of 1076. 18 of 1987 and 15 of 1990, both the tribes to which the parties belong are specified in Part XII. It is conceded even by the appellant that "the parties to the petition are two Tribals. Who otherwise profess Hinduism, but their marriage being out of the purview of HinduMarriage Act, 1955 in light of Section 2(2) of the Act, are thus governed only by their Santal Customs and usage."" (Emphasis supplied)

9. In view of the aforesaid decision also marriage of the parties to this First Appeal is not governed by the Hindu Marriage Act, 1955 looking to Subsection 2 to Section 2 thereof, to be read with the aforesaid provisions of the Constitution and the declaration made by the President.

10. Hence, there is no substance in this First Appeal, which is, hereby, dismissed.

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BABLI DEVI @ BABITA VERSUS ADITYA CHOURASIA @ ADITYA KUMAR

2015 SCC OnLine Jhar 3796

(Before Hon'ble Mr. Justice D.N Patel & Hon'ble Mr. Justice Ratnaker Bhengra, JJ.)

Babli Devi @ Babita, daughter of Sri. Shardanand Chourasia, resident of Police Line, Hirapur, Dhanbad, P.O, P.S & District-Dhanbad ..... Appellant

v.

Aditya Chourasia @ Aditya Kumar, son of Jagdish Chourasia, resident of N.S Lodna, Jharia, P.O & P.S-Jharia, District-Dhanbad ..... Respondent

For the Appellant: Mr. Sumeet Gadodia, Advocate

For the Respondent: Mr. Kripa Shankar Nanda, Advocate

F.A No. 16 of 2005
Decided on August 25, 2015

Trial Court has allowed the application preferred by the respondent and declared the marriage between the appellant and respondent as a void marriage, under Section 11 of the HinduMarriage Act, 1955 because, there was a breach of condition imposed under Section 5(i) of the Hindu Marriage Act, 1955 and, therefore, the original-respondent has preferred the present First Appeal.

The respondent is a original-applicant who has preferred an application under Section 11 of the Hindu Marriage Act, 1955 being T.M.S Case No. 385 of 2002, alleging that this appellant has already married in the year, 1995 with one Sanjya Kumar Gupta and during the lifetime of this Sanjay Kumar Gupta, she has married with the respondent in the year, 2000. This fact came to the knowledge of the respondent later on and therefore, this application under Section 11 of the Hindu Marriage Act, 1955 was instituted for declaring the marriage with this appellant as a void marriage, because of breach of condition imposed under Section 5(i) of the Hindu Marriage Act, 1955.

...it appears that themarriage of this appellant was solemnized with the respondent in the year 2000 during the life time of earlier husband of this appellant. The husband of the appellant was alive and during that second marriage has been solemnized by this appellant with the respondent in the year, 2000. Thus, there was a breach of condition under Section 5(i) of the Hindu Marriage Act, 1955 and therefore, themarriage between this appellant and the respondent is a void marriage under Section 11 of the Hindu Marriage Act, 1955. These aspects of the matter have been properly appreciated by the learned Principal Judge, Family court, Dhanbad while allowing the application preferred by the respondent.

D.N PATEL, J.:— This First Appeal has been preferred against the judgment and order delivered by learned Principal Judge, Family Court, Dhanbad in T.M.S Case No. 385 of 2002. The Principal Judge, Family court, Dhanbad has allowed an application preferred by the respondent under Section 11 of the Hindu Marriage Act, 1955and, has declared the marriage between the appellant and respondent as a voidmarriage, mainly for the reason that this appellant had earlier married with one Sri. Sanjay Kumar Gupta in the year, 1995 and has also filed a complaint against said Sri. Sanjay Kumar Gupta and others in the Court of learned Chief Judicial Magistrate, Dhanbad being Complaint Case No. 1147 of 2002 for the offence under Sections 34, 323, 307, 493

and 498A of Indian Penal Code, in which this appellant has stated on solemn affirmation that one Sri. Sanjay Kumar Gupta is her husband and arising out of marriage between the two in the year, 1995 birth of a female child has also taken place. These facts have been proved in an application preferred under Section 11 of the Hindu Marriage Act, 1955 and, hence the learned Trial Court has allowed the application preferred by the respondent and declared the marriage between the appellant and respondent as a void marriage, under Section 11 of the HinduMarriage Act, 1955 because, there was a breach of condition imposed under Section 5(i) of the Hindu Marriage Act, 1955 and, therefore, the original-respondent has preferred the present First Appeal.

2. Factual Matrix.

- The respondent has preferred an application bearing T.M.S Case No. 385 of 2002 before the Principal Judge, Family Court, Dhanbad for declaration of hismarriage with this appellant to be void under Section 11 of the HinduMarriage, Act, 1955, mainly on the ground that the appellant had already married with one Sri. Sanjay Kumar Gupta, in the year, 1995.
- Looking to Ext.-1 and Ext.A/1 it appears that the respondent has proved Complaint Case No. 1147 of 2002 preferred by this appellant against one Sri. Sanjay Kumar Gupta. This complaint has been filed for the offence under Sections 34, 323, 307, 493 and 498-A of Indian Penal Code. In this complaint, it is alleged by this appellant that she has married with one Sri. Sanjay Kumar Gupta and birth of a female child has also taken place, arising out of wedlock between this appellant and said Sri. Sanjay Kumar Gupta.
- This appellant has also given her statement in the form of examination-in-chief in Complaint Case No. 1147 of 2002.
- It further appears that the respondent has examined witnesses before the Trial Court and has proved that appellant has already married with one Sri. Sanjay Kumar Gupta and, therefore, during the lifetime of said Sri. Gupta, she cannot marry with the respondent. Earlier marriage was solemnized in the year, 1995 and the second marriage was solemnized in the year, 2000. The respondent has also proved Ext-1 Ext. A and Ext-A/1. Exts. A & A/1 are the undertakings executed in course of local negotiation on 5th May, 2002.
- The appellant has also filed Criminal Case being Jharia P.S Case No. 208 of 2003, for the offence under Sections 498A, 307 and 323 of Indian Penal Code, which was culminated in to S.T No. 408 of 2005 the trial having been concluded, there was an acquittal of the respondent and others against which this appellant had preferred appeal before this Court being Cr. Appeal No. 672 of 2013 which has also been dismissed by this Court. Thus, a false and frivolous complaint was filed by the appellant against the respondent and others.
- The respondent has also filed Complaint Case No. 1534 of 2002 against the appellant and ors. for the offence under Section 494, 495, 420 and 34 of Indian Penal Code in the Court of learned Chief Judicial Magistrate, Dhanbad and in the said case cognizance of the offence under Sections 494, 495, 417 and 410 has already taken against the appellant and others.
- Keeping in mind the evidences on record, especially the earlier marriage of this appellant with one Sri. Sanjay Kumar Gupta and the fact that during the lifetime of this spouse, the appellant has married with the respondent, the learned Trial Court has declared the marriage between the parties as a voidmarriage, as there was a breach of condition imposed under Section 5(i) of theHindu Marriage Act, 1955, vide order dated 15th December, 2004 in T.M.S Case No. 385 of 2002. The suit having been allowed by the learned Principal Judge, Family Court, Dhanbad, decree was also passed to that effect against which the original-respondent has preferred this First Appeal.

3. Arguments canvassed by the counsel for the Appellants.

- Learned counsel appearing for appellant submitted that in fact, this appellant has not married with Sri. Sanjay Kumar Gupta. The said complaint filed by this appellant being Complaint Case No. 1147 of 2002, was at the instigation of the respondent.
- It is further submitted by the learned counsel for appellant that the appellant is ready and willing to stay with the respondent and she has never deserted the respondent. These aspects of the matter have not been properly appreciated by the learned Principal Judge, Family court, Dhanbad, while allowing the application preferred by the respondent and hence, the said judgment and decree passed by the learned Trial Court deserve to be quashed and set aside.
- It is also submitted by the learned counsel for appellant that birth of the female child has taken place because of the marriage between the parties to this litigation. This aspect of the matter has also not been properly appreciated by the learned Trial Court.

4. Arguments canvassed by the learned counsel for respondent.

- Learned counsel appearing for respondent submitted that no error has been committed by the learned Principal Judge, Family Court, Dhanbad in allowing the application preferred by the respondent being T.M.S Case No. 385 of 2002 under Section 11 of the Hindu Marriage Act, 1955, declaring the marriage as a voidmarriage.
- It is submitted by the learned counsel for respondent that this appellant had preferred Complaint Case No. 1147 of 2002 before the learned Chief Judicial Magistrate, Dhanabd against one Sri. Sanjay Kumar Gupta to the effect that he was her husband and because of the marriage between this appellant and said Sri. Sanjay Kumar Gupta, there is birth of a female child. This Complaint Case No. 1147 of 2002 has been produced before the Trial Court and has been marked given Ext-1. There are further documents also, which are Ext A and Ext A/1 which are undertakings given by this appellant as well as by the brother of this appellant.
- It is further submitted by the learned counsel for respondent that the witnesses were examined by respondent (original-applicant) and the facts about earlier marriage of this appellant with one Sri. Sanjay Kumar Gupta which is solemnized in the year, 1995, has already been proved and therefore, during the lifetime of Sri. Sanjay Kumar Gupta, who is husband of this appellant, this appellant cannot marry with this respondent. Thus, there is a breach of condition imposed under Section 5(i) of the Hindu Marriage Act, 1955, no error has been committed by the learned Trial Court in declaring the marriage between the appellant and respondent as void marriage under Section 11 of the HinduMarriage Act, 1955.
- It is further submitted by the learned counsel for the respondent that false and frivolous criminal case was also instituted by this appellant being Jharia P.S Case No. 208 of 2003, for the offence under Section 498 A, 307 and 323 of Indian Penal Code, which was converted into Sessions Trial No. 408 of 2005. The Trial was conducted and order of acquittal was passed in favour of the respondent and his relatives, against which an appeal was preferred by this appellant being Criminal Appeal No. 672 of 2013 which was dismissed by a Division Bench of this Court and, the order of acquittal, passed by the learned Trial Court in favour of respondent and his relatives, was confirmed.
- It is further submitted by the learned counsel for the respondent that this appellant has also an filed an application under Section 125 Cr. P.C before the learned Trial Court for getting maintenance, in which plea has been taken by the respondent that the daughter for which this appellant is now insisting that the respondent is her father, is far away from truth. D.N.A test order was passed by the learned Trial Court for this appellant, for the respondent and for the female child. This order was challenged before this Court by this appellant, which was dismissed. Ultimately, D.N.A test was carried out of all the three, viz of this appellant, of the respondent and of the female child and it is found out by the trial Court that the birth of daughter is not because of this respondent and

the respondent is not a father of the said female child, on the basis of D.N.A test. These facts have been stated in the counter affidavit filed by the respondent in this First Appeal.

- Thus, it is submitted by the learned counsel for the respondent that there is a cruelty on the part of this appellant for filing a false criminal complaint and also for the maintenance application, despite the fact that she had already married in the year, 1995 with one Sri. Sanjay Kumar Gutpa and, therefore, she cannot marry with the respondent in the year, 2000, during the lifetime of the earlier husband. These aspects of the matter have been properly appreciated by the learned Principal Judge, Family Court, Dhanbad, while allowing the application preferred by this appellant bearing Matrimonial Suit No. 385 of 2002 vide judgment dated 15th December, 2004 and decree dated 16th/21st December, 2004.

5. Reasons:

6. Having heard learned counsel for both the sides and looking to the evidences on record, we hereby dismiss this First Appeal and upheld the judgment dated 15thDecember 2004 as also the decree dated 16th/21st December, 2004 passed by learned Principal Judge, Family Court, Dhanbad in T.M.S Suit No. 380 of 2002.mainly for the following facts and reasons:-

(i) The respondent is a original-applicant who has preferred an application under Section 11 of the Hindu Marriage Act, 1955 being T.M.S Case No. 385 of 2002, alleging that this appellant has already married in the year, 1995 with one Sanjya Kumar Gupta and during the lifetime of this Sanjay Kumar Gupta, she has married with the respondent in the year, 2000. This fact came to the knowledge of the respondent later on and therefore, this application under Section 11 of the Hindu Marriage Act, 1955 was instituted for declaring the marriage with this appellant as a void marriage, because of breach of condition imposed under Section 5(i) of the Hindu Marriage Act, 1955.

(ii) Looking to the Ext 1, Ext-A and Ext-A/1 to be read with deposition of the witnesses examined by the learned Trial Court on behalf of the original-applicant as well as on behalf of the original-respondent, it appears that this appellant had married with one Sanjay Kumar Gupta in the year, 1995.

(iii) Looking to the complaint petition preferred by this appellant being Complaint Petition No. 1147 of 2002 before the Chief Judicial Magistrate, Dhanbad, it appears that Sanjay Kumar Gupta is the husband of this appellant and there is birth of a female child, arising out of the said marriage which was solemnized in the year, 1995 and, therefore, also this appellant cannot marry with the respondent in the year, 2000, when the spouse is alive at the time ofmarriage in the year, 2000. This is a clear breach of Section 5(i) of HinduMarriage Act, 1955.

(iv) It further appears that statement on oath of this appellant was recorded by learned Chief Judicial Magistrate, Dhanbad in the complaint case filed by her bearing Complaint Petition No. 1147 of 2002 wherein she has stated that she had married with Sanjay Kumar Gupta in the year, 1995 and there is birth of a female child arising out of the said marriage. Thus, there is statement on oath by this appellant in Complaint Petition No. 1147 of 2002.

(v) It further appears from the facts of the case that a false and frivolous case was also filed by this appellant against the respondent and his relatives being Jharia P.S Case No. 208 of 2003, for the offence under Section 498A, 307 and 323 of Indian Penal Code. This was converted into Sessions Trial No. 408 of 2005 and ultimately, on the basis of the evidences on record, order of acquittal was passed by the learned Trial court. This order was in favour of the respondent and his relative, against which an appeal was preferred by this appellant being Criminal Appeal No. 672 of 2013, which was dismissed by a Division Bench of this Court vide order dated 12.08.2015 Thus, it is

rightly submitted by the counsel for the respondent that lodging of false and frivolous criminal case tantamount to cruelty by the appellant upon the respondent.

(vi) It further appears from the facts of the case that one more criminal case was instituted by this appellant/respondent for maintenance under Section 125 of the Code of Criminal Procedure, 1973 and in the said case the learned Trial Court has passed an order for D.N.A test, to be carried out of this appellant, of the respondent and of the female child, so that it can be proved whether the birth of female child was because of this respondent or not. Thereafter, this order was challenged by this appellant before the Jharkhand High Court. The order of the learned Trial Court for D. N. A test was confirmed and ultimately D.N.A test of this appellant, of the respondent as well as of the female child was carried out and it was proved that the respondent is not the father of the said female child. The respondent has already proved the marriage of this appellant with one Sanjay Kumar Gupta in the year, 1995, on the basis of the evidences on record including Ext-A, Ext-1 and Ext-A/1 to be read with the depositions of the witnesses, examined by the learned Trial Court on behalf of the appellant as well as on behalf of the respondent. These additional facts of maintenance application and the D.N.A test etc. have been brought on record by this respondent in the affidavit filed in this First Appeal.

7. As a cumulative effect of the aforesaid facts and reasons, it appears that themarriage of this appellant was solemnized with the respondent in the year 2000 during the life time of earlier husband of this appellant. The husband of the appellant was alive and during that second marriage has been solemnized by this appellant with the respondent in the year, 2000. Thus, there was a breach of condition under Section 5(i) of the Hindu Marriage Act, 1955 and therefore, themarriage between this appellant and the respondent is a void marriage under Section 11 of the Hindu Marriage Act, 1955. These aspects of the matter have been properly appreciated by the learned Principal Judge, Family court, Dhanbad while allowing the application preferred by the respondent.

8. Learned counsel appearing for the appellant submitted that earlier complaint filed against Sanjay Kumar Gupta was at the behest of the respondent. We are not accepting this contention, mainly for the reasons that this is an after thought. This appellant had filed earlier complaint in writing against one Sanjay Kumar Gupta, and her statement was recorded on oath before the learned Chief Judicial Magistrate, Dhanabd. Over and above, looking to the maintenance application, which is subsequent development in this case and also looking to the D.N.A test which speaks that respondent is not the father of the female child of this appellant, we, see no reason to entertain this First Appeal there being no error committed by the Trial Court is deciding the T.M.S Case No. 385 of 2002 vide order dated 15th December, 2004. Thus, there being no substance, this First Appeal is hereby dismissed.

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MRS. LARLEY VERSUS JOHN @ JOHNY C.A

2003 SCC OnLine Pat 1007 : AIR 2004 Pat 53 (FB) : (2005) 30 AIC 770 : (2005) 52 ACC (Sum 40) 12 : (2004) 1 PLJR 564 (FB)

Patna High Court

(Before Hon'ble Mr. Justice Sachchidanand Jha, Hon'ble Mr. Justice Radha Mohan Prasad & Hon'ble Mr. Justice Shiva Kirti Singh, JJ.)

Mrs. Larley … Petitioner;

v.

John @ Johny C.A … Respondent.

Matrimonial Reference No. 1 of 1998

Decided on October 13, 2003

Section 18 of the Act provides that any husband or wife may present a petition to the District Court or to the High Court praying that his or her marriage may be declared null and void. The grounds for declaration of null and void marriage are set out in Section 19, one of which is that either party was lunatic or idiot at the time of marriage.

... Having gone through records as well as the evidence — oral as well as documentary — led by the petitioner I do not find any error of procedure nor any error in the finding recorded by the Court below to warrant any modification under Section 17 of the Act. The Court below made attempts to secure the presence of the defendant but that was not to be. Perhaps, the defendant has no objection to the decree being passed by the Court below or the same being confirmed by this Court since he has chosen not to appear in this Court either.

S.N JHA, J.:— This is a reference under Section 20 read with Section 17 of the Indian Divorce Act, 1869 ('the Act' for short). Section 20 as it stood prior to the Indian Divorce (Amendment) Act, 2001 (Act 50 of 2001) provided that every decree or nullity of marriage made by District Judge shall be subject to confirmation by the High Court, and the provisions of Section 17, Clauses (1), (2), (3) and (4), shall mutatis mutandis apply to such decrees. I shall refer to Section 17 of the Act a little later in this judgment. The petitioner instituted suit being Matrimonial Case No. 38 of 1996 in the Court of District Judge, Bhagalpur for decree of nullity of marriage with respondent on the ground that the respondent was an idiot at the time of marriage. The Second Additional District Judge, Bhagalpur to whom the case was transferred, accepting the petitioner's case granted her decree of nullity of marriage subject to confirmation by the High Court under Section 20 of the Act. That is how the matter has come to this Court.

2. Notice of the reference was issued to the parties pursuant to which the petitioner entered appearance. The respondent however, chose not to appear as in the Court below. The case was accordingly listed for ex parte hearing. In the meantime the petitioner had filed an application (IA No. 1070/2003) stating that during the pendency of the reference, Section 20 of the Act was omitted by the Indian Divorce (Amendment) Act, referred to above, and therefore, there is no requirement of confirmation of the decree passed by the Court below, and in the circumstances, the reference has become redundant and infructuous. The matter was heard on 14-7-2003.

3. I shall first consider the question as to whether by reason of the amendment omitting Section 20 from the Act, the reference has become infructuous. In other words, whether the decree passed by the Court below has attained finality without requiring confirmation by this Court. The question as to the effect of the Amendment deleting Section 20 of the Act involves the question as to whether the amendment is prospective or retrospective. It is to be mentioned here that deletion of Section 20 is without any saving clause.

4. It is well settled rule of interpretation that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective effect. It is also well settled that while amendment in procedural law has a retrospective operation, any amendment affecting vested rights takes effect prospectively unless there are words in the Statute sufficient to show that the intention of the legislature was to affect the existing rights. The point which arises for consideration is whether the amendment in question brings about change in the procedural law or affects the vested right of the parties.

5. At this stage Section 17 of the Act so far as relevant, may be quoted as under:

"17. Confirmation of decree for dissolution by District Judge.—

Every decree for a dissolution of marriage made by a District Judge shall be subject to confirmation by the High Court.

…..…..…..

The High Court, if it think further enquiry or additional evidence to be necessary, may direct such enquiry to be made or such evidence to be taken.

The result of such enquiry and the additional evidence shall be certified to the High Court by the District Judge, and the High Court shall thereupon make an order confirming the decree for dissolution of marriage, or such other order as to the Court seems fit.

Provided that ……. ……"

It is relevant to mention here that a new Section 17 has been substituted in place of the earlier one quoted above, by the above-said amendment.

6. From reading of the above provisions (as they stood) it is evident that confirmation of decree is not an empty formality or a routine affair. The High Court in the facts and circumstances of the particular case may get further enquiry made or evidence taken and thereafter either confirm the decree, or pass such other order as it deems fit. The section, thus creates right in favour of the unsuccessful party to object to confirmation of the decree. It may be clarified here that though Section 17 deals with decree for dissolution of marriage — whereas the instant case is one of nullity of marriage covered by Section 20 of the Act — Section 20 makes the aforequoted parts of Section 17 applicable mutatis mutandis. If a decree of nullity of marriage made by the District Judge is subject to confirmation by the High Court; in other words, it does not take effect unless and until confirmed by the High Court, it is plain that the confirmation provision cannot be said to be a mere matter of procedure. The provision confers substantive rights on the parties to the proceeding and therefore, amendment has to be given prospective effect. There is nothing in the amendment to suggest that the legislature intended it to be retrospective. For the sake of analogy reference may be made to Section 366 of the Criminal Procedure Code which provides for confirmation of death sentence by the High court. Under that Section a sentence of death cannot be executed unless it is confirmed by the High Court and thus when the Court of Session passes such a sentence the proceedings are to be submitted to the High Court for confirmation. Theoretically, thus, where the accused does not prefer appeal from the conviction, or ever where he prefers appeal, he may alternatively argue that the death sentence was not warranted in the facts and circumstances of the case.

7. We could not lay our hands on any direct decision relating to retrospective or prospective effect of amendment relating to 'confirmation' provision. However, there are decisions galore relating to amendment of appeal provisions under different statutes. Though, it is true, confirmation is not the same thing as appeal, nevertheless having regard to the fact that the High Court can make "such other order" as it deems fit under Section 17 of the Act, there cannot be any doubt that the Court may decline to confirm the decree on one or the other ground. It is true that in the present case the defendant did not choose to contest the proceeding either in the Court below or in this Court. But this would hardly have any bearing on the question — the true test being as to whether in the event of contest by the respondent, the reference could have become infructuous by reason of the amendment. The answer has to be in the negative.

8. Reference may be made to cases on the point of prospective effect of the appeal provision. The leading case on the point is Garikapati Veeraya v. N. Subbiah Choudhry, AIR 1957 SC 540, where on review of various authorities the Constitution bench of the Apex Court, by majority, held that the right to appeal is not mere matter of procedure but is a substantive right. The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit. The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced, such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal. This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment, and not otherwise. In State of Bombay v.Supreme General Films Exchange Ltd., AIR 1960 SC 980, the Supreme Court observed that an impairment of the right of appeal by putting a new restriction thereon or imposing a more onerous condition is not a matter of procedure only; it impairs or imperils a substantive right and an enactment which does so is not retrospective unless it says so expressly or by necessary intendment. In Jose Da Costa v. Bascora Sadashiva Sinai Narcornim, AIR 1975 SC 1843, the Supreme Court observed that the right of appeal being a substantive right, the institution of suit carries with it the implication that all successive appeals available under the law then in force would be preserved to the parties to the suit throughout. The Court pointed out that this rule was subject to two exceptions — (a) when by a competent enactment such right of appeal is taken away expressly or impliedly with retrospective effect and (b) when the Court to which appeal lay at the commencement of the suit stands abolished.

9. In view of the clear pronouncement of law by the Apex Court, any amendment in the appeal provision has to be held to be prospective unless otherwise provided — expressly or by necessary implication. A fortiori any amendment in the confirmation provision must also be held to be prospective unless otherwise provided in the amendment. There is no such clause in the amendment by which Section 20 has simply been omitted, that is, deleted from the Act. It would thus follow that the deletion of Section 20 by the Indian Divorce (Amendment) Act, 2001 has no bearing on the present proceeding. The contention of the petitioner in the interlocutory application that there is no requirement of confirmation of the decree of the Court below and the reference has become redundant or infructuous, must therefore be rejected.

10. As a matter of fact, under Section 1(2) of the Amendment Act, the amendment is supposed to come into force on such date as the Central Government may by notification in the official Gazette appoint. It is not known whether the amendment has been brought into force by such notification. The above discussion is on the premise that necessary notification has been issued making the amendment effective from the appointed date.

11. Now coming to the facts of the present case, the petitioner's case is that on 8-6-93 she married the respondent at a Catholic Church at Mundur in district Trichur (Kerala) in accordance with custom and law provided for catholic marriage and certificate was granted by the Church to the parties. After

the marriage she returned to Bhagalpur to resume her avocation as a teacher in Mount Asisi School, Bhagalpur.

The respondent joined company in December, 1993. They started living as husband and wife. However, she was shocked to notice the abnormal behaviour of the respondent. She found that the respondent had no power of understanding, his behaviour was not rational and he had symptoms of insanity. Finding the respondent incorrigible she instituted the suit on the ground of his idiocy at the time of marriage. The petitioner alleged that the fact of idiocy was suppressed from her at the time of marriage and playing fraud upon her she was induced to contract the marriage with the respondent. The petitioner and respondent lived together till last part of 1995 at Bhagalpur whereafter the respondent left the place and has since been living at Trichur.

12. Notice was issued by the Court to the respondent several times but he did not appear. In the circumstances, the suit was taken up ex-parte. The petitioner examined three witnesses including herself and also brought documents on record. On the basis of materials and evidence adduced by the petitioner the Court below came to the conclusion that it was a fit case for declaring the marriage null and void and accordingly on 30-11-98 granted decree of nullity of marriage.

13. Section 18 of the Act provides that any husband or wife may present a petition to the District Court or to the High Court praying that his or her marriage may be declared null and void. The grounds for declaration of null and void marriage are set out in Section 19, one of which is that either party was lunatic or idiot at the time of marriage.

14. Having gone through records as well as the evidence — oral as well as documentary — led by the petitioner I do not find any error of procedure nor any error in the finding recorded by the Court below to warrant any modification under Section 17 of the Act. The Court below made attempts to secure the presence of the defendant but that was not to be. Perhaps, the defendant has no objection to the decree being passed by the Court below or the same being confirmed by this Court since he has chosen not to appear in this Court either.

15. In the result, the decree of nullity of marriage granted by the Court below dated 30-11-98 is confirmed and the reference is accordingly disposed of.

Radha Mohan Prasad, J.:— 16. I agree.

Shiva Kirti Singh, J. 17. I agree.

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VIJAY BAHADUR SHARMA VERSUS LALITA DEVI

2015 SCC OnLine Pat 9520

In the High Court of Patna

(Before Hon'ble Mr. Justice Ramesh Kumar Datta & Hon'ble Mr. Justice Mihir Kumar Jha, JJ.)

Vijay Bahadur Sharma, son of Gaya Sharma, resident of village Bukanaor, P.S Sanjhauli, District Rohtash ..... Appellant

v.

Lalita Devi, wife of Vijay Bahadur Sharma, D/o late Jatan Sharma, resident of village Pesour, P.S Charpokhari, District Bhojpur ..... Respondents

For the Appellant/s: Mr. Prashant Kashyap, Adv.

For the Respondent/s: Mr. Dineshwar Mishra, Adv.

Mr. Surendra Mishra, Adv.

Miscellaneous Appeal No. 128 of 2011
Decided on November 26, 2015

Hindu Marriage Act—Divorce -Desertion--By-now the law is well settled that two important elements are essential to constitute desertion, firstly, the fact of separation, and secondly, the intention to bring cohabitation to an end permanently. Further the intention to bring cohabitation to end permanently consists of two aspects, firstly, absence of consent or against the wish of the petitioner and secondly, conduct giving scope to a reasonable cause to the spouse leaving the matrimonial home with the intention of bringing the cohabitation permanently to an end.----the appellant himself was a wrong doer and could not have taken advantage of his own wrong.-- no error in the impugned judgment wherein the prayer of divorce has been rejected on the ground that either of the two grounds of cruelty or desertion having been not proved by the appellant he was not entitled for a decree of divorce.--decision of the trial court confirm-- Appeal Dismissed.

The Judgment of the Court was delivered by

MIHIR KUMAR JHA, J.:— Heard learned counsel for the appellant.

2. This appeal is directed against the judgment dated 26.4.2008 and decree dated 7.5.2008 passed by the Principal Judge, Family Court, Bhojpur at Arrah in Matrimonial Case No. 33 of 2005/204 of 2005 whereby and whereunder the application for divorce filed by the appellant has been dismissed.

3. The case of the appellant in brief is that his marriage with the Respondent was performed on 04.03.1985 and Gauna was also given on 02.03.1987 whereafter the Respondent came to his village home at Boknao. The appellant has however alleged that the Respondent was a quarrelsome lady and did not treat his parents with respect and thus be in order to ensure peace had shifted to Patna along with Respondent in the year 1987 itself and lived together with her in Mohalla Jakkanpur till October 1988.

4. That the further case of the appellant is that the behaviour of Respondent wife even during stay at Mohalla Jakkanpur did not make any improvement and she had ultimately on her own gone to her naihar in villager Pausar in October 1988 whereafter she did not return back despite repeated request though

made by the appellant and in the meantime she had given birth to his daughter in 1990. The appellant has also alleged that the Respondent had filed a case for maintenance in 1994 and the learned magistrate had passed an ex-parte order under Section 125 Cr.P.C in 1996 whose knowledge was acquired by the appellant only in May 2002 and thereafter he had filed an application for its recall on 15.05.2002 by taking a specific plea that he always was/is ready to keep respondent as his duly wedded wife with all respect but the Respondent remained adamant in staying separately at her Naihar with her mother and as such he was compelled to file the suit for divorce on 03.06.2005 on the ground of both cruelty and desertion.

5. Per contra, the case of the Respondent wife, on the other hand, is that after her marriage in 1985 and gauna in 1987 she had gone to her Sasural and lived together with her husband till 1990 during which she was also occasionally visiting her naihar but in 1990 after she had given birth to a daughter the appellant at her naihar, the appellant had deserted her and had got married to one Pushpa Kumari sometime in the year 1991.

6. The further case of the Respondent wife is that when the appellant did not take care of her and their daughter for next four years, she had filed a case for maintenance under Section 125 Cr.P.C on 17.01.1994 in which despite service of notice and summon the appellant did not appear and eventually the learned magistrate had passed an order on 24.08.1996 granting maintenance of Rs. 750/- per month (Rs. 500 for the Respondent and Rs. 250/- for the daughter) but the appellant did not comply even the aforesaid order of the court and only when a distress warrant was issued against him in May 2002 that he had filed an application for recall of the order of maintenance on 15.05.2002 which however was rejected by the concerned court on 07.06.2005 Thus according the Respondent wife, it was initially the appellant himself who had deserted her and having married one Pushpa Kumar, had filed the suit for divorce on 3.6.2005 only to get her rid of her as well as the liability of payment of maintenance as directed by learned magistrate u/s 125 Cr.P.C

7. The respondent in fact has also come out to assert that on 2.7.2005 the appellant had filed another petition in the court of the Principal Judge, Family Court, Bhojpur to recall the order of maintenance wherein he had alleged adultery on the part of the respondent-wife of living with one Hagrim Singh, who was none else but own uncle of the respondent-wife. The further case of the respondent-wife is that the application filed by the appellant for recall of the order of maintenance was also rejected by the Principal Judge, Family Court, Bhojpur, whereafter he had filed a Cr. Revision No. 653/2005 on 07.09.2005 before this Court assailing the order dated 07.06.2005 passed by the learned magistrate granting maintenance of 750/- per month which, however, was also dismissed by this Court an order dated 22.9.2006 with a direction to the appellant to pay Rs. 40,000/- forthwith to the respondent-wife through a Bank draft.

8. It was at this stage that the hearing of the divorce case filed by the appellant was taken up and the Family Court had framed the following issues:

   (i) Is the suit as framed maintainable?

   (ii) Has the respondent treated the petitioner with cruelty?

   (iii) Has the respondent deserted the petitioner without any reasonable cause for more than two years for the presentation of the petition?

   (iv) Is the petitioner entitled for decree of divorce, if so on what condition?

9. The appellant in fact had examined five witnesses, namely, P.W.1 Radheshyam Singh, P.W.2 Lalita Devi, P.W.3 Surendra Sharma, P.W.4 Jangi Singh and P.W.5 Vijay Bahadur Sharma (appellant himself).

10. The respondent-wife also had examined five witnesses, namely, R.W.1 Sheolal Sharma, R.W.2 Narayan Sharma, R.W.3 Munshi Sharma, R.W.4 Udrai Sharma and R.W.5 Lalita Devi (the respondent herself).

11. The Family Court on the basis of the evidence adduced by the parties had come to, particularly in view of admission of P.W.1 himself that the appellant had married a lady, namely, Pushpa Devi, D/o Ramlakhan

Sharma of village Nib Diliya, District Rohtas and had also children from the said marriage, a specific finding that the plea of both of cruelty and desertion as alleged by the appellant had not been proven. As a matter of fact the Family Court had found nothing in the oral evidence of P.W.1, P.W.2, P.W.3 and P.W.4 to support his allegation of cruelty or desertion on the part of the respondent-wife. The solitary evidence of the appellant himself regarding cruelty and desertion on the part of the respondent wife was also not found worth reliance by the Family Court in the impugned judgment.

12. The Principal Judge of the Family Court in fact had also gone to hold that suit for divorce filed by the appellant after 17 years of the alleged desertion by the respondent-wife in 1988 was in fact a ploy for resisting the order of maintenance passed by the competent court on 24.08.1996, on an application of the respondent-wife. The Principal Judge, Family Court, Bhojpur having discussed the evidence adduced by both the parties in the impugned judgment had also recorded a finding that the appellant had miserably failed to prove the allegation of cruelty and desertion by the respondent wife and also gone to hold that it was in fact the appellant who had created a situation by getting married again to Pushpa Devi in the year 1991 on account of which alone the respondent-wife had been left with no other option but to stay separately with her daughter at her Naihar.

13. Based on aforesaid consideration the Principal Judge, Family Court, Bhojpur had held that the appellant had no cause of action and was not entitled for a decree of divorce and consequently had dismissed the suit.

14. Learned counsel for the appellant while assailing the impugned judgment has basically concentrated on the aspect that the court below had miserably failed to take into account that the respondent-wife had led no evidence on the issue of second marriage of the appellant and that whatever was relied by the court below for recording a finding regarding second marriage of the appellant was based on evidence of P.W.1, who himself was a rustic person. He had also submitted that in any event when the respondent herself had also shown her inclination to get thedivorce from the appellant on certain conditions including payment of certain amount, this Court should make an effort for reconciliation between the appellant and the respondent. According to the learned counsel for the appellant, such recourse can be taken by this Court in exercise of its inherent power.

15. Per contra, learned counsel for the respondent-wife has submitted that well merited findings recorded by the court below in the impugned judgment would require no interference, especially when all the aspects, which are now being raised before this Court, were also gone into at length in the impugned judgment. He has in this regard also defended the finding of the court below with regard to second marriage of the appellant with one Pushpa Devi by explaining that in the written statement filed by the respondent-wife she had specifically alleged that in the year 1991 the appellant having entered into second marriage in her life time had himself created a situation in which no well respecting woman could have lived together. Learned counsel for the respondent has also explained that the plea of reconciliation/ settlement is also wholly uncalled for because not only in the written statement the respondent-wife had categorically resisted the claim of divorce of the appellant but in her own deposition she had stated that she did not want divorce as it could cause slur on the future prospect of her marriageable daughter that she had from the marriage with the appellant.

16. In the considered opinion of this Court there would be no question of any reconciliation because the appellant wants divorce, whereas the respondent-wife had and has still resisted such prayer of divorce made by the appellant. Reconciliation in such cases could have only been possible if there was no marriage of the appellant but then it is an admitted fact, even conceded by the learned counsel for the appellant, that in the year 1991 he had got married to Pushpa Devi when the respondent-wife had allegedly deserted him. Thus, this Court is of the view that reconciliation in this case is absolutely impossible only on account of irreversible situation of second marriage created by the appellant. If the appellant in the name

of reconciliation wants divorce by making some payment despite its being opposed by the respondent-wife that is not possible or permissible within the frame work of Section 13 of the Hindu Marriages Act.

17. This Court, therefore, in this appeal will keep itself confined to the consideration of the sole question as to whether the impugned judgment of Family Court dismissing the suit for divorce is factually correct and legally sustainable and further whether on the evidence on record the appellant was entitled for a decree ofdivorce on the ground of cruelty and/or desertion?

18. From reading of the plaint that was filed by the appellant before the Family Court it would become very clear that the allegation of cruelty against Respondent was not only vague but only unspecific. All that was said therein was that the respondent-wife is a quarrelsome lady and had always quarreled with the appellant and his parents on petty matters. This part of the allegation of cruelty in fact could not be proved by the appellant, inasmuch as the court below has recorded that P.W.1 to P.W.4 had not said a word in support of such allegation of cruelty. As noted above, this Court also had given an opportunity to the appellant to produce any evidence which in his opinion was misconstrued by way of non-consideration or wrong consideration by the Principal Judge, Family Court but the appellant has not produced any such evidence which in turn would amount to his giving up the ground of non-consideration of his evidence by the Principal Judge, Family Court.

19. The next question would be that of desertion and in this regard it is the case of the appellant that the respondent-wife had resided with the appellant for a period of one year in 1987-88 and she had gone to her Naihar during Dussahara festival in the year 1988, whereafter she had never returned. In this regard the appellant had also sought to make out a case that he had gone to his Sasural and had requested his mother-in-law to send his wife, the respondent, but the wife-respondent herself had flatly refused to go back alongwith the petitioner.

20. The court below however again had examined this aspect of desertion at length in the light of the evidence adduced by the parties and had come to a specific finding that such story of desertion by the respondent in the year 1988 itself was not proved because the respondent-wife had given a birth to a female child out of the marriage with the appellant in the year 1990. In fact all that came in evidence adduced by the appellant was that both the appellant and the respondent were residing separately since 1990, after respondents had given birth to the daughter of appellant in 1990 but then the reason of such separation was revealed by P.W.1 Radheyshyam Singh who in paragraph no. 5 of his deposition had stated that the appellant had solemnized his second marriage with Pushpa Devi and was having children from the said marriage.

21. Let it be kept in mind that this appeal was filed on 18.5.2009 and in course of hearing on 22.6.2012 a Division Bench of this Court had recorded as follows:

"Prima facie, the views of the learned Principal Judge for refusing the prayer of the petitioner for divorce appear to be sound. If appellant wants to show that the court below has misread evidence of any witness, copy of the deposition of the witnesses should be produced on the next date. This Court may consider the prayer for making effort for reconciliation and amicable settlement of dispute if by the next date, the appellant files an affidavit disclosing amount of maintenance paid by him pursuant to orders passed in maintenance case of 1994."

22. Pursuant to the aforementioned order though a supplementary affidavit was filed on behalf of the appellant wherein though he had annexed the order of the maintenance case and has also given detail of payment of Rs. 40,000/- made on 29.3.2006 in terms of the order dated 22.9.2005 passed by this Court in Cr. Revision No. 653/2005 as also further detail of payment of Rs. 10,500/- in monthly instalment in compliance of the order of maintenance but he did not enclose any of the evidence adduced before the Family Court in such supplementary affidavit.

23. The respondent-wife however having appeared in this case had filed a counter affidavit on 2.9.2013 wherein while supporting the findings of the impugned judgment passed by the Principal Judge, Family Court she has come out to say that the appellant himself had not only committed adultery by also getting married to a lady, namely, Pushpa Devi in the year 1991 but had also made baseless allegations in the memo of appeal against her (respondent-wife) that she was living in adultery with her own uncle though this ground was never taken by him in the application filed by him for divorce before family court. She has also enclosed documents to show that not only the appellant was a man of means having huge income from the landed property, house rent but even the father of the appellant being a retired Government servant is well placed whereas she with her daughter aged about 23 years as on 2.9.2013 was having no means to support herself or get her daughter married. In this regard she has also stated there is only 90 decimals of ancestral land in the joint family of his father having two more brothers which was wholly insufficient for upkeep and maintenance of the respondent-wife and her daughter.

24. It is here that this Court would find that the case of the respondent duly supported by her own oral evidence becomes strong, inasmuch as it was her case both in the written statement as well as in her deposition before the court that the appellant was having an extra marital affair with Pushpa Devi and when she had objected to such relationship she was even physically assaulted. Thus, when P.W.1 being the witness of Appellant himself had supported marriage of the appellant with another lady, namely, Pushpa Devi in 1991 and also having children from that marriage nothing would remain for speculation that the respondent-wife was literally coerced and forced to live separately on account of physical and mental torture caused to her by the appellant on account of his such marriage with Pushpa Devi.

25. By-now the law is well settled that two important elements are essential to constitute desertion, firstly, the fact of separation, and secondly, the intention to bring cohabitation to an end permanently. Further the intention to bring cohabitation to end permanently consists of two aspects, firstly, absence of consent or against the wish of the petitioner and secondly, conduct giving scope to a reasonable cause to the spouse leaving the matrimonial home with the intention of bringing the cohabitation permanently to an end.

26. This aspect of the matter in fact was directly gone into by the Apex Court in the case of Savitri Pandey v. Prem Chandra Pandey, reported in (2002) 2 SCC 73, wherein it was held as follows:

"13. In any proceedings under the Act whether defended or not the court would decline to grant relief to the petitioner if it is found that the petitioner was taking advantage of his or her own wrong or disability for the purposes of the reliefs contemplated under section 23(1) of the Act. No party can be permitted to carve out the ground for destroying the family which is the basic unit of the society. The foundation of the family rests on the institution of a legal and valid marriage. Approach of the Court should be to preserve the matrimonial home and be reluctant to dissolve the marriage on the asking of one of the parties.

17. The marriage between the parties cannot be dissolved only on the averments made by one of the parties that as the marriage between them has broken down, no willful purpose would be served to keep it alive. The legislature, in its wisdom, despite observation of this Court has not thought it proper to provide for dissolution of the marriage on such averments. There may be cases where, on facts, it is fond that as the marriage has become dead on account of contributory acts of commission and omission of the parties, no useful purpose would be served by keeping such marriage alive. The sanctity of marriage cannot be left at the whims of one of the annoying spouses. This Court in V. Bhagat v. D. Bhagat ((1994) 1 SCC 337 : AIR 1994 SC 710) held that irretrievable break-down of the marriage is not a ground by itself to dissolve it.

18. As already held, the appellant herself is trying to take advantage of her own wrong and in the circumstances of the case, the marriage between the parties cannot be held to have become dead for invoking the jurisdiction of this Court under Article 142 of the Constitution for dissolving the marriage."

27. The aforesaid law laid down by the Apex Court in the case of Savitri Pandey(supra) was also followed in somewhat exactly similar case by Madhya Pradesh High Court in the case of Mst. Butti v. Gulab Chand Pandey, reported in AIR 2002 Madhya Pradesh 123, wherein it was held as follows:

"9. It would appear from the pleadings of the husband/respondent's petition, that his main plank for seeking divorce was desertion by the appellant-wife. Elaborating on the meaning and purport of desertion, the Supreme Court in a recent decision in Savitri Pandey v. Prem Chandra Pandey, 2000 AIR SCW 182: ((2002) 2 SCC 73 : AIR 2002 SC 591), referred to its earlier decisions inBipinchandra Jaishingbhai Shah v. Prabhavati Chandra Jaisingbhai Shah, AIR 1957 SC 176 and Lachman Utamchand Kripalani v. Meena @ Mota, AIR 1964 SC 40, wherein it was laid down that in essence desertion means the international permanent forsaking and abandonment of one spouse by the other without the other's consent, and without reasonable cause. It was laid down therein that for the offence of desertion so far as deserting spouse is concerned, two essential conditions must be there (1) the factum of separation and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly the 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.

10. It may be noticed in the above context that the statement of Butti Bai (NAW/1) supported by the statement of her father Bhawandas (NAW/2) and brother Badri Prasad (NAW/3), indicates that the respondent/husband married anther woman Guddi, during the subsistence of his marriage with the appellant/wife. It also appears from birth certificate (Ext.D/1) that a son was also born, from the said second marriage. It is also noticed that the averments as above by the appellant/wife have not been controverted by the respondent/husband in his pleadings. In view of the above, the statements of the respondent/husband and his father denying the fact of second marriage cannot be accepted in preference to the oral and documentary evidence of the appellant/wife.

11. The appellant's evidence also discloses that after learning about the second marriage by the respondent/husband, she went to her matrimonial home. However, she was maltreated and beaten by the respondent/husband and his relatives, and was thus forced to leave her matrimonial home. She therefore lodged report of the incident with police Uchetra. The evidence as above clearly establishes the defence of the appellant/wife that as the respondent/husband and his family members used to maltreat her, therefore she was forced to leave her matrimonial home. In the above circumstances, there was sufficient and reasonable cause for the appellant/wife to live separately from the respondent/husband. She could not be blamed for living with her father as she could not be expected to continue to live with the respondent/husband, in the foregoing circumstances. There was reasonable cuase for the appellant/wife to leave the matrimonial home, in view of maltreatment by the respondent/husband and his family members and he having married another woman. Therefore, the finding of the learned trial Court that the ground of desertion by the appellant/wife is not established, is wholly justified."

28. This Court, however, would find absence of both the elements to constitute desertion on the part of the Respondent wife, inasmuch as the said separation in the year 1988 was never proved because of birth of the female child in the year 1990. Then comes the question of the appellant getting married to Pushpa Devi in the year 1991 and if on account of the marriage of the appellant with Pushpa Devi the respondent-wife was forced by the conduct of the appellant to live separately, she cannot be said to have deserted the appellant.

29. Thus, both on the facts of this case as also in the light of the settled principle of law it has to be held that the appellant himself was a wrong doer and could not have taken advantage of his own wrong. It was he who being a Hindu, during subsistence of the marriage with the respondent and also having a child from the respondent had got married to another lady, namely, Pushpa Devi and thus had created a situation in which no self respecting lady could live with him especially when it has come in evidence that she

was also physically assaulted by the appellant on a protest made by her as with regard to extra marital relationship of the appellant with Pushpa Devi.

30. Judged in this background the plea of desertion made by the appellant after 17 years by way of filing the suit for divorce in 2005 obviously smacks of malafide on the part of the appellant, inasmuch it becomes clear that after the order of maintenance dated 24.8.1996 under Section 125 Cr.P.C at the instance of respondent wife became final and the processes under section 83 Cr.P.C by way of distress warrant was issued against the appellant for realization of the amount in 2002 that the present application for divorce was filed by the appellant on 03.06.2005

31. Learned counsel for the appellant infact was also not in a position to assail the impugned judgment on any other ground but then he was quite emphatic that since the respondent-wife herself in some statement before the court below had made a prayer for grant of divorce on certain conditions, the Family Court keeping in view of the finding arrived of the marriage of the appellant with Pushpa Devi and also having children ought to have passed a decree of divorce on account of irretrievable break down of the marriage.

32. This Court hoever would not find even this ground to be sustainable for more than one reason. Firstly, as noted in the case of Savitri Pandey (supra) the Apex Court having regard to the law laid down in the case of V. Bhagat v. Mrs. D. Bhagat, reported in (1994) 1 SCC 337 : AIR 1994 SC 710, had held that irretrievable break down of the marriage is not a ground by itself to dissolve it. Secondly, whatever was given in pleading in the written statement has to be read as a whole. In such written statement followed by the contest by the respondent-wife by adducing evidence of five witnesses including herself she had resisted grant of divorce to the appellant at a belated stage of her life when she was to support his marriageable daughter. In fact in her own deposition she had also explained that she was not ready for thedivorce and thus, this Court would not find any error in the impugned judgment wherein the prayer of divorce has been rejected on the ground that either of the two grounds of cruelty or desertion having been not proved by the appellant he was not entitled for a decree of divorce.

33. Thus, for the reasons indicated above, we find no ground to interfere with the finding of the trial court. In consequence it is only necessary to affirm the finding of the trial court and dismiss this appeal. We accordingly confirm the decision of the trial court and dismiss this appeal. There would be, however, no order as to costs.

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LANDMARK JUDGMENTS ON

CUSTODY OF CHILDREN AND VISITATION RIGHTS

IRSHAD ALAM VERSUS ISMA ALAM

2013 SCC OnLine All 13585 : (2013) 98 ALR 739 : (2013) 5 All LJ 248 : (2013) 129 AIC 304 : 2013 AIR CC 2497

(Allahabad High Court)

(Before Hon'ble Mr. Justice Sunil Ambwani & Hon'ble Mr. Justice Bharat Bhushan, JJ.)

Between

Irshad Alam

v.

Isma Alam

First Appeal No. 1011 of 2012 Connected with First Appeal No. 1005 of 2012

Decided on May 9, 2013

Guardians andWards. Section 17& 25- custody of minor- to invoke the provisionof section 25, two conditions must be satisfied. Firstly, either the ward should leave or is removed from the custody of the guardian of his person, and secondly, the Court should come to a conclusion, in the welfare of the ward, to return to thecustody of the guardian, it may make an order of return of the ward to his/hercustody.---Wife is a Director in a Private Firm and is earning Rs. 80,0007- per month- The respondent-wife is an educated lady with sufficient in-come to look after the welfare of both her children.-- keeping in view the paramount consideration of the welfare of the children --it is not desirable to disturb the custody of male child. It is also desirable that the custody of the female child is given to her mother. the order of the Court below in giving the exelusive custody of the male child till he attains majority and of female child to the mother deserves to be maintained--Appeal Dismissed.

The Judgment of the Court was delivered by

BHARAT BHUSHAN, J.:— These two appeals under section 19 of the Family Courts Act have been filed by the appellant-husband against the judgment and order dated 20.11.2012 passed by the Principal Judge, Family Court, Kanpur Nagar whereby the application filed under section 25 of the Guardianship and Wards Act by the appellant-husband being Misc Case No. 50/70 of 2009 was rejected and the application filed by the defendant-wife un-der section 25 of the Guardianship and Wards Act being Misc Case No. 26/70 of 2009 was allowed with directions that the Master-Irish (minor) shall be in the custody ofher mother till he attains majority and further the appellant-fa-ther was directed to give the custody of minor daughter namely Km. Urooz aged about 8 years to her mother Isma Alam, the respondent wife.

2. The brief facts, which are relevant for disposal of these appeals, are recapitulated as under:

The marriage of appellant-husband and defendant wife was solem-nized on 11.8.1998 according to Muslim rites and customs at Kanpur. After the marriage, the wife stayed at her husband's house happily and out of the said wedlockand cohabitation one male child namely Iris Irshad Alam was born on 13.11.2002 and a female child namely Urooj Irshad Alam was born on 5.12.2005 On 17.12.2008 the respondent wife left her matrimonial home alongwith her male child on account of matrimonial discord between themand thereafter she did not return. The appellant husband even went to the extent of making alle-gations of character assassination against his wife. The appellant husband al-legedly used to abuse the respondent wife and vice versaand they were report-edly indulged in beating each other very often.

3. On 19.12.2008, the appellant husband gave 'Talaq' to the plaintiff-re-spondent wife and fatwa of 'Talak' was issued by the 'kaji' and notice of Talaq' was sent to the respondent wife through registered post. After the 'Talaq', the appellant husband is stated to have filed a suit for the declaration of divorce being Suit No. 1294 of2010, which was decided ex parte in favour of the appellant husband vide order dated 15.7.2011 It was held that the 'Talaq' was given in presence of the witnessesand according to "Shariyat". The said decree has become final as it has not been challenged any where in any proceedings by the respondent wife. In between, the appellant husband re-married another muslim lady on 17.5.2009 according to the Muslim customs. Differences between the appellant-husband and his first wife ultimately resulted into decree of divorce in favour of the plaintiff-husband. Thereafter husband filed petition under section 25 of the Guardians and Wards Act, 1890 (for short as "'1890 Act'") being Petition No. 50/70 of 2009 seekingcustody of the male child Iris Irshad Alam who had been taken away by the respondent wife at the time of leaving the house. The respondent wife objected to this claim of custody of the male child by filing ob-jections and simultaneously she also filed a petition being Petition No. 26/70 of 2009 under section 25 of the 1890 Act for the custody of the female child namely Urooj Irshad Alam who was left at the house of the appellant-husband at the time of her departure from matrimonial home.

4. Both the petitions filed under '1890 Act' were clubbed together and the petition No. 50/70 of 2009 was made the leading case by the Court below. The parties led their evidences. The appellant-husband appeared as P.W 1 and the respondent wife appeared O.P.W 1 and she also produced one private detective namely Kirtikesh Kavi as O.P.W 2 whose testimony was rejected by the Court below.

5. In the meantime, during the proceedings of the case under section 25 of the Act, 1890, the Court below passed orders dated 4.12.2009 and 17.9.200??? that the respondent wife would not take away the male child Iris Irshad Alam out of the city of Kanpur. Despite the aforesaid orders, the respondent wife took away the male child Irish Irshad Alam out of the city of Kanpur to Faridabad and thereafter to Delhi. Aggrieved with the disobedience of the order passed by the Court below, by the respondent wife, the appellant husband filed a con-tempt petition before the Family Court, which is still pending.

6. Thereafter, the appellant husband moved an interim applications (6-Ga) dated 15.6.2009 and (16-Ga) dated 28.5.2009 under section 12 of the '1890 Act' seeking interim custody of the male child who had attained the age of 7 years on which objections were filed by the respondent wife stating that the said application was not maintainable. The Court below after hearing allowed the application for interimcustody vide order dated 4.12.2010 and directions were issued to hand over thecustody of male child in favour of the appellant husband. This order, was, however, challenged by the respondent wife before this Court in Writ C No. 6412 of2011, Isma Alam v. Irshad Alam, and this Court vide order dated 2.2.2011 stayed the effect and operation of the order dated 4.12.2010 and direction was issued to the Court below to finalize the pro-ceedings under section 25 of the '1890 Act' within a period of six weeks.

7. It will not be out of place to mention here that in Petition No. 26/70 of 2009 filed by respondent wife under section 25 of the '1890 Act', she moved an application (6-Ga) dated 15.6.2009 and application (16-Ga) dated 28.5.2009 re-questing the Court below to permit her to meet female child Urooj Irshad during the Court proceedings. The Court after hearing the objections of both the sides disposed of the said applications vide order dated 4.12.2009 saying that there is every likelihood that the hearing of case under 1890 Act will take some more time though the Court is expected to decide the case early. Directions were issued that the respondent-wife shall have the visitation rights with re-gard to the minor female child. She could meet the child once in a month in the presence of the appellant-husband on an undertaking that there will be no breach of public peace by either patties.

8. Thereafter, the Court below proceeded to pass a detailed composite in-terim order 20.11.2011 in the petitions filed by the appellant-husband and the respondent wife under section 25 of the '1890 Act', which is subject-matter ofchallenge before this Court in the present appeal.

9. Before final hearing this Court explored the possibility of settlement between the parties. With the consent of Counsel for the parties the matter was taken up on 5.2.2013 in Chambers. We talked to both

the children sepa-rately. To us, they appeared to be quite intelligent and happy. We also talked to father and mother separately and also in the presence of their Counsel. Amicable settlement was not possible.

10. We have heard Sri V.C Mishra, learned Senior Counsel assisted by Sri A.G Karunakar, learned Counsel for the appellant and Sri V.K Upadhyaya, learned Counsel assisted by Sri Ritvik Upadhyaya, Advocate appearing on behalf ofrespondents and have perused the impugned judgment and the mate-rial on record.

11. The said impugned order has been challenged by the appellant-hus-band inter alia on the grounds that the impugned order has been passed absolutely ignoring the provisions of the Mohammedan Law, particularly, in violation of Articles 352and 354 of Chapter XVIII of the Mulla's Mohammedan Law which deals with the guardianship of persons and property. He further sub-mits that according to Article 354 of Mulla's Mohammadan Law if the mother goes and, resides during the subsistence of the marriage at a distance from the father's place of residence she loses her right to the custody of her child. However, the mother has a rightof 'hizanit' i.e, the right of custody of her children which lasts up to the age of seven years in the case of a male child anduntil the age of puberty in the case of female child. He further submits that this right of 'hizanit', that is of custody, is lost if she lives separately.

12. It is also contended by learned Counsel for the appellant-husband that the Court below has failed to consider the provisions of Rule 151 of Chapter XIV ofthe Mohammedan Lal wherein it is provided that a non-Mohammedan could not be a guardian as in the present case, the respondent wife had admit-ted in cross-examination dated 28.3.2011 that one Praveen Singh is guardian.

13. It is further contended that the Court below while passing the im-pugned judgment and order under section 25 of the '1890 Act' has failed to con-sider the welfare of the minor children which is an important factor while or-dering custodyof the minor children as the respondent wife, is unable to show any residential accommodation or any source of income. The Court below while assessing the income of wife has placed reliance on the fact that the respondent wife is working as a Director in a Firm A.L.P Techno Consultants Private Limited. The authorised capital of the said firm is only Rs. 1 Lac and therefore the finding arrived at by the Court below regarding the income of the respon-dent wife is based on surmisesand conjectures and hence the impugned order is liable to be set aside by this Court on this score as well.

14. Refuting the submissions made by learned Counsel for the appellant, it is submitted by learned Counsel for the respondent wife that it is wrong to say that the respondent wife left her matrimonial house together with male child out of her own free Will. The correct facts are that the respondent wife had lodged an FIR under the Domestic Violence Act and in pursuance thereof the appellant husband was arrested and thereafter managed his bail. Her situation at Kanpur had become untenable. She apprehended danger to her and her child. Thereafter, she escaped out of Kanpur fro her safety and peace. It is fur-ther stated that the Talaq' given by the appellant husband was not in accordance with the "Shariyat" and therefore has never been accepted by the re-spondent wife. The photographs produced by the appellant have been doctored tactfully only to influence the Courts. The Court below has rightly assessed the financial status of the respondent wife. The Court below has correctly passed the impugned order after considering the evidence led before itand has rightly came to the conclusion that the custody of the children should remain with mother i.e, the respondent wife.

15. In the circumstances of the present case, the only short question arises for consideration in these appeals is as to whether the father or the mother should have the custody of a male and female child?

16. Before proceeding further, it will not be out of place to have a birds eye view upon the relevant provisions of personal law as well as some provisions of the Guardians and Wards Act, 1890.

17. The custody of a minor child in Islam is called 'Hizanit', which liter-ally means the care of the infant (custody). As per the Shariat that applies to Muslims, the father is considered to be the natural guardian of his children ir-respective ofsex, but the mother is entitled to the custody of her son till the age of

7 yearsand of her daughter till she attains puberty. Thus, under the Muslim law a male would attain majority when he reaches the age of 7 years and a fe-male would attain majority on attaining puberty. Mulla, a well known author, in his commentary on Mohammedan Law has specified the grounds when a fe-male becomes disqualified for the custody of a child under section 354. These have been set out as under:

Article 354. Females when disqualified for custody:—A female, including the mother, who is otherwise entitled to the custody of a child, loses the right ofcustody—

"(1) if she marries a person not related to the child within the prohib-ited degrees (sections 260-261) e.g a stranger, but the right revives on the dissolution of the marriage by death or divorce; or

(2) if she goes and resides, during the subsistence of the marriage, at a distance from the father's place of residence; or

(3) if she is leading an immoral life, as where she is a prostitute; or

(4) if she neglects to take proper care of the child."

18. It is, difficult to concede the contention of the learned Counsel for the appellant husband that the right of 'Hizanit', that is of custody, is lost in all eventuality if she lives separately during the subsistence of marriage. The questionof custody of the minor would generally arise in a case when she is ei-ther living separately or has been divorced. We are here dealing with the case of a divorced wife whose life has been in turmoil. It is normal and natural for a divorced wife to reside separately and away from the husband and so long as it is not demonstrated that general supervision of the child to which the father is entitled as the natural guardian has become impossible, in our opinion, the mother cannot be deprived of the right of 'Hizanit'. Moreover, as has been re-peatedly stressed in the conflict of rival claims put forward by the father and the mother with regard to the custody of children of tender ages based on their respective rights under the personal law, the interest of the children cannot be sacrificed.

19. The Guardians and Wards Act, 1890, is another enactment that regulatesand governs the law relating to appointment and declaration of guardians; duties,rights and liabilities of guardians and all laws relating to the Guardians andWards. Section 17 of the '1890 Act', stipulates the paramount consideration in deciding the guardianship would be the welfare of the minor child and therefore, there could be no hard and fast rule to follow the statute for the purpose ofdeciding the guardianship. For appreciation, the provisions of section 17 of the Act, 1890 is quoted as under:

Section 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, con-sistently with the law to which the minor is subject, appears in the circum-stances to be for the welfareof the minor.

(2) 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 andcapacity 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.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(4) …….

(5) The Court shall not appoint or declare any person to be a guardian against his will.

20. Thus, according to the said provision, the welfare of the minor should be considered as paramount consideration. Section 25 of the Guardians and Wards Act, 1890 refers to the title of guardian to custody of ward, which reads as under:—

Section 25 in The Guardians And Wards Act, 1890:

25. Title of guardian to custody of ward.— (1) If a ward leaves or is re-moved from the custody of a guardian of his person, the Court, if it is ofopinion that it will be for the welfare of the ward to return to the custody ofhis guardian, may make an order for his return, and for the purpose ofenforcing 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 Codeof Criminal Procedure, 1882 (10 of 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 guardian-ship.

21. From the aforesaid, provision, it is evidently clear that to invoke the provisionof section 25, two conditions must be satisfied. Firstly, either the ward should leave or is removed from the custody of the guardian of his person, and secondly, the Court should come to a conclusion, in the welfare of the ward, to return to thecustody of the guardian, it may make an order of return of the ward to his/hercustody.

22. Here, in the present case, the Court below has considered the question as to whether the husband/wife are able to maintain the welfare and interest of the children and what is their income?

23. The Court below in its judgment has stated that the appellant husband has filed contradictory evidence with regard to his income. In his cross-exami-nation, it is admitted by him that he has no source of income and due to the loan taken on account of his loss in business several criminal proceedings have been launched against him and due to lot of pressure he is absconding from his house. In the circumstances, the Court below came to the conclusion that there might be a problem in getting the female child educated due to loss of business and on account of criminal proceedings and looking to the circumstances, it will also not be in the welfare and interest of the male child to hand over his cus-tody to his father.

24. We have examined the rejoinder-affidavit filed by the appellant hus-band dated 15.1.2013 and the oral testimony rendered by him before the family Court, Kanpur. They do reveal that the appellant husband Irshad Alam is facing financial hardships and is facing CBI investigation. He has also invoked the jurisdiction ofCourt against the notice of C.B.I under section 160, Cr. P.C It is also apparent that the Bank of Baroda has proceeded against the appellant husband before the Courtof Debt Recovery Tribunal IIIrd Delhi. The Bank has also seized the Foreign Exchange Packing Credit Limit of appellant husband Irshad Alam. Some of these facts have been admitted by the appellant hus-band during his testimony before the Trial Court. It has also been stated that the appellant husband also tried to evade the criminal investigation and went into hiding. All these facts cannot be ignored while the custody of minor chil-dren is being considered.

25. In our opinion, the stability and security of the child is also an essen-tial ingredient for a full development of child's talent and personality. As recorded by the Court below in his judgment after appreciation of detailed evidence.

In the cross-examination, respondent wife admitted that she is a Director in a firm namely AIP Techno Consultant Ltd. and her salary is Rs. 80,000.per month. Admittedly, she is living with her male child at Faridabad and getting him educated in a renowned school. Evidently, she is taking good care of her child.

26. The question that emerges is whether the Muslim personal law (Shariat) would be applicable to a proceeding under the Guardianship Act. Section 6 gives scope for the application of the personal law to which the mi-nor is subjected to. Further section 17 of the Act, 1890 also stipulates that a guardian has to be appointed in consonance with the personal law by which the parties are governed.

27. The said legal proposition was amply dealt with by the Hon'ble High Court ofDelhi in Akhtar Begum v. Jamshed Munir1, which held that the per-sonal law of the parties has to be kept in view in deciding an application for custody by virtue ofthe mandate of section 6 of the Act:

Although the personal law of the parties is to be taken into consideration while deciding the custody of the child, the welfare of the child is ofparamount importance and must be the deciding factor. At the sametime the personal law cannot be completely sidelined as the personal law would be an important facet of the welfare of the child and must also be taken into consid-eration.

28. So far as the argument of learned Counsel for the appellant-husband that the Court below has failed to consider the provisions of Rule 151 of Chapter XIV ofthe Mohammedan Law stating that a non-Mohammedan could not be a guardian as according to him, the respondent wife has admitted during cross-examination that one Praveen Singh is acting as their guardian, we have gone through the cross-examination of respondent wife and found that she has merely stated that the said Praveen Singh, who is posted as Addl. Director General of Police, Faridabad is known to her for the last fifteen years and he acts as a local guardian during her stay at Faridabad. The said person did not come across the appellant-husband at any point of time during that period, and they do not know each other. It is apparent that the respondent wife used the term "local guardian" in a broader sense. After her separation from her hus-band she went to live at Faridabad. Mr. Praveen Singh is a police officer and she apparently used his position for her own and her child's protection. The evidence clearly reveals that Mr. Praveen Singh is not a guardian ofeither Isma Alam and her child in any religious or legal term. He was merely providing a succour to distraught wife and her child. The argument of learned Counsel for the appellant husband cannot be accepted that by seeking help of Mr. Praveen Singh, senior police officer she has disentitled herself to the custody ofher child. Under the circumstances the argument of violation of Mohammedan Law is unsustainable for the simple reason that the welfare of the child is ofparamount importance and cannot be overruled by any other con-siderations.

29. On this question a Division Bench of this Court in Mt. Sakina Begum v. Malka Ara Begum2 had thus to say:

"According to the Hanafi law, as between a mother and a father, the mother has a preferential claim to the custody of their children. It cannot be laid down as an absolute proposition that she loses the right of custody if she goes and resides at a distance from the father's place. It all depends upon circumstances. If the stay is only temporary or forced or is due to cir-cumstances beyond her control, it is difficult to hold that she should even then be deprivedof the custody of her own children. She loses the right of custody of her children only if she has any defect of character such as would render her unfit to have the custody other own child".

30. However, in custody matters, it has been consistently held by the Courts that the welfare of child is of paramount consideration. Supreme Court in Mausami Moitra Ganguli v. Jayanti Ganguli1, observed;

"The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the careand 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 ofthe parents under a statute. Indubitably the provisions of law pertaining to thecustody of a child contained in either the Guardians and Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a predomi-nant consideration. In fact, no statute, on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor. The question of wel-fare of the minor child has again to be considered in the background of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the Court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the childmay be one of the rele-vant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the Court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration."

31. In Rosy Jacob v. Jacob A. Chakratnakkal2 a three-Judge Bench of the Hon'ble Supreme Court has observed that the children are not mere chattels; nor are they mere play-things for their parents. Absolute right of parents over the destinies andthe 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. Further in case ofa conflict or dispute between the mother and the father about the custody of the minor the Court has to adopt a somewhat different but more pragmatic approach. No doubt the father may have a legal right to claim the custody of the child but at the sametime fitness of father has to be considered, determined and weighed predominantly in terms of the welfare of the minor. If it is found that the father cannot promote the welfare equally or better than the mother, he cannot claim indefeasible right to such custody. Merely father's fitness to maintain the minor cannot override consideration of the welfare of the minor. Statute has presumed that the father is generally in a better position to look-after the minor being the head of the family earning bread for it. In any case it has to be seen primarily the welfare of the minor while determining the question of his custody. But merely because the father agrees to. maintain the minor showing all affection would not necessarily lead to the conclusion that the welfare of the minor would be better promoted by grantingcustody to him. The mother may be equally affectionate towards the minor. If she is possessed of requisite financial resources, she would be always in advantageous position of guaranteeing better health, education and mainte-nance for the minor.

32. In the case of Mohammed Khalid v. Smt Zeenat Parveen1 a similar view was taken. It is well established that in a proceeding under the Act for the custody of a minor it is the welfare in the widest sense of the term that is to be considered, though the father as natural guardian may have a prima facie right to a minor'scustody. It can be negatived if minor's welfare lies in keeping him in the custodyof his mother. Merely because the father is the natural guardian under the personal law applicable to him, the custody of the minor cannot be entrusted to him having in mind overall consideration of his physical and material well being, education, up-bringing, happiness etc., the dominant consideration shall be the interest of the minor than the claims of the rival parties. Ordinarily, the mother is the most competent and suitable person to protect the interest of the minor and safeguard his welfare. To the af-fection and love of a mother there is no substitute. Universal phenomenon and human approach have acknowledged that the mother's affection for the child is unparalleled.

33. Admittedly, in the present case, the respondent wife was divorced by the appellant husband after consummating marriage for about ten years. The two minor children were born out of the said wedlock till the time of the di-vorce. They wereof tender age at the time of divorce. When the relations be-tween them became strained, the respondent wife lodged a complaint under the Domestic Violence Actand out of the fear and apprehension the respondent wife left her matrimonial home alongwith her male child aged about 6 years. Her apprehension could not said to be totally misplaced. Apprehension and fear are partly matter ofperception as well.

34. The respondent wife has brought up the male child throughout showering affection and protecting his welfare. She has looked after him and ensured his education in a reputed school for better education and maintaining him to his utmost. She is a Director in a Private Firm and is earning Rs. 80,0007- per month. The appellant husband on the other hand is a businessman as admitted by him also in his cross-examination and is facing financial difficulties. He may be having sufficient resources to maintain the child but that alone does not mean that the welfare of the minor would be better served by granting custody of children to him. The respondent-wife is an educated lady with sufficient in-come to look after the welfare of both her children.

35. Another aspect of the matter is that after divorcing the respondent wife, admittedly the appellant husband has remarried a young lady and out of the said wedlock he has a daughter. The love and affection of second wife to-wards the minor child of his first wife is divided and may gradually diminish. The childrenof the

first wife may also feel left out and neglect. The Court can-not keep close eye to the vicissitudes of such a situation. Human frailties have resulted in causing miseries to such minors. In a proceeding under section 25 it is well established by a series of judgments that it is not the legal claim ofguardianship of the minor which is of importance but the welfare of the minor, which is of predominant consideration.

36. In Smt. Ajnunnisa v. Mukhtar Ahmad1 it was held that where a minor aged about 10-11 years is in the custody of his mother and has intelligently exercised his preference to continue to stay with her, his custody cannot be disturbed andbe given to his father though he is legal guardian of the minor in the personal law (Mohammadan Law). A mere claim to legal guardianship in such a situation will not stand on a higher footing than the claim of the real mother to continue to have thecustody of the minor who has remained in her custody since the birth of thechild.

37. In Mt. Haliman Khatoon v. Ahmadi Begum2 it was held that the mother imparts natural affection. Her natural affection for her chil-dren cannot be substituted and replaced by any one else.

38. Hon'ble Apex Court in Nil Ratan Kundu v. Abhijit Kundu3, it has held as under:

"The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent the careand 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 ofthe parents under a statute. Indubitably the provisions of law pertaining to thecustody of child contained in either the Guardians or Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child are predominant consideration. In fact, no statute on the subject, can ignore, eschew or oblit-erate the vital factor of the welfare ofthe minor. The question of welfare of the minor child has again to be considered in the background of the rele-vant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the cases are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of the family, yet in each case the Court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the childmay be one of the rele-vant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the Court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration."

39. In view of the aforesaid discussions of facts and law and keeping in view the paramount consideration of the welfare of the children, we are convinced that children's interest and welfare will be best served if they are in the custody of the mother. In our opinion, it is not desirable to disturb the custody of male child. It is also desirable that the custody of the female child is given to her mother. Therefore, the order of the Court below in giving the exelusive custody of the male child till he attains majority and of female child to the mother deserves to be maintained. Thus on a consideration of all the facts andcircumstances of the case and the legal position, as discussed above, we are ofthe opinion, that the judgment and order of the Court below does not suffer with any material irregu-larity or illegality in entrusting the minors to the custody oftheir mother, the respondent wife.

40. The first appeals fail and are dismissed.

41. Appeal Dismissed.

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POOJA MALHOTRA AND ORS. VERSUS PANKAJ MALHOTRA AND ANR.

2012 SCC OnLine All 4187 : (2013) 3 All LJ 515

Allahabad High Court

(Before Hon'ble Mr. Justice Syed Rafat Alam, C.J. & Hon'ble Mr. Justice Vikram Nath, J.)

Pooja Malhotra and Ors.

v.

Pankaj Malhotra and Anr.

Special Appeal. 523 of 2012

Decided on May 10, 2012

Guardians and Wards Act-- custody of child- overseas citizens of India-- While in New Zealand, the mother filed an application for the custody of the children before the Family Court at Wellington.-- the Family Court at Wellington passed a Parenting Order by consent- appointed mother as Guardians , custody of children given to her- with visitation right to the father-- two younger ones, Pooja and Krish were retained in India. The mother thereafter approached High Court of New Zealand at Wellington whereupon an interlocutory order was passed on 7.11.2011, directing the respondent No. 1 to make immediate arrangements for return of Pooja and Krish.---Habeas Corpus petition through the father-in-law of the appellant No. 3 for production of the corpus of Pooja and Krish- was dismissed.--Court had no jurisdiction to entertain the petition under Section 9 of the 1890 Act.---Special Appeal No. 523 of 2012 is allowed--respondent No. 1) is directed to accompany the children to New Zealand and produce them before the Court at New Zealand.

The Judgment of the Court was delivered by

VIKRAM NATH, J.:— After courtship of seven years, appellant No. 3 Anupma Malhotra and respondent No. 1. Pankaj Malhotra tied their knots in December, 1995, in India. At the time of their marriage they were both Indian Citizens. On 19.11.1996 while in India, they were blessed with a girl child Hena. In search ofbetter career, the couple along with their daughter Hena, shifted to New Zealand on April 10, 1997. While working in New Zealand in November, 1999 they surrendered their Indian Passport and accepted the citizenship of New Zealand. While in New Zealand, they were blessed with another daughter Pooja on 3.10.2000 and a son Krish on 13.06.2006 Both Pooja and Krish were born in New Zealand, as such they were natural citizens of New Zealand by birth. Entire family of five are thus citizensof New Zealand. They have not surrendered their citizenship of New Zealand andeven till date are continuing to be its citizens. The family is also registered as overseas citizens of India after the insertion of Section 7A by Act No. 32 of 2005 in the Citizenship Act, 1955. The Indian Embassy at New Zealand has also issued 'OCT' Card 'as it is called' to the entire family to continue to live and work in New Zealand.

2. In March, 2008, in order to explore chances of settlement in India, the family came to India. On 14.02.2011, the appellant No. 3 Anupma Malhotra along with her three children went back to New Zealand apparently on account of certain discord having arisen with her husband respondent No. 1. Today both the parents are not even willing to see each other and are not even willing to pay for the other's coffee when they were requested by the Court to spend some time together. The children are divided. The eldest daughter Hena

is with her mother whereas the two younger ones are with their father. They are all confused and lost We were pained to see how a settled family breaks up. Both the parents are financially independent. They are well educated coming from decent families. Children are torn mentally andemotionally between the parents. They are confused. While in New Zealand, the mother filed an application for the custody of the children in June, 2011, before the Family Court at Wellington. On the said application notices were issued to the respondent No. 1, the husband who filed his objections. Thereafter the Family Court at Wellington on 12.08.2011, passed a Parenting Order by consent under Sections 40(3), 48 and 55 of the Care of Children Act, 2004. The said order along with the terms and conditions contained therein are reproduced below:

"Applicant
Anupma Malhotra
of Wellington
NEW ZEA LAND
Respondent
Pankaj Malhotra
Of Noida
INDIA

On an application made to it, the Court by consent orders that

1. Anupma Malhotra ("Mrs. Malhotra") have the role of providing day-to-day care for

   Hena Malhotra ("Hena") born 19 November, 1996

   Krish Malhotra ("Krish") born 13 June, 2006

   Pooja Malhotra ("Pooja") born 03 October, 2000 ("the children")

   Until the children reach the age of 16 years

   While exercising the role of providing day-to-day care for children, you have exclusive responsibility for the children's day-to-day living arrangements, subject to any conditions stated below and to any Court order.

   If you are a guardian, unless your role or another guardian's role is modified by a Court order, you must at jointly (e.g consulting whenever practicable with an aim of reaching agreement) when making guardianship decisions for a child.

2. The children's nationality is to remain as New Zealanders. Neither parent will seek to change their nationality.

3. The Family Court of New Zealand will retain jurisdiction for the children whilst their primary care remains in New Zealand.

4. Pankaj Malhotra ("Mr Malhotra") agrees that he will return the children to the care of Mrs. Malhotra in New Zealand at the end of each agreed contact period in terms of this order.

5. The children are to spend each school holiday period in India with Mr. Malhotra. For the 2011/12 Christmas holidays the children will leave New Zealand on the day the holidays start and return 7 days before school starts.

6. Mr. Malhotra will exercise contact with all three children in India during the New Zealand October school holidays.

7. For shorter school holiday periods the children will leave New Zealand two or three days prior to each term ending and return two to three days after the new term has commenced. The parents agree to some flexibility around this for Hena, taking into account her academic requirements.

8. Mr. Malhotra will be responsible for arranging and paying for the transport of the children for contact visits. Mr. Malhotra will accompany Pooja and Krish to and from New Zealand on their travel for the October, 2011 and December, 2011 holidays.

9. The parents agree to re-negotiate in good faith the care arrangements for Pooja and Krish. The dates for re-visiting the care arrangements for Pooja will be February, 2012 and for Krish will be February, 2015.

10. Any other time Mr. Malhotra is in New Zealand, he is to have as much contact with the children as fits in with the children's schedules.

11. If the children express a high Degree of distress during the long Christmas holiday contact, the parents will discuss the situation andendeavour to resolve matters for the children. If the children's distress remains high, Mr. Malhotra will use his best endeavours to return the children to New Zealand early.

12. For the time being neither parent will introduce the children to any new partner without the consent of the other parent.

VARIATION OR DISCHARGE OF THIS ORDER

Any person affected by this order or a person acting for a child who is the subject of this order may apply to the Court to vary or discharge this order.

CONSEQUENCES OF NON-COMPLIANCE

If you do not comply with this order there are a number of things that may happen, such as requiring you to attend counselling, or enter a bond (see also the information sheet accompanying this order). The Court taken noncompliance very seriously.

Han Kristono
Deputy Registrar
12 August, 2011"

Note

This order may include terms of an agreement between parents or guardiansof a child, relating to,

(a) the role of providing day-to-day care for the child; or

(b) contact with the child; or

(c) the upbringing of the child; or

(d) any combination of (a) to (c)

See section 40 of the Care of Children Act, 2004 for the circumstances in which agreement terms may be included

GENERAL INFORMATION TO ACCOMPANY PARENTING ORDERS

(as required by section 55(1)(b) of the Care of Children Act, 2004)

Obligations created by a parenting order

This parenting order requires you to conform with its conditions.

If you do not do so, another party may apply to the Court to enforce the order. The family Court may choose from a variety of tools to remedy the non-compliance. For example, you may be required to enter into a bond to ensure you do not contravene the parenting order again, or to meet reasonable costs incurred by another party because of your contravention. The Court might admonish you, or vary the order, for example, by reducing the amount of time you have with the child.

You or another party to the order or a person acting for a child who is the subject of this order may apply to the Court, asking for the order to be varied or discharged.

If you and another party or parties to the order are unable to agree about how to exercise guardianship or you are in a dispute arising from one of you contravening, or appearing to contravene, the order, you may request the Court to arrange counselling to assist you in resolving the dispute.

It is also an offence to, without reasonable excuse and with the intention ofpreventing compliance with a parenting order, contravene a parenting order. The penalty for this offence is imprisonment for a term not exceeding 3 months or a fine not exceeding $2,500."

3. As per the terms agreed upon between the parties, as the children were to spent school holidays in India with the father (clause 5), the appellant No. 3 permitted all the three children to come to India during holidays in the month ofOctober, 2011. The father (respondent No. 1) went to New Zealand and on 4.10.2011, accompanied all the three children to India along with the commitment to return on 28.10.2011 for which the return tickets had also been purchased. The respondent No. 1 decided, while in India, not to send the children back to New Zealand. Apparently the eldest child Hena, who was almost 15 years of age at that time, did not appreciate the decision of her father and as such she alone was allowed to travel to New Zealand on the return ticket on 28.10.2011 The two younger ones, Pooja and Krish (appellant Nos. 1 & 2) were retained in India. The mother (appellant No. 3) thereafter approached High Court of New Zealand at Wellington under Section 31 of the Care of Children Act, 2004 whereupon an interlocutory order was passed on 7.11.2011, directing the respondent No. 1 to make immediate arrangements for return of Pooja and Krish. The said order is reproduced

'INTERLOCUTORY ORDER

To the Respondent PANKAJ MALHOTRA

1. The Interlocutory Application made by ANUPMA MALHOTRA on 4 November, 2011, was determined by The Honourable Justice Mallon on 7 November, 2011.

2. The determination was made without a hearing.

3. The following Orders were made.

   a. An interim Order pursuant to S. 31 of the Care of Children Act placing the children Poojah Malholtra (DOB: 3 October, 2000) and Krish Malhotra (DOB: 13 June, 2006) under the guardianship of the High Court of New Zealand pending further Order of the Court.

   b. That the Respondent, Pankaj Malhotra, make immediate arrangements to ensure that Poojah Malhotra and Krish Malhotra are re turned to the jurisdiction of New Zealand straightway.

   c. That upon return to New Zealand the children, Hena Malhotra (DOB: 19 November, 1996), Poojah Malhotra and Krish Malhotra are to reside with the Applicant, their mother, in the Wellington area until further order of this Court of the Family Court.

   d. That upon the return to New Zealand of the children, Poojah Malhotraand Krish Malhotra, their passports and travel documents are to be handed to the Applicant for safe keeping until further Orderof this court or of the Family Court.

e. That there be a direction pursuant to Rule 18.4(1) of the High Court Rules to the effect that if the Respondent does intend to make an application to vary or discharge the current Parenting Order made in the Wellington Family Court on 12 August, 2011, then he be permitted to do so only once the children have been returned back into the Applicant's care in New Zealand.

4. Additionally, all juridical and administrative bodies in the Republic ofIndia are respectfully invited to render assistance in ensuring that the two children, Pooja Malhotra and Krish Malhotra, are returned as soon as possible to the jurisdiction of New Zealand."

4. It may be interesting to mention here that Lt. Col. Raj Malhotra (Vr C) father-in-law of the appellant No. 3 was the Power of Attorney holder of the appellant No. 3 and has throughout been supporting his daughter-in-law. A Habeas Corpus petition registered as Writ Petition No. 10530 of 2012 was filed through the father-in-law of the appellant No. 3 for production of the corpus of Pooja and Krish. The said petition was dismissed by the learned single Judge vide judgment andorder dated 27.2.2012

5. Special Appeal No. 523 of 2012, Pooja Malhotra v. Pankaj Malhotra has been filed assailing the correctness of the order of the learned single Judge dated 27.2.2012 along with further relief to allow the writ petition and direct the respondents to produce the two minor children (appellants 1 & 2) and theircustody be given to the mother (appellant 3).

6. In the meantime Pankaj Malhotra Respondent No. 1 filed a petition before the Civil Court at Gautam Budh Nagar under Section 25 of The Guardians and Wards Act, 1890 (hereinafter referred to as the 1890 Act) claiming title of guardian of all his three children, which was registered as Case No. 11 of 2011 and was being heard by the Court of 4th Additional District and Sessions Judge. On the said petition notices were issued to the mother, appellant No. 3, who filed objections whereupon the 4th Addl. District and Sessions Judge, Gautam Budh Nagar by a detailed judgment and order dated 4.2.2012, dismissed the petition on the groundof lack of jurisdiction.

7. The husband preferred appeal before this Court, under section 47 of the 1890 Act against the judgment and order dated 04.02.2012 of the 4th Addl. District Judge, Gautam Budh Nagar, which has been registered as F.A.F.O No. 804 of 2012,Pankaj Malhotra v. Anupma Malhotra.

8. When the special appeal was placed before us, the learned counsel for the appellant informed that against the order dated 4.2.2012, passed by the Additional District Judge, Court No. 4, Gautam Budh Nagar in the petition under Section 25 ofthe 1890 Act, the husband had preferred a First Appeal from Order before this Court under Section 47 of the 1890 Act. He further informed that Sri H.N Singh, Advocate was appearing in the said appeal. We adjourned the matter to enable the learned counsel for the appellant to inform Sri H.N Singh, Advocate in order to facilitate the service of notice on the husband as it would save time and expenses both. Sri H.N Singh, Advocate appeared before the Court and upon instructions from his client, the husband, made a statement that he was accepting the notice. He was thereupon requested to ensure the presence of the husband along with two minor children Pooja and Krish before the Court on 2.4.2012 Both the parents appeared before the Court along with two minor children on 2.4.2012

9. The Court considering the gravity of the issue and also considering the aspectof exploring an amicable and healthy reunion of the family which would be in the best interest of the minor children, called upon the husband and the wife to have a dialogue with the Court in Chambers. The Court had independent conversation with both, the husband and the wife.

10. In the conversation held, initially with the parents, in Chambers, the Court could not find any discrete or any strong reason for either of the parties for giving up on the other. The only allegations made against each other were of immorality, basically carrying on some extra marital relationship Which was denied by the other side. The Court found that both the parents were educated and were earning reasonably well

to afford decent living and provide quality education for their children. Both the parents were emotional and very strongly attached to all their children.

11. In view of the foregoing opinion formed by us, the Court tried to persuade them to ar rive at an amicable solution to reunite and jointly take care of the children so that the children could not be deprived of the love, affection and careof any one of the parents. The children would be most benefited if they live in a healthy environment under the joint guardian ship and supervision of both their parents. The Court was conscious of the fact that minor children living with single parent would be deprived of the care, affection and guidance of the other parent. At times minor children living with single parent often lose their emotional andsentimental balance adversely affecting their career and their personality. For such considerations, the Court permitted the mother to meet the children in the evening for about two hours and also requested both the parents to spent some time aloneand have a dialogue with regard to the reunion of their relationship. The matter was posted for the next day. The Court on the next day again had an independent dialogue with the parents but found that there was apparently no ray of hope oftheir arriving at an amicable solution.

12. The matter was thereafter posted for hearing. The appeal arising from the proceedings under Section 25 of the 1890 Act was also clubbed with the intra court appeal arising from the habeas corpus petition. The records of court below as alsoof the proceedings before the learned single Judge were summoned urgently. Thus with the consent of the counsel for the parties both the appeals were heard finally under the Rules of the Court

13. We have heard Sri V.K Singh, learned Senior Advocate assisted by Sri S. Shekhar, learned counsel for the wife and Sri H.N Singh, learned counsel for the husband in both the appeals and have perused the material on record of both the appeals.

14. The hearing of the appeal commenced from Thursday 5th April, 2012. During the course of hearing the husband moved an application praying that the Court may record the statement/wish of the minor children before taking any final decision in the matter.

15. Sri H.N Singh, learned counsel for the husband submitted that the Court has to watch and protect the welfare and the interest of the minor children. He further submitted that this should be the paramount consideration in taking a final decision in the matter and therefore, it was necessary to interact with the children so as to derive their preference. He further submitted that in all cases of custody of the children, the preference of the minor child is a relevant fact to be considered by the Court.

16. Sri V.K Singh, learned senior counsel for the wife appellant opposed the said application on the ground that as Pooja and Krish have been in the exclusive company of the father from 4th October, 2011 till date and during this period they were not even allowed to either meet the mother or to talk to her on the phone, their statement/wish at this stage would be predominantly influenced by him who has already poisoned their mind against their mother. It is further submitted that any statement/wish of the children would be tutored. It would neither be independent or fair. He further submitted that as Km. Pooja is about 11 years andMaster Krish is little more than 5 years, they would not be in a position to make an intelligent preference of either of the parents and therefore it would be a futile exercise interacting with the children.

17. Having considered the submissions and the material on record, we decided to have an exclusive meeting with the two minor children in the Chambers. To make the children comfortable we offered them Chocolates and Ice creams. We spent about an hour with them. We found that both the children were quite open andwilling to talk. Throughout the conversation we found them to be honest and fair. They answered all our questions to the best of their understanding andknowledge.

18. Little Krish loved both his parents but wanted to stay with his father as his father would give him gifts, take him out for shopping, buy things of his choice, would never scold him and always try to keep him

happy and fulfil his desires. He had nothing to say against his mother. In fact he admitted of missing his mother.

19. Pooja is quite intelligent and matured for her age. She liked India more than New Zealand. She also made an honest confession mat when she came to India in 2008 after having lived in New Zealand for 8 years she initially did not like India andwanted to return to New Zealand but with the passage of time she started liking India so much so that now she does not want to return to New Zealand. The only reason why she did not wish to stay with her mother, according to her, was that her mother used to take alcohol occasionally. However she could not express any untoward incident of her mother under influence of alcohol. She also could not relate any incident of misbehaviour on her mothers part whether with or without alcohol. She also admitted that her mother was very caring and affectionate andwould take good care of all her children. She also expressed her wish that both the parents should stay together. She also stated that she missed her elder sister Hena who according to her was a good friend and would also guide her in studies as also in her relationship with friends.

20. Sri V.K Singh, learned Senior Counsel appearing for the appellant (wife) referred to various provisions contained under the Citizenship Act, 1955, the subsequent amendment brought out in the year 2005 by inserting Sections 7A to 7D on the Statute Book. These provisions relate to the status of overseas citizenship ofIndia, the grant and cancellation of such certificates and the rights conferred upon grant of such certificate to the people of Indian origin living abroad. He has then referred to the well known principle of Comity of Courts and has strongly contended that in view of the orders passed by the Family Court at Wellington andthe High Court at Wellington, New Zealand, this Court should relegate the parties to the Courts at New Zealand which alone have the jurisdiction to deal with thecustody of the minor children, being citizens of New Zealand.

21. He then referred to doctrine of 'parens patriae'. According to which the guardian of the two minor children, being citizens of New Zealand, would be the Courts at New Zealand or in other words the two minor children would be wards ofthe Court of New Zealand and to that effect the order has already been passed by the High Court of New Zealand on 18.11.2011 He then referred to the other important aspect to be considered in the present case i.e welfare and interest ofthe minor children. According to him, considering the age of Pooja who was about 11 years and was entering into puberty/maturity, the mother would be the best guardian and it is only in her supervision that Pooja would be best taken care ofWith regard to Krish, he is of very tender age being less than six years and as such would need love, affection and care of his mother. He then relied upon the judgment of the Apex Court in the case of V. Ravi Chandran (Dr.) v. Union ofIndia, reported in (2010) 1 SCC 174 : (AIR 2010 SC (Supp) 257) as also the judgment in the case of Shilpa Agrawal (Ms) v. Aviral Mittal, reported in (2010) 1 SCC 591 : (2009 AIR SCW 7694) in support of the submissions advanced. Sri Singh on all the above counts prayed that the two minor children be directed to be handed over in lawfulcustody of their mother being natural guardian to be taken to New Zealand where the Court would decide their question of custody.

22. On the other hand Sri H.N Singh, learned counsel for the respondent husband has submitted that the children are receiving the best of education in an International School at Delhi/Noida. Both the children are happily settled here anddo not wish to return to New Zealand, the life in New Zealand is very hard and the children have to study in a Government School in New Zealand. The mother does not make enough money to provide decent living to the children and to educate them in a private institution. The mother is addicted to alcohol and is therefore not fit to take care of the minor children.

23. He further submitted that both the children are ordinary residents of Indiaand have been living in district Gautam Budh Nagar for the last more than three years and would therefore be deemed to be ordinary residents within the jurisdiction of the Courts at Gautam Budh Nagar. The petition filed for their custody under the provisions of 1890 Act has been wrongly and illegally dismissed by the Court below. The

appeal filed against the said order has merits and is liable to be allowed. We have dealt with the F.A.F.O separately in this order.

24. Sri H.N Singh has further submitted that the orders passed by the Court at New Zealand have no binding effect. He further submitted that it is the welfare ofthe child which is predominant aspect to be taken into consideration and if the Court is satisfied that the minor children's best interest and welfare would be served by retaining them in India with their father then merely because there is an order passed by a Foreign Court, the Courts of this Country will not compel the minor children to go to the said Country, contrary to their welfare and interest In support of his submissions, he has placed reliance upon a judgment of the Apex Court in the case of Ruchi Majoo v. Sanjeev Majoo, reported in (2011) 6 SCC 479 : (AIR 2011 SC 1952).

25. Having heard the submissions advanced we are of the view that the question for con sideration in these two appeals, on the facts and circumstances of the case, is whether the welfare and the interest of the minor children would be best served if they are allowed to remain with their father in this country? or they should be sent to New Zealand and leave it to the Courts at New Zealand to deal with thecustody and parenting of the minor children?

26. In considering the said questions the Court will have to balance the principleof Comity of Nations, i.e the effect of the orders passed by the Courts at New Zealand as against the welfare and the interest of the minor children.

27. Under the Private International Law, there is no binding force of the orders passed by a Foreign Court. Hague Convention on 'Parental Responsibility andProtection of Children' held on 18.10.1996 was made effective from 1.1.2002 Three Hague Children's Convention have been developed over the last 25 years. The fundamental purpose being to provide practical machinery to enable States which share a common interest in protecting the children to co-operate together to do so. The resolutions passed in the Hague Convention do not have binding force. The resolution are actually to be understood to extent mutual respect and due importance to the orders passed by courts of one country by the courts of other countries.

28. We cannot have any issue with regard to the proposition that the interest andwelfare of the minor children is to be given utmost importance in deciding the matters relating to their custody.

29. FIRST APPEAL FROM ORDER No. -804 of 2012

30. We first proceed to decide the appeal under Section 47 of the 1890 Act.

31. Under the terms of the consent order dated 12.08.2011 the husband accompanied all the three children to India on 4.10.2011 The children were to return to New Zealand on 28.10.2011 for which they had return tickets. However the husband apparently had reservations of sending the children back to New Zealandand accordingly got an application prepared under Section 25 of the Guardianand Wards Act, 1890 to be filed before the Civil Court at Gautam Budh Nagar for retaining the custody of the children. He decided not to send the children to New Zealand, on 28.10.2011 It appears that the eldest daughter Hena did not agree to her father's decision and insisted that she should be allowed to go, however, the other two children Pooja and Krish agreed to stay back. Hena left India for New Zealand on 28.10.2011 as per schedule and ever since then she is in New Zealand. On the very next day i.e 29.10.2011, the husband presented the application under Section 25 of the 1890 Act before the District Court at Gautam Budh Nagar which was registered as Misc. Case (GW) No. 94 of 2011.

32. The following five questions were raised in the said petition, for being adjudicated by the Court, as contained in paragraph II of the petition—

    A. Whether for a healthy growth of minor children and development of their personality, it is conducive for them to be in the custody of the respondent mother when she is suffering from compulsive leanings toward men outside her marriage and alcoholism. The minor children (whilst

two of them are young girls) being taken away from their own home where they were earlier comfortably living & studying before their disruption & relocation to a foreign country.

B. Whether the petitioner being the natural guardian is entitled to have thecustody of three minor children when they were unilaterally relocated from their residence in Noida by their mother to a foreign country after her extra marital relationship was discovered to the petitioner.

C. Whether an order passed by a foreign court having no jurisdiction at the outset would be binding on the petitioner particularly when the habitual/ordinary residence of the minor children was Noida (India), & when the said order was obtained under duress and in the backdrop of changed scenario. The respondent now is in continuing breach of representation made by her before the petitioner vis a viz her alcoholism and extra marital relation ship.

D. Whether the respondent who had an il legal custody of minor children after having them relocated unilaterally and disrupting their daily schedule at school & at home can con tinue to have the custody of minor children under the garb of an order of a foreign court having no jurisdiction at the threshold.

E. Whether the respondent mother could be said to a responsible guardian when the entire family (respondent, petitioner & minor children) once living together was broken into pieces only because the respondent mother & a married woman instead of correcting her self proceeded to live a reckless lifeand to continue with her extra marital affairs."

33. The relief sought by means of the said petition is reproduced below—

Prayer

The Petition, therefore, humbly prays that the present Hon'ble court be pleased—

A. To grant the custody and guardianship of the minor children Pooja andKrish to the petitioner/ father being the natural guardian of the minor children, keeping in mind their interest and welfare;

B. Visitation right to the petitioner on the dates/time that may be mutually agreeable to both the parties.

C. Grant any other relief the court deems fit.

34. Along with the petition under Section 25 of the 1890 Act, the husband filed an application seeking exparte ad interim order restraining the mother from taking or resorting to such method or measure for taking the minor children out of the jurisdiction of the Court and also restraining the mother from taking the minor children from the custody of the husband during the pendency of the said petition.

35. Notices were issued to the mother, whereupon she appeared and filed objections and also an application praying for a direction that she may be permitted to meet the children at the week ends and spend a night with them and also for a direction to the husband to allow the children to speak to her over webcam or mobile phone. It would be pertinent to mention here that at that time as the mother was in New Zealand, Col. R.K Malhotra (father of the husband) had filed the said application supported by an affidavit being duly constituted attorney of the mother.

36. One of the objections raised was with regard to the jurisdiction of the Court to entertain the application under section 25 of the 1890 Act. The Court of IV Addl. District Judge, Gautam Budh Nagar which was hearing the matter after considering the pleadings of the respective parties, and the material placed on record, recorded the following specific finding's in its order dated 4.2.2012

The children were not normally residing within the jurisdiction of the Court.

They were ordinary residents of New Zealand.

The Court had no jurisdiction to entertain the petition under Section 9 of the 1890 Act.

There was already an order by consent of the parties dated 12.8.2011, passed by the Parenting Family Court, Wellington by which the parties were bound.

The husband had not approached the Court with clean hands and had in fact concealed material facts and had also misrepresented before the Court.

37. It is against the said order that the present appeal under section 47 of the Act has been filed.

38. The basic grounds for challenge to the said order dated 04.02.2012 as per the submissions advanced by Sri H.N Singh, learned counsel for the husband are:

Both the children had been residing in India since 2008 continuously till 14.02.2011, when they were taken away by their mother without the consent ofthe father, as such they should be deemed to be ordinary residents within the jurisdiction of the Court at Gautam Budh Nagar

Pooja and Krish were studying in Lotus Valley International School, Noida, District Gautam Budh Nagar.

Both the parents of the children were of Indian origin, in order to earn their livelihood, they went to New Zealand, on a temporary basis but finally returned to India.

The parenting order passed upon consent of the parties by the Family Court, Wellington at New Zealand was under compelling circumstances.

According to the judgment of the Apex Court in the case of Ruchi Majoo v.Sanjeev Majoo, reported in (2011) 6 SCC 479 : (AIR 2011 SC 1952), the ordinary place of residence of the minor children was within the jurisdiction of the Court at Gautam Budh Nagar.

The petition under Section 25 of the 1890 Act would be maintainable in viewof Section 9 of the 1890 Act.

39. Counter and rejoinder affidavits have been exchanged in the appeal (appellant) and we have perused the same.

40. In support of his submission, reliance has been placed upon the following judgments:—

(1) Smt Sunita Malik v. Dharam Veer Singh Malik, reported in 1992 ACR Vol (16) 138.

(2) Dhanwanti Joshi v. Madhav Unde, re ported in (1998) 1 SCC 112.

(3) Sarita Sharma v. Sushil Sharma, reported in (2000) 3 SCC 14 : (AIR 2000 SC 1019).

(4) Syed Saleemuddin v. Dr. Rukhsana, reported in (2001) 5 SCC 247 : (AIR 2001 SC 2172).

(5) Mamta Alias Anju v. Ashok Jagannath Bharuka, reported in (2005) 12 SCC 452.

(6) Mausami Moitra Ganguli v. Rayant Ganguli, reported in (2008) 7 SCC 673 : (2008 (4) ALJ 767.

(7) Nil Ratan Kundu v. Abhijit Kundu, reported in (2008) 9 SCC 413 : (Am 2009 SC (Supp) 732).

(8) Vikram Vir Vohra v. Shalini Bhalla, reported in (2010) 4 SCC 409 : (AIR 2010 SC 1675).

41. On the other hand Sri V.K Singh, learned Senior counsel appearing for the mother has submitted that all the three children along with both the parents are citizens of New Zealand. They never surrendered their citizenship of New Zealand to reacquire the citizenship of India; right from 1997, for a period of almost 11 years, the entire family had been residing in New Zealand uptill 2008.

The visit to India in 2008 was only on experimental basis. It was for compelling reasons that the mother had to take her children to New Zealand to keep them away from the ill shadow of their father.

From February, 2011 till October, 2011 all the three children were in New Zealand and were studying there.

It was under the terms of the consent order dated 12.8.2011 passed by the New Zealand Court that the children had come to India for visiting their father during vacations.

Merely because the father has retained them beyond 28.10.2011, when they were to return to New Zealand, it cannot be accepted by any stretch ofimagination that the children were ordinary residents within the jurisdiction ofthe Court at Gautam Budh Nagar.

The father did not file any petition claiming custody of guardianship of the children right from 14.2.2011, the date on which the children left India, for New Zealand but it is only after they came to India in October, 2011 under terms of the consent order dated 12.8.2011, that the father filed the petition under Section 25 of the 1890 Act.

The application was not maintainable; any orders passed on it would be in direct conflict with the orders passed by the Courts at New Zealand.

42. In support of his submissions he has relied upon the following judgments:

(1) V. Ravi Chandran (Dr.) v. Union of India, reported in (2010) 1 SCC 174 : AIR 2010 (Supp) 257.

(2) Shilpa Aggarwal (Ms) v. Aviran Mittal, reported in (2010) 1 SCC 591 : (2009 AIR SCW 7694).

(3) Ruchi Majoo v. Sanjeev Majoo, reported in (2011) 6 SCC 479 : (AIR 2011 SC 1952).

43. Counsels for both the parties have placed strong reliance upon the judgmentsof the Apex Court in the case of V. Ravi Chandran (Dr) : (AIR 2010 SC (Supp) 257) (supra), Shilpa Aggarwal : (2009 AIR SCW 7694) (supra) and Ruchi Majoo (supra). From the side of the wife the reliance is upon the first two cases and further submission is to the effect that even the third case is not adverse to her interest. However, on behalf of the husband the reliance is upon the third judgment referred to above.

44. Before proceeding to discuss the said authorities, in our opinion no judgmentof the higher court or a Bench of larger strength can be said to be binding untiland unless the facts of the case of the alleged precedent can be applied to the facts of the case in which it is relied upon. Needless to say that a decision is only an authority for what it actually decides. It is the ratio decidendi laid down in the said judgment which has the binding force. Even such ratio is to be appreciated andapplied in the facts of each case. It would be apt to refer to the ratio with regard to the applicability and binding force of a precedent as enunciated in the judgmentof the Apex Court in the case of Union of India v. Dhanwanti Devi, (1996) 6 SCC 44: (1996 AIR SCW 4020). The relevant extract from the aforesaid report as contained in paragraphs 9 and 10 thereof is reproduced below:

"9……It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well settled theory of precedents, every decision contain three basic postulates - (i) findings of material facts, direct and inferential. An inferential finding of facts is the interference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there is not intended to be exposition of the Whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and therefrom the judgment and to build upon it because the essence of the decision is its ratioand not every observation found therein. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent The concrete decision alone is binding between the, parties to it, but it is the

abstract ratio decidendi, ascertained on a consideration of the judgment in relation to the subject-matter of the decision, which alone has the force oflaw and which, when it is clear what it was, is binding. It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution. A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case or is put in issue may constitute a precedent no matter for what reason, and the precedent by long recognition may mature into ruleof stare decisis. It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its ratio decidendi.

10. Therefore, in order to understand and appreciate the binding force of a decision, it is always necessary to see what were the facts in the case in which the decision was given and what was the point which had to be decided. No judgment can be read as if it is a statute. A word or a clause or a sentence in the judgment cannot be regarded as a full ex position of law. Law cannot afford to be static and therefore, Judges are to employ an intelligent in the use ofprecedents……"

45. In the case of Ruchi Majoo : ((2011) 6 SCC 479 : AIR 2011 SC 1952) (supra), on which reliance is placed by Sri H.N Singh, learned counsel for the husband while pressing his appeal under Section 47 of 1890 Act, although the parents of thechild were ordinary American Citizens, but they had come to India in July, 2008and ever since then mother and the son had stayed in India whereas the father had left for United States. The mother and son continued their stay in India with the consent of the father.

46. The Apex Court has recorded that from time to time the father had given his consent for their stay in India and therefore son continued to study in India in the Indian Schools. In the meantime, both the parents filed separate cases for thecustody and the guardianship of the children in their country of residence. The father filed a petition before the Court at California, USA whereas the mother filed petition for the custody and guardianship in India. The trial court upon an objection being taken to the question of jurisdiction held that the minor would be the ordinary resident of the jurisdiction of this Court. On appeal by the father, the Delhi High Court reversed the order of the trial court for the reasons that the parents and the child were American citizens; that there was an order by the Court at California, USA; applying principle of comity of Courts held that petition for guardianship and custody were not maintainable. The matter was agitated before the Apex Court by the mother. The Apex Court in the fasts and circumstances ofthe said case was of the view that the minor was an ordinary resident within the jurisdiction of the Court at Delhi and accordingly provided that the said proceedings would go on and disposed of on merits expeditiously. While dealing with the question as to what is the ordinary resident as mentioned in Section 9 ofthe 1890 Act, the Apex Court referred to large number of the decisions but as stated above it was in the facts of that case that it held that minor child was an ordinary resident within the jurisdiction of the Court at New Delhi.

47. In the present case at the time when the petition under Section 25 of the 1890 Act was filed on 29.10.2011 before the Court at Gautam Buddha Nagar, the children were on vacation visiting their father in India under the terms andconditions contained in the consent parenting order dated 12.8.2011 passed by the Family Court at Wellington, New Zealand. From 14.2.2011, the children were residing in New Zealand along with their mother. The father did not file any petition in India although he was residing in India after 14.2.2011 till 29.10.2011 Although the father alleges that the children were taken to New Zealand on 14.2.2011 by the mother without his consent but he did not take any steps to claim the custody of his children. On the contrary, the father participated in the proceedings initiated by the mother before the Family Court at Wellington, New Zealand and filed his objectionsand thereafter agreed to the parenting order dated 12.8.2011 Further the children had come to India along with their father under the terms and conditions of the consenting order dated 12.8.2011 It was only when the time came to return the children to New Zealand as per the terms and conditions of the parenting order dated 12.8.2011 that the father committed breach of the terms and conditionsand retained the two minor children beyond 28.10.2011 Admittedly, the eldest daughter Hena protested for continuance of her stay in India beyond 28.10.2011and as such she was allowed to return to New Zealand. The conduct of the father clearly indicates that he had

some ill design in his mind to retain the children contrary to the consent parenting order and thereafter to initiate legal proceedings in India to complicate the situation and to ensure the continuance of the stay of the children in India. The father could not be allowed to approbate andreprobate. On the one hand, he acquiesced to the consent parenting order andaccompanied the children to India but thereafter committed its breach. All the three children along with their parents were citizens of New Zealand till today.

48. The argument of Sri H.N Singh that as the children had stayed in India from March, 2008 till February, 2011 and again after 4.10.2011, as such they should be treated to be ordinary residents of India conferring the jurisdiction on the Court at Gautam Buddha Nagar under Section 25 of the 1890 Act cannot be sustained. We are not impressed by the said submission for the facts and reasons recorded above. The facts of the case of Ruchi Majoo : ((2011) 6 SCC 479 : AIR 2011 SC 1952) (supra) were quite different as recorded above and we do not find any similarity with the facts of the present case.

49. Even in the judgment in the case of Ruchi Majoo : ((2011) 6 SCC 479 : AIR 2011 SC 1952) (supra), the Apex Court had followed the view taken by the Apex Court in the earlier decision in the cases of V. Ravi Chandran (Dr.) : (AIR 2010 SC (Supp) 257 (supra) and Shilpa Aggarwal : (2009) AIR SCW 7694) (supra) and had held that the orders passed by the foreign courts cannot be completely ignored and had to be given due respect and importance on the principles of comity of nations.

50. Another finding recorded by the Apex Court in the case of Ruchi Majoo : ((2011) 2 SCC 682 : AIR 2011 SC 952) (supra) was to the effect that the best interestand welfare of the child would be served by retaining the minor child in India along with the mother for the reasons that both the parents had divorced; the father was an extreme case of the addiction of alcohol; the father had remarried; the ageof the minor child was very tender and his interest could be better watched by mother; his growth and development would be well taken care of under the control and supervision of the mother.

51. In the present case, we have recorded separate findings while dealing with the special appeal arising out of the habeas corpus petition that the interest andwelfare at this stage for both the minor children could be well taken care of by the mother and there was nothing adverse or detrimental to the interest of the children in their being sent to the New Zealand.

52. In view of above discussions we are of the view that the learned court below rightly arrived at the conclusion that it had no juris diction under Section 9 of the 1890 Act to entertain the petition. The First Appeal From Order No. 804 of 2012 therefore is liable to be dismissed and it is accordingly dismissed.

SPECIAL APPEAL No. -523 of 2012

53. We now proceed to deal with the appeal arising out of habeas corpus petition dismissed by the learned single Judge.

54. The sheet anchor of the argument on behalf of the appellants is the judgment of the Apex Court in the case of V. Ravi Chandran (Dr.) : (AIR 2010 SC (Supp) 257) (supra) by a Bench comprising of three Hon'ble Judges viz. Hon. Tarun Chatterjee, Hon. R.M Lodha and Hon. B.S Chauhan, JJ. According to Sri V.K Singh, learned Senior Counsel appearing for the appellants, the facts of the present case, if not identical; are quite similar to the facts in the case of V. Ravi Chandran (Dr.)(supra).

55. In the cake of V. Ravi Chandran (Dr.) : (AIR 2010 SC (Supp) 257) (supra), the minor boy Adithya was born out of the wedlock of V. Ravi Chandran (Dr.) andVijayasree Voora on 1.7.2002 in the United States of America (USA). The father was an American citizen. The marriage had taken place on 14.12.2000 at Tirupati (Andhra Pradesh). While living in USA the wife Vijayasree Voora had instituted a petition for divorce and dissolution of marriage before the New York State Supreme Court A consent order was passed regarding custody and guardianship of the minor boy Adithya on 18.4.2005 by the New York State Supreme Court whereby joint custodyof the minor child was given to the both the parents. Later

on a separation agreement was entered into between the parties. However, with regard to theCustody of the minor boy Adithya, the parties consented to the order dated 18.4.2005 Later on the New York State Supreme Court by order dated 8.9.2005 dissolved the marriage of Dr. V. Ravi Chandran and Vijayasree Voora. After about two years, the Family Court of the State of New York upon a petition for modification of thecustody of the minor boy Adithya filed by Dr. V. Ravi Chandran and further on petition for enforcement filed by both the parents, upon consent of both the parties, passed a detailed order on 18.6.2007 laying down the terms and conditions as agreed.

56. Under the terms and conditions as incorporated in the order dated 18.6.2007 passed by the Family Court of the State of New York, the mother Vijayasree Voora brought the minor boy Adithya to India but did not return him to the father resulting into filing of the petition for modification by the father for custody and a violation petition for custody before the Family Court of the State of New York. Appropriate orders were passed by the Family Court of the State of New York granting temporary sole legal and physical custody of Adithya to the father along with the directions to the mother to immediately turn over the minor child and his passport to the father. Other conditions were also put in the order, which included that the issue of custody of the minor boy Adithya would be heard in the jurisdiction of the Courts of the United States in particular the Albany County Family Court.

57. Despite the above conditions when the mother Vijayasree Voora did not comply with the orders, the father Dr. V. Ravi Chandran was compelled to approach the Courts in India by preferring a Habeas Corpus Petition under Article 32 of the Constitution of India before the Supreme Court which was registered as Writ Petition (Crl.) No. 112 of 2007. Initially the notices were issued to the mother Vijayasree Voora but the same were returned unserved at the address informed by her while bringing the minor boy Adithya to India. The Supreme Court thereafter required the Police Administration of the different States to trace out and produce the corpus of the minor boy Adithya along with the mother Vijayasree Voora but all went in vain. Ultimately, the Supreme Court was compelled to take help from the Central Bureau of Investigation (CBI), which launched search on all-India basis by issuing lookout notices to the heads of police of States, Union Territories andMetropolitan Cities and also alert notices through the Bureau of Immigration, Ministry of Home Affairs, New Delhi and also flashed photographs of minor childAdithya and his mother Vijayasree Voora. It took about two months to the CBI to trace Adithya and his mother in Chennai and accordingly they were produced before the court.

58. Sufficient opportunity was given to the parties to exchange pleadings. The Supreme Court after considering the respective arguments advanced on behalf ofthe parties and material placed on record was faced with the problem as to what should be the appropriate order in the facts and circumstances keeping in mind the principle of custody of the child and the orders of the courts of the countryof which the child is a national. In other words, what would prevail: the welfareand custody of the minor child or the orders passed by the foreign courts keeping in mind the comity of nations. The Apex Court also considered as to how to balance the two propositions without hurting the other. Before arriving at a conclusion, the Supreme Court considered the law as had been developed over the period of time by referring to various judgments of tins country and also ofAmerican and English courts. We will not refer to all the cases referred to by the Supreme Court but would definitely like to refer to a few of them.

59. In paragraph 25 of the report of the case of V. Ravi Chandran (Dr.) : (AIR 2011 SC (Supp) 257) (supra), the Supreme Court dealt with the case of Surinder Kaur Sandhu v. Harbax Singh Sandhu, (1984) 3 SCC 698 : 1984 SCC (Cri) 464 : (AIR 1984 SC 1224), which is reported hereinunder:

25. This Court in Smt. Surinder Kaur Sandhu v. Harbax Singh Sandhu 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. Thechild 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 Indiaand 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: (SCC p. 703, para 10)

"10. …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 ofthat place must govern which has the closest concern with the well-being ofthe 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 hiscustody by removing him to India, not in the normal movement of the matrimonial home but, by an act which was gravely detrimental to the peaceof 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. (SeeInternational 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."

60. In paragraph 26 of the report the Supreme Court dealt with the case ofElizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42 : 1987 SCC (Cri) 13 : (AIR 1987 SC 3), which is reproduced hereinunder:

26. In Elizabeth Dinshaw v. Arvand M. Dinshaw 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 H. (Infants), In re, (1966) 1 WLR 381 (Ch & CA) : (1966 1 All ER 886) (CA) and approved the same in the following words: (SCC p. 47, paras 9-10)

9. In Re H. (infants), In re, 1966) 1 WLR 381 (Ch & CA) : (19661 All ER 886)(CA) 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 natural-born 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 jurisdictionof 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, andwithout 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 ofNew 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 mat 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 duty ofcourts in all countries to see-that a parent doing wrong by removing children outof 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. [H. (Infants), In re,(1996) 1 WLR 381 (Ch & CA) : (1995) 3 All ER 906 (Ch), All ER at p. 912]:

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 dutyof all courts in all countries to do all they can to ensure mat the wrongdoer does not gain an advantage by his wrongdoing. (Ch p. 389 B)

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.(Ch p. 289 D-E)

With respect we are in complete agreement with the aforesaid enunciationof the principles of law to be applied by the courts in situations such as this.

61. Having dealt with the law on the question the Supreme Court was of the view that as there was nothing on record which may even remotely suggest that it would be harmful to the child to return to his native country and giving due importance to the principles of comity of nations/comity of courts directed that the minorchild Adithya be returned to USA. It would be relevant to quote paragraphs 34, 35, 36 and 37 of the report of V. Ravi Chandran (Dr.) : (AIR 2010 SC (Supp) 257) (supra):

34. The fact that all orders concerning the custody of the minor childAdithya 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; failureof petitioner to give medication to the child; denial of education to the minorchild; 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.

35. 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.

36. 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 custodyorders of the U.S court passed by consent of the parties. It is also true that oneof 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.

37. 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 thechild 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 servedand child could not be produced for more than two years.

62. Further in paragraph 41, the necessary directions were issued which are also reproduced below:

41. 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 ofher own to the United States of America within fifteen days from todayand report to that court.

(ii) The petitioner shall bear all the travelling expenses of the respondent no. 6 and minor child Adithya and make arrangements for the residenceof 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 dateand 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 thecustody of the child, if so advised.

(vi) The parties shall bear their own costs.

63. In the case of Shilpa Aggarwal (supra) (2009 AIR SCW 7694), where also the facts were quite similar to the present case, the Supreme Court approved the order passed by the Delhi High Court directing the mother who had detained the child in India, to appear before the United Kingdom (UK) Court and it was left for the UK Court to take appropriate decision with regard to the custody of the minor child. In the said case, the marriage had taken place in India on 4.11.2003 The husband was already working in UK and both husband and wife acquired the status ofpermanent residents of UK in 2004 before the birth of the girl child Elina on 20.2.2006 By birth the child Elina acquired British citizenship and was holder of a British passport.

64. Later on, as some disagreement arose between the parents, the mother along with the minor child came to India on 12.9.2008 The husband also followed andvisited India for four days in October, 2008 but things did not improve. The mother was supposed to leave for UK along with the minor child on 9.11.2008 but she got the tickets cancelled and continued to reside in India.

65. At this stage, the father initiated proceedings on 25.11.2008 before the High Court of Justice, Family Division, UK praying for an order that the minor girl be made a ward of the court and for a direction to the mother to return the minor child to the jurisdiction of the said court. The UK Court passed an order directing the mother to return the minor child to the jurisdictionof the said court and also to handover the passport and other international travelling documents of the minor child to the solicitors of the husband.

66. Thereafter the husband through his attorney (his father) filed a petition before the Delhi High Court for a direction that the custody of the minor child be handed over to him. The Delhi High Court relegated the parties to the Mediation Centre ofthe Delhi High Court to explore the possibility of settlement but ultimately the mediation could not be materialized. Later on the Delhi High Court vide order dated 7.8.2009 disposed of the petition with the directions, as contained in paragraph 8of the report of the case of Shilpa Aggarwal : (2009 AIR SCW 7694) (supra), which is extracted hereinunder:

"At the first instance, a period of 14 days be granted to Respondent 2 (the petitioner herein) to take the child of her own to England and join the proceedings before the courts of England and Wales, failing which the child be handed over to the petitioner to be taken to England as a measure of interimcustody and thereafter it is for the courts of England and Wales to determine which parent would be best suited to have the custody of the child."

67. It was against the said directions of the Delhi High Court that the mother appealed be fore the Supreme Court. The Supreme Court after taking into consideration the arguments advanced by the parties and the material placed on record and in particular the order passed by the High Court of Justice, Family Division, UK on 26.11.2008 was of the view that the High Court did not commit any error in issuing the necessary directions. The relevant ex tract from the judgment in the case of Shilpa Aggarwal : (2009) AIR SCW 7694) (supra) as contained in paragraphs 33, 34, 35 and 36 is reproduced hereinunder:

33. It is evident from the aforesaid order that except for insisting that the minor be returned to its jurisdiction, the English Court did not intend to separate the child from the appellant until a final decision was taken with regard to thecustody of the child. The ultimate decision in that regard has to be left to the English Courts having regard to the nationality of the child and the fact that both the parents had worked for gain in the U.K and had also acquired permanent resident status in the U.K

34. The High Court has taken note of the fact that the English Court has not directed that the custody of the child should be handed over to the respondent father but that the child should be returned to the jurisdiction ofthe Courts in the U.K which would then proceed to determine as to who would be best suited to have the custody of the child. In our view, the approach of the High Court takes into consideration both the questions relating to the Comity ofCourts as well as the interest of the minor child, which, no doubt, is one of the most important considerations in matters relating to custody of a minor child. It has been rightly observed by the High Court following the decision in Surinder Kaur's case that it was the English Courts which had the most intimate contact with the issue in question to decide the same.

35. The fact that the minor child has been declared a ward of the English Court till she attains majority, is also a matter of considerable importance in considering whether the impugned order of the High Court should be interfered with or not.

36. We are satisfied from the materials produced before us and the submissions made on behalf of the parties that the High Court did not commit any error in relying on the doctrine of Comity of Courts since the question of what is in the interest of the minor still has to be considered by the U.K Court and the interim order passed inthe proceedings initiated by the Respondent No. 1 is only of an interim nature with a view to return the child to the jurisdiction of the said Court.

68. In the present case, we find that the facts are quite similar to the facts in the case of V. Ravi Chandran (AIR 2010 SC (Supp) 257) (Dr.) (supra). Both the appellants are citizens of New Zealand. The two minor children Pooja and Krish for whom the present habeas corpus petition is filed are also citizens of New Zealand by birth. Even the eldest daughter Hena, who is presently living with her mother in New Zealand is also citizen of New Zealand. Appropriate orders regarding the appellants 1 and 2 being wards of the Court of New Zealand, the parenting order by consent have also been passed by different Courts at New Zealand. The two minor children (appellants 1 and 2) have been detained in India in clear breach of the orders passed by the Courts at New Zealand. Presently there are no orders passed by Indian Courts which may be in conflict with the orders passed by the New Zealand Courts. There is apparently no material which may suggest any harm being caused to the appellants 1 and 2 if they are taken to New Zealand. For the foregoing reasons, we are inclined to follow the judgment in the case of V. Ravi Chandaran (Dr.) (supra) and issue appropriate directions accordingly subject to the arguments advanced by learned counsel for the husband which we now proceed to deal with.

69. Sri H.N Singh, learned counsel for the husband has relied upon various cases mentioned in the earlier part of this judgment on three different propositions. Firstly with regard to the principles of the comity of courts/comity of nations. The submission based upon the said decisions is that the comity of courts cannot be the sole ground for relegating the matter to the courts of foreign nation. He has referred to the three cases on this point namely (i) Dhanwanti Joshi (supra), (ii) Ruchi Majoo(supra) and (iii) Sarita Sharma ((2000) 3 SCC 14 : AIR 2000 SC 1019) (supra). We are apparently not in disagreement with the submission advanced by Sri H.N Singh as we are also of the view that the principle of comity of nations cannot be the sole factor to decide a matter relating to parenting of minor children. The more important factor to be taken into consideration is the interest and welfare of the minor children. Thus if the principle of the comity of nation is to be given its due regard without any violence to the interest and welfare of the minor children, there could be no justification for not honouring the principles of comity of nations or in other words honouring the orders passed by the courts of other countries.

70. In the present case upon the material placed on record, the submission advanced by the counsel for the parties and the interaction which we had with the parents and the minor children, apparently we do not find any reason to hold back the minor children in this country and not to let them appear before the courts of their nation as there is no material on record to indicate that such exercise would be detrimental or adverse to their interest and welfare in any manner.

71. The other set of authority relied upon is with regard to the considerations relevant for grant of custody. These cases are (i) Smt. Sunita Malik (supra), (ii) Syed Salimuddin : ((2001) 5 SCC 247 : AIR 2001 SC 2172) (supra), (iii) Dr. Ashish Ranjan(supra) and (iv) Mausami Moitra Ganguli (supra): (2008 (4) ALJ 767). We are of the view that it is not necessary for us to go into the details of these decisions as apparently we are not deciding the issue of custody following the judgment in the case of V. Ravi Chandran : (AIR 2010 SC (Supp) 257) (supra). We are only relegating the matter to be decided by the courts of the country of which the minor children are nationals and detailed reasons in that regard have already been discussed above. The question of custody would be appropriately dealt with by the Courts at New Zealand upon material being placed before it by the respective parties. The third set of cases relied upon by Sri H.N Singh lay emphasis on the proposition that the statement of the children should be recorded in the matter relating to the custody of minor children. In the instant case since we have interacted with the children in chambers as such the following set of cases are not being dealt with in detail:

72. In view of foregoing discussion, we are of the considered view that the appellants 1 and 2 (the two minor children) should be returned to New Zealand to the jurisdiction of the court in that country for the reasons summarised below:

Km. Pooja Malhotra and Master Krish Malhotra both are citizens of New Zealand being born in that country.

Both the parents, Pankaj Malhotra (father) and Anupma Malhotra (mother) acquired citizenship of New Zealand in 1999 and till date continue to be citizens of New Zealand.

The eldest daughter Hena although born in India is also a citizen of New Zealand since 1999 and till date.

Right from 1997 the family lived in New Zealand till March, 2008 for almost eleven years.

During the stay of the family in India from 2008 to 2011, the citizenship of New Zealand was not surrendered which clearly indicates that there was an intention to move back to New Zealand and the stay in India was only temporary.

From 14.2.2011 till 29.10.2010 the father Pankaj Malhotra did not file any case before the Indian Court for the custody of the children even though the children had been moved to New Zealand by the mother during this period.

The father Pankaj Malhotra participated in the proceedings initiated by the mother in New Zealand and was a party to the consent order dated 12.8.2011 providing for parenting of minor children.

The father Pankaj Malhotra did not file any application for recalling, modifying, varying or discharging the order dated 12.8.2011 passed on the basis of consent, alleging that consent had been obtained by coercion.

The father for the first time alleged coercion with regard to the consent order when he filed the petition under Section 25 of the 1890 Act before the Court at Gautam Buddha Nagar.

Under the terms of the consent order passed by the New Zealand Court on 12.8.2011, the father Pankaj Malhotra went to New Zealand accompanied his three minor children to India on 4.10.2011 with the condition that they would be returned on 28.10.2011 for which the tickets had also been purchased but while the three children were in India, he committed breach of the consent order by not returning the children to New Zealand and retaining them in India.

Apparently the father Pankaj Malhotra had while bringing the children to India on 4.10.2011 decided to retain them in India as he immediately filed the petition for their guardianship.

Both the minor children in their conversation with us could not express any such drastic or serious drawback with the mother which would compel this Court to think of not sending the children to New Zealand.

Both the children expressed that the mother was very caring, loving and affectionate to them.

They also expressed that they were also comfortable with their mother and wanted that both the parents should live together.

They also mentioned, especially Pooja Malhotra, that she used to miss her eldest sister Hena very much.

The comity of courts requires that the proceedings initiated before the New Zealand Court, the nation of which the entire family is a citizen, may proceed with the matter.

Nothing could be brought on record to show that the proceedings before the New Zealand Court or living of the children in New Zealand would in any manner be detrimental to the welfare and interest of the minor.

The educational institutions in this part of the country are normally closed for summer vacations which last for about two months, beginning middle or end of May each year. In case the appellants 1 and 2 are sent to New Zealand to the jurisdiction of courts in that country within the next fifteen days they would not be missing out their schools in case ultimately the Courts of New Zealand handover their custody to the father or permit them to continue their studies in India.

The matter can be decided by the Courts at New Zealand within a reasonable time so that the studies of the children do not get adversely affected whether they pursue the same in New Zealand or in India.

73. In the result the Special Appeal No. 523 of 2012 is allowed. The judgment and order of the learned single Judge dated 27.2.2012 passed in Habeas Corpus Petition No. 10530 of 2012 is hereby set aside and the writ petition stands disposed of with the following directions:

(i) Pankaj Malhotra (respondent No. 1) is directed to accompany the children to New Zealand and produce them before the Court at New Zealand within the next fifteen days and it would be for the Courts at New Zealand to pass appropriate orders with regard to the parenting, care and custody of the minor children.

(ii) We leave it open to Pankaj Malhotra (respondent No. 1) to apply for modification, variation or discharge of the orders passed by the Courts at New Zealand.

(iii) In case Pankaj Malhotra (respondent No. 1) does not accompany the appellants 1 and 2 to New Zealand within fifteen days from today, custody of the appellants 1 and 2 along with their passports and other foreign travelling documents would be handed over to the appellant No. 3, the mother Mrs. Anupma Malhotra to accompany the children to be produced before the Courts at New Zealand.

(iv) In case the respondent No. 1 accompanies the children to New Zealand within fifteen days as provided in this order, the appellant No. 3 may consider not pressing the warrants issued against the respondent No. 1. However, if the respondent no. 1 fails to accompany the children to New Zealand within the time allowed, this request to appellant No. 3 would be treated as nullified.

74. There shall be no orders as to costs in the facts and circumstances of the present case.

75. Before parting we may record that any expression in our order touching merit of the case may not be construed to have expressed opinion on merit for the adjudication of the issues subjudice/pending before the Courts at New Zealand.

76. Order accordingly.

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SMT. VARSHA LAKHMANI VERSUS HITESH WADHVA

2008 SCC OnLine All 249 : (2008) 71 ALR 665 :
(2008) 6 AIR Kant R (NOC 971) 347 : (2008) 4 All LJ 446

(Allahabad High Court)

(Before Hon'ble Mr. Justice Amitava Lala & Hon'ble Mr. Justice Shishir Kumar, JJ.)

Between

Smt. Varsha Lakhmani

v.

Hitesh Wadhva

F.A No. 32 of 2008

Decided on March 3, 2008

Guardians and Wards Act (sec 12)--- Code of Civil Procedure, 1908.-- Right of Appeal--The Guardiansand Wards Act, 1890, under which the application was made, provides niether any scope of appeal from such type of order nor any similar provision under different Act i.e section 26 of the Hindu Marriage Act, 1955 provides any scope of appeal from an interim order.----with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith--- Family Courts Act clearly debars scope of appeal from any interlocutory order in its provisions.

JUDGMENT

AMITAVA LALA, J.:— This appeal arises out of the order dated 9th January, 2008 passed by the Principal Judge, Family Court, Varanasi refusing to pass an interim order of injunction regarding custody of minor Daksha in favour of the plaintiff-appellant under section 12 of the Guardians and Wards Act, 1890 (hereinafter called as 'Guardians and Wards Act') fixing a date for conciliatory talks on 13th March, 2008.

2. Admittedly, minor Daksha, son of the defendant-respondent, is now staying with the plaintiff-appellant, who is maternal grandmother of the minor, at Varanasi, Uttar Pradesh. No order has been passed as yet by any Court in the State of Uttar Pradesh giving any custodial right in favour of the father, the defendant-respondent herein.

3. One Mrs. Dipika (since deceased), wife of the defendant-respondent anddaughter of the plaintiff-appellant, expired on 24th/25th April, 2006 while she was residing with her parents at Varanasi. The plaintiff-appellant initiated a criminal proceeding of dowry death against the respondent husband of Mrs. Dipika, which was registered as Case Crime No. 13 of 2007, under sections 304-B, 498-A, 504, 506 of Indian Penal Code read with section ¾ of the Dowry Prohibition Act at Police Station Mahila Mahanagar, District Varanasi. However, after the police investigation in the said criminal case a final report has been filed in favour of the defendant-respondent. But the Court below has not come to a final conclusion on such report due to non-availability of certified copy of the final report. But from the photocopy of the first information report lodged against the defendant-respondent by the plaintiff-appellant the Court below observed that there is no allegation regarding the demand of dowry or any unnatural death. It is also observed by the Court below that defendant-respondent has filed photocopy of an application therein, being Paper (Page ?) No. 28C/2, which was filed by Sri Dwarika Das, husband

of the plaintiff-appellant, in the Nagar Nigam, Varanasi informing death of his daughter, to establish that cremation was done in presence of in-laws of the deceased, Panchesof Sindhi Samaj and relatives of plaintiff-appellant, and the cremation was done by Sri Avinash Badhya (Wadhva?), the younger brother of the defendant-respondent. It is also recorded by the Court below that after the death of the deceased, the defendant-respondent, being husband of deceased, took minor Daksha with him at his place of residence i.e Bhopal, Madhya Pradesh. It is complained that one day the plaintiff-appellant and her husband in the pretext of taking minor Daksha for a walk took him to Varanasi. As a result whereof, the defendant-respondent has filed an application before the concerned Magistrate under section 97 of the Code of Criminal Procedure, 1973 for search. Ultimately, considering all pros and cons i.e prima facie case, balance of convenience and irreparable loss and injury, the Court below rejected the application for injunction and directed to place the matter on 13th March, 2008 for conciliatory talks.

4. According to us, in such type of proceedings a final decision could be reached weighing the balancing factors keeping in the mind the principle that right of the father, as a natural guardian, is unlimited but such right can not be provided at the cost of welfare of the child. However, such stage has not yet been reached nor the custody is directed to be given by the Family Court at an interlocutory stage. Therefore, no right of the plaintiff-appellant has been infringed as yet. Thus, apparently the attempt to get an order of injunction regarding custody of the child by the plaintiff-appellant is a futile attempt. However, at the invitation of the defendant-respondent we have entered into different context as discussed below.

5. Mr. K.S Tiwari, learned Counsel appearing for the defendant-respondent, raised an objection about maintainability of the appeal from such order refusing grant of interim injunction at first, which has been strongly opposed by Mr. B.D Mandhyan, learned Senior Counsel appearing in support of the plaintiff-appellant with the able assistance of Mr. Udai Chandani, learned Counsel for the plaintiff-appellant taking a plea that the order is appealable under Order XLIII Rule 1 of the Code of Civil Procedure with the interpretation of Full Bench judgment of this Court in Smt. Kiran Bala Srivastava v. Jai Prakash Srivastava.1 It appears to us that the objection on the part of Mr. Mandhyan is based on the well celebrated decision of the SupremeCourt in Shah Babulal Khimji v. Jayaben D. Kania2 Therefore, our endeavour would be to consider appealability of the order impugned.

6. According to Mr. Tiwari, the order, which was passed under section 12 of the Guardians and Wards Act, is interlocutory in nature from which no appeal could lie as per the provisions of Order XLIII, Rule 1 of the Code of Civil Procedure, 1908. This appeal is arising out of an order of the Family Court, hence the scope of appeal will be guided by the Family Court Act, 1984 (hereinafter called as 'Family Courts Act') but not by the Code of Civil Procedure.

7. Chapter V of the Family Courts Act speaks about the appeal under section 19 of such Act. The heading of this chapter is "Appeals and Revisions". The scope of appeals has been substituted by the Act 59 of 1991 with effect from 28th December, 1991. Section 19 of such Act speaks as follows.—

"19. Appeal.— (1) Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a FamilyCourt to the High Court both on facts and on law.

(2) No appeal shall lie from a decree or order passed by the Family Courtwith the consent of the parties or from an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974):

Provided that nothing in this sub-section shall apply to any appeal pending before a High Court or any order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) before the commencement of the Family Courts (Amendment) Act, 1991.

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment or order of a Family Court.

(4) The High Court may, of its own motion or otherwise, call for andexamine the record of any proceeding in which the Family Court situate within its jurisdiction passed an order under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) for the purpose of satisfying itself as to the correctness, legality or propriety of the order, not being an interlocutory order,and as to the regularity of such proceeding.

(5) Expect as aforesaid, no appeal or revision shall lie to any court from any judgment, order or decree of a family court.

(6) An appeal preferred under sub-section (1) shall be heard by a Bench consisting of two or more judges."

8. Section 47 of the Guardians and Wards Act being subjective law also provides scope of appeal, as quoted hereunder:

"47. Orders appealable.— An appeal shall lie to the High Court from an order made by a Court,—

(a) under section 7, appointing or declaring or refusing to appoint or declare a guardian; or

(b) under section 9, sub-section (3), returning an application, or

(c) under section 25, making or refusing to make an order for the return of a ward to the custody of his guardian; or

(d) under section 26, refusing leave for the removal of a ward from the limits of the jurisdiction of the Court, or imposing conditions with respect thereto; or

(e) under section 28 or section 29, refusing permission to a guardian to do an act referred to in the section; or

(f) under section 32, defining, restricting or extending the powers of a guardian; or

(g) under section 39, removing a guardian; or

(h) under section 40, refusing to discharge a guardian; or

(i) under section 43, regulating the conduct or proceedings of a guardian or settling a matter in difference between joint guardians, or enforcing the order; or

(j) under section 44 or section 45, imposing a penalty."

9. According to us, the special derogates from the general as per the maximgeneralibus specialia derogant. On the other hand, general things do not derogate from the special things following the maxim generalia specialibus non derogant. The Guardians and Wards Act and Family Courts Act are special Acts, when the Guardians and Wards Act is the subjective law then the Family Courts Act is procedural law. But both have made certain provisions for preferring an appeal. Neither of the Acts provides remedy of appeal from such type of order. Characteristics and trappings of finality of an order as under Order XLIII Rule 1 of the Code of Civil Procedure read with the interpretation of guidelines of Shah Babulal Khimji (supra) can not be applicable herein. It is to be remembered that any subsequent general law or interpretation thereof can not override the enactments of the special statute in relation to the matters dealt with by such subsequent laying down general principle of law. In other words, it can not derogate from the earlier special law in spite of the maxim leges posteriores priores conterarias abrogant i.e later laws abrogate earlier contrary laws applying the rule of construction. In cases of conflict between the special provision and general provision, the special provision prevails over general provision and the general provision applies only to such cases, which are not covered by the special provision. Lot of discussions are available

with regard thereto in the judgment of the Supreme Court in J.K Cotton Spinning and Weaving Mills Co. Ltd. v. State of Uttar Pradesh.3 One other special feature is that legislature introduced the Family Courts Act, 1984 with effect from 14th September, 1984 with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith, much after the judgment of Shah Babulal Khimji (supra) delivered on 10th August, 1981. Therefore, when such Family Courts Act clearly debars scope of appeal from any interlocutory order in its provisions, it can be construed that the legislature deliberately done so keeping in its mind ratio of such judgment. Hence, such special statute being posterior to the applicability of general law and its interpretation can not override the intention of the legislature. We are all aware that after the judgment of Shah Babulal Khimji (supra) there is a sea change with regard to wideness of scope of appeal from the interlocutory orders particularly in the cases of injunctionand receiver. By such judgment it is declared that such type of orders arejudgments in the wider sense. Therefore, as per the ratio of the judgment, refusal of appointment of receiver and/or grant of ad interim injunction both are also undoubtedly judgment within the meaning of the Clause 15 Letters Patent. Order XLIII Rule 1 of the Code of Civil Procedure applies to internal appeals in the HighCourt and apart from it such an order if on merit contains the quality of finalityand would, therefore, be a judgment within the meaning of the Clause 15 of the Letters Patent. However, such judgment expressly or impliedly either by the majority view or by the minority view held that the expression has necessarily to be considered and interpreted in each particular case. According to us, this judgment has extended the scope because of disparity between the scope of appeal in the original side of the Chartered High Courts and the scope of appeal in the appellate side of the other High Courts. In the Chartered High Courts, where Letters Patentand Original Side Rules are applicable, the provision of appeal is available from almost all the similarly placed orders, when right of appeal is restricted under the Code of Civil Procedure made for the High Courts where Letters Patent andOriginal Side Rules are not available. Therefore, to remove the disparity the SupremeCourt extended the scope to have the right of appeal for all the High Courts where the characteristics and trappings of final order are available. Mr. Mandhyan contended that since the application is in the nature of injunction, it is squarely covered under Order XXXIX Rule (2) of the Code of Civil Procedure when injury is complained, which can not be compensated by any manner whatsoever, moreover the right can not be interfered with. We are of the view that nomenclature "injunction" can not be read in isolation but in the context of the appropriate case. Here, the Court has to ultimately come to final finding about the welfare of the child upon weighing various evidences. The Court has not reached to such stage as yet in a situation when the plaintiff-appellant herself and her husband are keeping the custody of the child with them. We are not on that issue now but on the issue of genesis of special Act vis-a-vis general Act and its applicability in this case.

10. So far as Smt. Kiran Bala Srivastava (supra) is concerned, it deals with following question:

"Whether an appeal under section 19 of the Family Courts Act, 1984 would lie against an order passed under section 24 of the Hindu Marriage Act, for grant of interim maintenance?"

11. Therefore, we have to see the scope and ambit of such Act particularly the section referred in the question.

12. Section 24 of the Hindu Marriage Act, 1955 deals with maintenance pendente lite and expenses of proceedings. Section 25 deals with permanent alimony andmaintenance. Therefore, both the above sections have no face value in the present proceeding. Section 26 deals with custody of children. Therefore, it is nearer to section 12 of the Guardians and Wards Act, which is applicable in the present case. Section 28 of said Act deals with question of appeals from the decrees and orders. Section 28 of the Act is as follows:

"28. Appeals from decrees and orders.— (1) All decrees made by the Courtin any proceeding under this Act shall, subject to the provisions of sub-section (3), be appealable as decrees of the Court made in the

exercise of its original civil jurisdiction, and every such appeal shall lie to the Court to which appeals ordinarily lie from the decisions of the Court given in the exercise of its original civil jurisdiction.

(2) Orders made by the Court in any proceeding under this Act under section 25 or section 26 shall, subject to the provisions of sub-section (3), be appealable if they are not interim orders, and every such appeal shall lie to the Court to which appeals ordinarily lie from the decisions of the Court given in exercise of its original civil jurisdiction.

(3) There shall be no appeal under this section on the subject of costs only.

(4) Every appeal under this section shall be preferred within a period of ninety days from the date of the decree or order."

13. From the provision of section 28 of the Hindu Marriage Act it is crystal clear that all decrees are appealable in nature. Therefore, a necessity arose to consider the cause of section 24 of such Act, which itself could exist for pendente lite periodand can not exist after decree. Hence, it has to have the characteristics andtrappings of final order. In any proceeding there are two stages i.e interim and final. But an order under section 24 itself exists at an interim stage till final decision. Therefore, in that way the order under such section seems to be both interim andfinal. Hence, characteristics and trappings of finality is available under such section. Thus, the Full Bench has rightly accepted the ratio of Shah Babulal Khimji (supra) with regard to the section under anterior Act. But such decision by no means is applicable under the section of the Act applicable herein. Therefore, this case is to be considered only on that background being relevant for the purpose.

14. Hence, we conclude by saying that the procedural law i.e The Family Courts Act, 1984 promulgated about three years after the judgment of the Supreme Courtin Shah Babulal Khimji (supra), does not give any room for the purpose of appeal from any interlocutory order. Secondly, neither the subjective law i.e The Guardiansand Wards Act, 1890, under which the application was made, provides any scope of appeal from such type of order nor any similar provision under different Act i.e section 26 of the Hindu Marriage Act, 1955 provides any scope of appeal from an interim order. Lastly, express intention of the legislature is to be understood from its plain reading at first and in case any vaccum arose, the same is to be understood by the implied intention from such Act as well as parallel Act, if any. In this case neither the express intention nor the implied intention of the legislature speaks that an appeal can be preferred from the order impugned.

15. Therefore, in totality we can not admit the appeal. Hence, the appeal is dismissed upon being heard on the basis of informal papers and on exchange of affidavits, as agreed upon, without imposing any costs.

SHISHIR KUMAR, J.:— I agree.

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LOKNATH VERSUS RUKMANI BAI

2013 SCC OnLine Chh 132 : 2014 AIR CC 170

(Before Hon'ble Mr. Justice Sanjay K. Agarwal, J.)

Loknath ..... Appellant

v.

Rukmani Bai ..... Respondent

Shri Manoj Paranjpe and Shri Vikram Dixit, learned counsel for the appellant.

None for the respondent, though served.

M.A No. 334 of 2005

Decided on September 26, 2013

Hindu Marriage Act Section 26 -Guardians and Wards Act, 1890 Section 17(1) & (2) and Section 25 ---in the matter of custody of the child paramount consideration is welfare of the minor and not the status of the parents or relatives.-- The word 'welfare' used in Sections 7, 17 and 25 has to be construed literally and must be taken in its wider sense.---the trial Court has committed a serious legal error in granting the application without considering the welfare of thechild, which must have been the paramount consideration for granting the custodyof the ward. ----impugned order passed in Guardians and Wards Case No. 02/2004 is set aside. The matter is remanded to the concerned District Judge/District Court within the meaning of Section 4(5)(b) (ii) of the Act, 1890 for decision afresh, strictly in accordance with law.

ORDER

Sanjay K. Agarwal. J.

(1) Invoking the appellate jurisdiction of this Court under Section 47(C) of the Guardians and Wards Act, 1890 (for short 'the Act, 1890') the appellant/father(Loknath) has preferred this appeal challenging the impugned order dated 10.02.2005 passed by the Civil Judge, Class-I, Baloda Bazasr, District - Raipur in Guardians and Wards Case No. 02/2004 (Rukhmani Bai v. Loknath) on the application under Section 25 of the Act, 1890 granting custody of minor male child Poonam Prakash, who was aged about two and a half years.

(2) The facts necessary for the disposal of this appeal are as under:

(2.1) The respondent/mother (Rukhmani Bai) filed an application under Section 25of the Act, 1890 seeking custody of Poonam Prakash stating inter alia that she was married with Loknath in the year 1999 and they were blessed with one son Poonam Prakash and one daughter Khileshwari. It was further pleaded that the appellant/father was not taking proper care of Poonam Prakash and despite the legal process issued by the Sub Divisional Magistrate (SDM), Bilaigarh, Poonam Prakash was not produced before the S.D.M

(2.2) It was alleged that the appellant was ill treating her due to demand of dowry and she has been thrown out of the matrimonial house by the appellant and therefore she is residing separately with her parents at her parental house. Proceedings under Section 498-A is pending consideration. Since the appellant/father is not managing the ward properly as well as she is deprived ofher love and affection, therefore the custody of Poonam Prakash be given to her.

(3) The present appellant, though served with a notice, did not file any written statement before the trial Court and therefore the trial Court proceeded, declaring the appellant as ex parte. The appellant neither filed written statement nor adduced any evidence in support of his case.

(4) The respondent/mother examined herself before the trial Court stating inter alia that the appellant/father is not taking proper care of her son Poonam Prakash and proceedings under Section 498-A of the I.P.C is pending against him and therefore she is entitled for the custody of the ward.

(5) The trial Court vide its impugned order dated 10.02.2005 granted the application under Section 25 of the Act, 1890 mainly on the ground finding that the evidenceof the mother has remained uncontroverted and minor Poonam Prakash is in need of mother/respondent to look him after and accordingly directed for grantingcustody of the child to respondent/mother.

(6) Shri Paranjpe, learned counsel appearing for the appellant/father would submit that since the minor Poonam Prakash was residing at village Noharpali, Tahsil-Bilaigarh, District-Raipur and thus the District Court, Raipur had the jurisdiction toentertain any such application under Section 25 of the Act, 1890 and certainly, not the Civil Court at Baloda Bazar. He alternatively submits that even otherwise, the trial Court has failed to consider that in the matter of custody of minor child the paramount consideration should be the welfare of the child. The trial Court has failed to consider this aspect of welfare of the child while granting the order directing custody of the child Poonam Prakash to the respondent/mother and thus the impugned order passed by the trial Court is liable to be set aside.

(7) I have heard learned counsel for the appellant and considered the submissions made hereinabove and perused the record of the trial Court.

(8) Section 7 of the Act, 1890 provides for the power of the Court to make order as to guardianship. Sub section (1) of Section 7 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 tobe such a guardian, the Court may make an order accordingly.

(9) Section 17(1) & (2) and Section 25 of the Act, 1890 reads as under:

"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 theminor.

(2) 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 ofthe proposed guardian and his nearness of kin to the minor the wishes, if any, ofa deceased parent, and any existing or previous relations of the propose guardian with the minor or his property."

"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 thecustody of his guardian, may make an order for his return and for the purpose ofenforcing 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 (10 of 1982).

(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."

(10) Thus, from a bare perusal of the provisions of Section 17 read with Section 25(1) of the Act, 1890, one thing is clear that in the matter of custody of thechild paramount consideration is welfare of the minor and not the status of the parents or relatives. The word 'welfare' used in Sections 7, 17 and 25 has to be construed literally and must be taken in its wider sense.

(11) The Supreme Court in a decision reported in (2008) 7 SCC 673 (Mousmi Moitra Ganguli v. Jayant Ganguli) has held that it is the welfare and interest of the childand not the rights of the parents which is the determining factor for deciding the question of custody. It was the further held that the question of welfare of thechild has to be considered in the context of the facts of each case and decided cases on the issue may not be appropriate to be considered as binding precedents.

(12) Under Section 17 of the Act, 1890 the Court is duty bound to find more suitable person amongst the rival claimants. The moral and ethical welfare of thechild must also weigh with the court as well as its physical well-being.

A Division Bench of this Court in 2011 (3) C.G.L.J 80 (DB) (Shailesh Khandelwal v.Meenakshi Khandelwal) has held in para 13 as under:

"13. Section 6 of the Act of 1956 provides that the natural guardian of a Hinduminor, in 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 offive years shall ordinarily be with the mother. As per Section 13, of the Act of 1956, 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. Under Section 17 of the Act of 1890, the court is under a duty to appoint the most suitable person amongst the rival claimants for guardianship, although a person who under the personal law would be entitled to the custody of the child in preference to any one else. As per Section 17(3) of the Act of 1890; if the minoris old enough to form intelligent preference, the court may consider that preference. Scope of Section 17 of the Guardians and Wards Act is that the court has to see who of the several applicants has a preferential right to be appointed as guardian of the minor under the personal law keeping also in view the welfareof the minor. The court should be guided by the sole consideration of the welfareof the minor."

(13) The Supreme Court in 2013 AIR (SC) 102 (Gayatri Bajaj v. Jiten Bhalla) in para 12 and 13 held as under:

"12. The law relating to custody of minors has received an exhaustive consideration of this Court in a series of pronouncements. In Gaurav Nagpal v.Sumensha Nagpal. (2009) 1 SCC 42 the principles of English and American law in this regard were considered by this Court to hold that the legal position in India is not in any way different. Noticing the judgment of the Bombay High Court inSaraswati Bai Shripad Ved v. Shripad Vasanji Ved, 1941 AIR (Bo) 0 103; Rosy Jacob v.Jacob A Chakramakkal (1973) 1 SCC 840 and Thirty Hoshie Dolikuka v. Hoshiam Shavdaksha Dolikuka (1982) 2 SCC 544 this Court eventually concluded in paragraph 50 and 51 that:

50. That 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 hasto exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mousmi Moitra Ganguli's case the court has to give due weightage tothe 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 childmust also weigh with the Court as well as its physical well being. Though the provisions of the special statutes which governs the rights of the parents and guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parent patriae jurisdiction arising in such cases."

(14) A bare perusal of the impugned order would show that the trial Court has failed to consider the welfare of the ward Poonam Prakash while considering and granting the application under Section 25(1) of the Act, 1890, even though, the appellant failed to appear pursuant to the summons issued by the Court, and neither filed return nor adduced any evidence but in that situation also the trial Court was duty bound to consider the welfare of the child/ward.

(15) In 2008 (9) SCO 413 (Nil Ratan Kundu v. Abhijit Kunduj the Supreme Court has held that the Court while dealing with custody case is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents, which reads as under:

"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 aminor, 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 humane 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 ofa minor, the paramount consideration should be the welfare and well-being of thechild. 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 conductive to the welfareof the minor."

(16) In a decision reported in (2012) 5 SCC 265 (C.N) Ramappa Gowda v. C.C Chandregowda (dead) by Lrs.) the Supreme Court, while considering the circumstances wherein the written statement was not filed by the defendant it was held that the Court is duty bound to adjudicate even in absence of complete pleadings or in presence of pleadings of only one party and held as under in para 18:

"18. The learned counsel in this context has specifically placed reliance on the observations of this Court in Balraj Taneja which is of great relevance and value, wherein it was held as follows: (SCC p. 410, para 29)

"29. As pointed out earlier, the court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor should the court proceedto pass judgment blindly merely because a written statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the court. In a case, specially where a written statement has not been filed by the defendant, the court should be a little cautious in proceeding under Order 8 Rule 10 CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of the court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the court can conveniently pass a judgment against the defendant who has not filed the written statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression 'the court may, in its discretion, require any such fact to be proved' used in sub-rule (2) of Rule 5of Order 8, or the expression 'may make such order in relation to the suit as it thinks fit' used in Rule 10 of Order 8."

(17) Thus, in the considered opinion of this Court the trial Court has committed a serious legal error in granting the application without considering the welfare of thechild, which must have been the paramount consideration for granting the custodyof the ward.

(18) Resultantly, the impugned order dated 10.2.2005 passed in Guardians and Wards Case No. 02/2004 is set aside. The matter is remanded to the concerned District Judge/District Court within the meaning of Section 4(5)(b) (ii) of the Act, 1890 for decision afresh, strictly in accordance with law, following the observations made by the Supreme Court in the afore cited cases, within a period of three months from the date of receipt of a copy of this order after noticing the parties.

(19) The appeal is allowed to the above extent. No cost.

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SARJU THAKURE VERSUS RANJEET KUMAR PRAMANIK

2016 SCC OnLine Jhar 2244

In the High Court of Jharkhand at Ranchi

(Before Hon'ble Mr. Justice D.N Patel & Hon'ble Mr. Justice Amitav K. Gupta, JJ.)

Sarju Thakure, son of Late Ludhu Thakur, resident of Sector IX B, Street No. 16 Qr. No. 1269. B.S City, P.O & P.S B.S City, District - Bokaro ..... Appellant

v.

Ranjeet kumar Pramanik, son of Dulal Paramanik resident of Rangatand, P.O & P.S - Topachanchi, District - Dhanbad ..... Respondent

For the Appellant: Mr. Kalyan Banerjee, Advocate

For the Respondent: Mr. Atanu Banerjee, Advocate

First Appeal No. 91 of 2012

Decided on August 2, 2016

Hindu Marriage Act-Section 26- custody of minor---The paramount consideration of the welfare of child also encompasses that the child must get a sense of belonging and social security and she should not feel that she has been neglected by the father or her other siblings-- The emotional plight of child is also to be considered, and it is relevant to mention that it is not necessary that if a person is a bad husband he cannot be a good father. Moreover, the remarriage of the father cannot be taken as a ground for not granting the custody of the child. The Court has to weigh the moral and ethical welfare of the child as well as the physical and mental well being of the child because the child cannot be treated as a commodity or property.

AMITAV K. GUPTA, J.:— The present appeal has been preferred, under Section 19(1)of the Family Court Act, 1984, against the order dated 19.07.2011 passed in Civil Misc. No. 18 of 2005 whereby the learned Principal Judge, Family Court, Dhanbad,allowed the petition under Section 26 of the Hindu Marriage Act, filed by the respondent-plaintiff for custody of his minor daughter, Khushbu Kumari.

2. Learned counsel for the appellant has assailed the impugned order inter-aliaon the ground that the court below has failed to appreciate that the minor childhas been residing with the appellant - defendant, who is the maternal grandfather. The respondent-plaintiff had driven out his wife, late Gita Devi, from the matrimonial home since she could not bear any male child. That late Gita Devi was murdered by the respondent-plaintiff and his relatives, for which, a case under Sections 302/211of the Indian Penal Code was lodged with the police. It is argued that the respondent-plaintiff has remarried and is not interested in the welfare of the childwhich is reflected from his conduct as he had abandoned Khushbu Kumari after the death of her mother lat Gita Devi and he is least concerned about the welfare ofKhushbu Kumari and has not provided for the maintenance of Khushbu Kumari who has been residing with the appellant who has been looking after and taking careof her since her birth and providing for her education.

3. It is contended that it was the last wish of late Gita Devi that Khushbu Kumari should reside under the guardianship of her nana (maternal grandfather), i.e, the appellant. It is argued that the petition for custody of Khushbu Kumari has been filed by the respondent to pressurize the appellant to withdraw or to compromise the murder case filed against the respondent. It is submitted that welfare of other four

daughters of late Gita Devi is at stake, as they are not being given proper love, care and affection by the respondent and their step-mother. It is argued that the court below has failed to appreciate and consider that the welfare of the childwould be jeopardized if she was given in the custody of the respondent-plaintiff, accordingly it is argued that the impugned order is fit to be set aside.

4. Per contra, learned counsel, for the respondent-plaintiff, has submitted that it would be evident from the impugned order that the appellant-defendant after filing his reply to the petition under Section 26 of the Hindu Marriage Act, did not lead any evidence to substantiate the allegations that the other four daughters of the respondent, begotten out of the wedlock with Gita Devi, are not being looked after properly by the respondent-plaintiff or their stepmother. That Gita Devi had died dueto a disease. That the court below has applied its judicial mind to the available evidence on record and has rightly passed the order, allowing the petition under Section 26 of the Hindu Marriage Act, for giving the custody of the child in the guardianship of the respondent-plaintiff.

5. Having heard learned counsels for the parties and on perusal of the impugned order, it is abundantly clear that the appellant - defendant, i.e, the maternal grandfather of Khushbu Kumari, has not led any evidence or examined any witness in support of the allegation that the welfare of the other four daughters, born from the wedlock of the respondent and late Gita Devi, is at stake. It is not disputed that late Gita Devi gave birth to five daughters and the youngest daughter namely, Khushbu Kumari, is presently residing with the appellant. P.Ws - 2 & 3 namely, Bham Ram Mahto and Rameshwar Prasad Mahto respectively, have supported the case of the respondent-plaintiff. They have stated that other four daughters are residing with respondent-plaintiff and they had accompanied the respondent-plaintiff to Bokaro to bring his daughter, Khushbo Kumari but the appellant had refused to hand over the custody.

6. From the evidence adduced, it is evident that the other four daughters are residing with the respondent-plaintiff whereas the minor Khushbu Kumari has been deprived of the company of her sisters as she has been kept by the appellant.

7. It is settled proposition that for the custody of the child, the paramount consideration is the welfare and interest of the child and not the rights of the parents under the statute. It is to be noticed that welfare includes material welfare, both in the sense of an adequacy of resources to provide a pleasant home and comfortable standard of living and the most important factor to be considered is the stability, security, love and understanding, care and guidance, the warm and compassionate relationship which are essential for the complete development ofthe child's personality, character and talents. In the absence of mother, the fatheris the main stakeholder for being considered as the guardian to whom the custodyof the child is to be given and for giving the custody to either of the parents the attending facts and circumstances of each case has to be given due weightage on the touchstone of welfare of the child. The emotional plight of child is alsoto be considered, and it is relevant to mention that it is not necessary that if a person is a bad husband he cannot be a good father. Moreover, the remarriage ofthe father cannot be taken as a ground for not granting the custody of the child. The Court has to weigh the moral and ethical welfare of the child as well as the physical and mental well being of the child because the child cannot be treated as a commodity or property.

8. It is apparent from the recital of the evidence in the impugned order that the appellant has not been able to substantiate the plea that the other four daughters,of the respondent begotten from late Gita Devi, are not being properly cared and looked after by the respondent-plaintiff or their step-mother or the welfare of other daughters are at stake. In the given fact situation the separation of a child from her father and other sisters will only lead to a sense and feeling of isolation and deprivation in the child which will have a negative impact on the psyche of thechild affecting the mental and physical health of a child of tender years leadingto adverse impact in the development of her personality.

9. The paramount consideration of the welfare of child also encompasses that the child must get a sense of belonging and social security and she should not feel that she has been neglected by the father or her

other siblings. Depriving the childof the company of her father and sisters would have an adverse affect on the tender and impressionable mind of the child. The handing over custody of theminor girl to her father will foster a sense of belonging to the family and she shall enjoy the company of her sisters and foster a healthy relationship which will have positive impact on the overall development of the personality of the childboth emotionally and physically.

10. In view of the discussions made above and looking to the evidence on record, and in the facts and circumstances of the case, we see no reason tointerfere with the order passed by the learned Principal Judge, Family Court, Dhanbad dated 19th July, 2011 in Civil Misc. No. 18 of 2005. No error has been committed by the learned Principal Judge, Family Court, Dhanbad in passing the order under Section 26 of the Hindu Marriage Act, 1955 for giving the custody ofthe minor daughter Khushbu Kumari to the respondent-plaintiff.

11. In the result this appeal stands dismissed.

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MRS. KHURSHEEDA KHATOON & ORS. VERSUS MD. SHAID AKTAR

2015 SCC OnLine Jhar 873 : (2015) 2 AIR Jhar R 304 : AIR 2015 (NOC 846) 316

(Before Hon'ble Mr. Justice D.N Patel & Hon'ble Mr. Justice Pramath Patnaik, JJ.)

1. Mrs. Khursheeda Khatoon, widow of Late Motiur Rahman, 2. Rahmatur Rahman, son of Late Motiur Rahman, 3. Nausadur Rahman, son of Late Motiur Rahman, 4. Irshadur Rahman, son of Late Motiur Rahman, 5. Sadaur Rahman son of Late Motiur Rahman, All resident of C/o M/s. Perfect Engg. Works, Maulana Azad Lane, Near Mehdi Hassan Chowk Barhampura, P.O & P.S Barhampura, District-Muzaffarpur, Bihar ..... Appellants/Opp. Parties

v.

Md. Shaid Aktar, son of Md. Akhtarul Hussan resident of Arbind Nagar, P.O & P.S Doranda, District-Ranchi ..... Respondent/Petitioner

For the Appellants: Mr. Kalyan Banerjee, Advocate

For the Respondent: M/s. Sohail Anwar, Senior Advocate, Afaque Ahmad, Shivani Verma & Altaf Hussain, Advocates

F.A No. 227 of 2012
With
I.A No. 1577 of 2014
With
I.A No. 1578 of 2014
With
I.A No. 6102 of 2014

Decided on February 11, 2015

Guardians and Wards Act, 1890,- custody of minor- Section 25 and 10---original opposite parties have preferred this First Appeal agaist the order whereby the application preferred by the husband under Section 25 and 10of the Guardians and Wards Act, 1890, has been allowed by the Principal Judge, Family Court, Ranchi and the custody of minor son of the respondent, namely, Ehab Shahid has been directed to be handed over to the respondent.-- the respondent is a Government employee, who is working on the post of Jan Sewak .The respondent is staying with his mother and unmarried sister.---The respondents is already having custody of his elder son, aged about 13 years. -- that the elder son of the respondent is studying in a school, namely, St. Thomas School at the city ofRanchi-capital of Jharkhand. Thus, looking to the family environment at the house of this respondent and also looking to the fact that the respondent is a Government employee, the welfare of his minor second son, Ehab Shahid, will always be with the respondent, if the custody is given to him. This aspect of the matter has been properly appreciated by the learned Trial Court.

Oral Order

Per D.N Patel, J.:

I.A No. 1577 of 2014:

1. This interlocutory application has been preferred by the appellants for condoning the delay of 28 days in preferring the First Appeal.

2. Having heard learned counsel for both the sides and looking to the reasons, given in paragraph nos. 4, 5 and 6 of the interlocutory application, there are sufficient reasons to condone the delay of 28 days in preferring the instant Appeal.

3. Accordingly, delay in filing the instant First Appeal is hereby condoned. I.A No. 1577 of 2014 stands disposed of.

F.A No. 227 of 2012:

4. The instant First Appeal has been preferred by the appellants (original opposite parties in Guardianship Case No. 50 of 2007) against the judgment and order, passed in Guardianship Case No. 50 of 2007 dated 10th September, 2012, whereby the application preferred by the husband (respondent here) under Section 25 and 10of the Guardians and Wards Act, 1890, has been allowed by the Principal Judge, Family Court, Ranchi and the custody of minor son of the respondent, namely, Ehab Shahid has been directed to be handed over to the respondent and, therefore, the original opposite parties have preferred this First Appeal.

5. Learned counsel appearing for the appellants has submitted that appellant no. 1 is maternal-grand-mother of the child, namely, Ehab Shahid and rest of the appellants i.e appellant nos. 2 to 5 are the maternal uncles of Ehab Shahid. These appellants are having custody of the minor boy Ehab Shahid, since long i.e since the death of his mother, who was wife of the respondent (applicant in Guardianship Case No. 50/2007).

6. It is submitted by the learned counsel for the appellants that minor boy Ehab Shahid is staying nicely with these appellants are he is also studying in the school at Muzaffarpur, Bihar. The welfare of the minor is with these appellants and proper education is also being provided to the minor. All the needs of the minor are being fulfilled or supplied by these appellants whereas if the custody is to be givento the respondent (original applicant), the minor boy, namely, Ehab Shahid will not get proper education and the welfare of the minor boy will not be with the respondent, if the custody is given to him.

7. Learned counsel for the appellants has also relied upon a decision, rendered by the Hon'ble Supreme Court in the case of Shyamrao Maroti Korwate v. Deepak Kisanrao Tekam, as reported in 2011 (1) JCR 264 (SC). Relying upon the aforesaid decision, it is submitted by the learned counsel for the appellants that in the aforesaid decided case of the Hon'ble Supreme Court even though father of theminor boy applied for the custody of his son, it was not given and it was retained by the in-laws of the husband. It it further submitted that the facts of the present case are similar to the aforesaid decided case and, therefore, instead of givingcustody of the minor boy, namely, Ehab Shahid, to the respondent/appellant, it may be allowed to be retained by these appellants. It is also submitted by the learned counsel for the appellants that the city of Muzaffarpur is the Head-quarterof the district within the State of Bihar and within the city of Muzaffarpur, there are good facilities of education. There is an Engineering College as well as Medical College at Muzaffarpur. It is further submitted by the learned counsel for the appellants that appellant nos. 2 to 5 are married maternal-uncles of the minorboy, but, these appellant, namely, appellant nos. 2 to 5 have no issue and, therefore, the welfare of the child is with the appellants, because appellant nos. 2to 5 along with appellant no. 1 are providing sufficient means to the minor boy for his livelihood, including luxury etc. and, therefore, custody of this minor boy may be allowed to be retained by these appellants. These aspects of the matter have not been properly appreciated by the learned trial court and, hence, the judgment and order delivered by the learned Principle Judge, Family Court, Ranchi, in Guardianship Case No. 50/2007 dated 10th September, 2012 may be quashed and set aside.

8. Learned counsel appearing for the respondent has vehemently submitted that no error has been committed by the learned Trial Court in allowing the application, preferred by the respondent for getting custody of his minor son, under Section 25 and 10 of the Guardians and Wards Act, 1890.

9. It is further submitted by the learned counsel for the respondent (original applicant) that the respondent is a government employee and is working as Jan Sewak (Village Level Worker). He is staying with his mother and unmarried sister.After the death of his wife, this respondent has not married at all. One son is already with this respondent, who is now aged about 13 years and is studying in oneof the finest schools of the city of Ranchi (capital of Jharkhand), namely, St. Thomas School, whereas illegally the custody of another son, namely, Ehab Shahid, has been retained by these appellants (original opposite parties), since long. It is further submitted by the leaned counsel for the respondent (original applicant) that looking to the evidences, given by PW 1 and PW 2, who are original applicant and his mother respectively, they have stated that after the death of the wife of the respondent, when the respondent had gone at the house of these appellants for getting custody of his minor son, namely, Ehab Shahid, these appellants had never given the custody of the said minor boy. This is a consistent evidence ofthe witnesses from the side of the original applicant and, therefore, an application was preferred by the respondent which was numbered as Guardianship Case No. 50/2007 under the Guardians and Wards Act, 1890. The welfare of the minor son has been properly appreciated by the learned Trial Court by giving custody of thisminor boy to the respondent, whereas the appellants are residing at Muzaffarpur, where there is no proper and adequate educational facilities. Moreover, comparatively the respondents has better environment at his house. The respondent is already having custody of one of his sons and, therefore, this minor boy, namely, Ehab Shahid, will also have the company of his elder brother. Thus, lookingto the totality of the evidences before the learned Trial Court, the welfare of theminor son of the respondent is always with the respondent, if the custody is givento the respondent whereas these appellants have no love, labour and lust for theminor boy, namely, Ehab Shahid. The respondent is a natural guardian-father ofthe minor son. These aspects of the matter have been properly appreciated by the learned Trial Court and hence, this First Appeal may not be entertained by this Court.

10. Having heard learned counsels for both the sides and looking to the facts and circumstances of the case and the evidences on record, we see no reason toentertain the First Appeal for the following facts and reasons:

(i) The respondent is the original applicant, who preferred application for getting ofcustody of his minor son, namely, Ehab Shahid (approximately 11 years of age). His application has been numbered as Guardianship Case No. 50/2007 before the Principal Judge, Family Court, Ranchi.

(ii) The appellants are relatives of the deceased wife of respondent. Wife of the respondent has expired and out of two children, these appellants have retained thecustody of one of the sons, who is Ehab Shahid.

(iii) Looking to the deposition given by the PW 1 and PW 2, who are original applicant and mother of the original applicant respectively, they have stated before the learned Trial Court, in no uncertain terms, that after the death of the wife ofrespondent (original applicant) when PW 1 and PW 2 had gone at the residence ofthese appellants for getting custody of the minor boy Ehab Shahid, these appellants have refused to give custody of the said minor boy. On the basis ofthis evidences, it appears that the appellants have retained forcefully the custodyof minor boy, Ehab Shahid.

(iv) It further appears from the evidences before the learned Trial Court that the respondent (original applicant) is a Government employee, who is working on the post of Jan Sewak (Village Level Worker). The respondent is staying with his mother and unmarried sister. The respondents is already having custody of his elder son, aged about 13 years. It further appears from the facts of the case that the elder sonof the respondent is studying in a school, namely, St. Thomas School at the city ofRanchi-capital of Jharkhand. Thus, looking to the family environment at the houseof

this respondent and also looking to the fact that the respondent is a Government employee, the welfare of his minor second son, Ehab Shahid, will always be with the respondent, if the custody is given to him. This aspect of the matter has been properly appreciated by the learned Trial Court. We, therefore, see no reason take any other view than what is taken by the learned Principal Judge, Family Court, Ranchi.

(v) It further appears from the evidences, given by PW 1 and PW 2 that the second son of the respondent who is minor, namely, Ehab Shahid, will stay at Ranchi - capital of Jharkhand, where there are very good facilities of education and medical. At house also, this minor boy will have the company of his father and his elder brother and also the mother of the sister of the respondent.

(vi) Learned counsel for the appellants has relied upon the decision, rendered by the Hon'ble Supreme Court in the case of Shyamrao Maroti Korwate v. Deepak Kisanrao Tekam (supra).

(vii) The facts of the present case are entirely different from the facts of the case, cited by the counsel for the appellants. Here the respondent-father has not married again. He has no son or daughter arising out of the second marriage. Here the maternal - grandfather of the minor boy was never appointed as a guardian. Unlike the reported case, cited by the learned counsel for the appellants, here the respondent and his mother both tried to get the custody of minor boy, namely, Ehab Shahid, after the death of the wife of respondent, but, these appellants had refused to give his custody, whereas in paragraph no. 15 of the aforesaid reported, it has been stated by the Hon'ble Supreme Court that the father had never visited the minor child. These are the glaring different facts of the present case and hence, the said decision is not useful to these appellants.

11. As a cumulative effect of the aforesaid facts, reasons and evidences on record, no error has been committed by the learned Trial Court in appreciating the fact that the welfare of the minor boy-Ehab Shahid is with the respondent and, therefore, rightly the custody of the minor boy has given to the respondent from these appellants. We, therefore, uphold the decision rendered by the learned Principle Judge, Family Court, Ranchi in Guardianship Case No. 50/2007 dated 10thSeptember, 2012. Thus, there being no substance, this First Appeal is hereby dismissed.

12. Interim stay granted by this Court vide order dated 24th March, 2014 hereby stands vacated.

13. Consequent to dismissal of this appeal, I.A Nos. 1578 of 2014 and 6102 of2014 also stand disposed of.

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AMIT SANDEEP KHANNA VERSUS UNION OF INDIA AND OTHERS

2011 SCC OnLine Jhar 415 : (2011) 3 AIR Jhar R 172 : AIR 2011 Jhar 109 : (2011) 103 AIC (Sum 16) 9 : (2011) 106 AIC 317 : 2011 AIR CC 2347

Jharkhand High Court

(Before Hon'ble Mr. Justice R.K. Merathia & Hon'ble Mr. Justice D.N Upadhyay, JJ.)

Amit Sandeep Khanna

v.

Union of India and others

W.P(HB) No. 388 of 2010

Decided on May 3, 2011

Hindu Minority and Guardianship Act, 1956- custody of minor- effect of foreign judgment---- must depend on the circumstances of each case--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."

ORDER

1. Heard the parties finally.

2. This writ petition has been filed for issuance of a writ in the nature of Habeas Corpus for protection of minor female child-Mitali born out of wedlock ofpetitioner-Amit and Sheena-respondent No. 3, and for directing Sheena to produce Mitali before the High Court of New Zealand at Auckland in view of order dated 17-6-2010 passed by that Court under the Care of Children Act, 2004. Mr. H.K Mehta, learned counsel, appearing for Amit submitted as follows.

   In view of the said order of New Zealand High Court, Sheena be directed to produce Mitali before that Court Mitali is a New Zealand citizen by birth who has been illegally detained by Sheena at Ranchi. Mitali being a citizen of New Zealand will have several privileges and benefits of education/medical facility, etc. in that country. Amit is financially superior than Sheena and Mitali is the nominee of Amit, in several monetary benefits. For the welfare of Mitali, hercustody should be handed over to Amit. Sheena has filed a case for maintenance which shows that she is not in a position to maintain the childproperly. All these matters are to be examined by the High Court of New Zealand and therefore in terms of the judgment of Shilpa Aggarwal (Ms) v.Aviral Mittal (2010) 1 SCC 591 : (2009 AIR SCW 7694) orders may be passed in this case. Amit is also ready to bear all the expenses such as air fare of Sheena with Mitali, their lodging, boarding, fooding, litigation expenses, local travelling, etc. at New Zealand. Sheena has also filed case under Section 498A/34 I.P.C only with a view to harass, humiliate and blackmail Amit. She has been

trying to remarry even without a decree of divorce and if she remarries, it is not known how Mitali will be brought up by her step father.

3. On the other hand, Mr. R K. Prasad, learned senior counsel, appearing for Sheena, submitted as follows.

The paramount consideration for this Court should be welfare and happinessof Mitali. Amit filed an application for parenting order under Sections 47 and48 of Care of Children Act, 2004, before the Family Court at Manukau, New Zealand. Sheena sent her written statement, by courier on 19-9-2009. Then Amit moved the Supreme Court of India, in March 2009, for similar reliefs. The said Writ Petition (Crl.) No. 35 of 2010, was dismissed as withdrawn on 24-3-2010 with liberty to move the High Court. On 29-4-2010, an ex parte order of judicial separation was passed. Amit filed an interlocutory application, before New Zealand High Court on 25-5-2010, on which an interim order was passed on 17-6-2010 mainly on the ground that the Court had juris-dictipn to pass such order. Then Amit filed this writ petition of Habeas Corpus. He suppressed before the Family Court and the New Zealand High Court about the pendency of the Matrimonial Suit, in India filed by Sheena for judicial separation. Mitali was taken by Sheena to India with the consent of Amit when she was about 2 years old. Thereafter she remained in India for about 3 years and is doing well in her school. Before the extended/converted VISA lapsed on 24-10-2010, Mitali got Person of India Origin-P.I.O Certificate, according to which she can live in India till 2025. If Mitali is detached from her mother at this tender age, she will suffer psychological trauma, and personality disorders. After Sheena and Mitali came to India, Amit has not visited India for 3 years, which shows that he is not serious in either resolving the disputes or in welfare of the Mitali. The apprehension ofremarrying Sheena, and Mitali getting step-father, applies to Amit also. Regarding the cases filed by Sheena, he submitted that Sheena is present in Court, and she undertakes to withdraw the Maintenance Case No. 157 of 2009 pending in the Court of Principal Judge, Family Court, Ranchi and the other case filed against Amit and his family members on 12-2-2010 being G.R Case No. 660 of 2010 arising out of Manila Sadar P.S Case No. 3 of2010 pending before the Chief Judicial Magistrate, Ranchi under Sections 498Aand 34 I.P.C Mr. Prasad relied on the judgments of Dhanwanti Joshi v. Madhav Unde (1998) 1 SCC 112 and Sarita Sharma v. Sushil Sharma (2000) 3 SCC 14 : (AIR 2000 SC 1019). Relying on the judgment of Amar Singh Yadav v. Shanti Devi, reported in 1987 PLJR 184 : (AIR 1987 Patna 191) he submitted that the judgmentof Dhanwanti Joshi (supra) should be preferred and relied over the judgmentsof Shilpa Aggarwal (supra) and V. Ravi Chandran (Dr.) v. Union of India (2010) 1 SCC 174 : (2010 AIR SCW 192). He also questioned the competency of the deponent in this writ petition.

4. Before coming to the facts of the present case, it will be useful to examine the judgments relied by the parties.

5. In the case of Dhanwanti Joshi (supra), the child was taken to India against the orders of American Court in which Dhanwanti was given only visiting right. In paragraph-18(2), the following question was posed:—

"18(2) Do the facts relating to the appellant bringing away the child to India in 1984 contrary to an order of the US Court or not producing the child in the Bombay High Court have any bearing on the decision of the Courts in India while deciding about the paramount welfare of the child in 1993 or 1997?"

6. It was inter alia observed in Paragraph-21 that—

"21……. orders relating to custody of children are by their very nature not final, but are interlocutory in nature and subject to modification at any future time upon proof of change of circumstances requiring change of custody but such change in custody must be proved to be in the paramount interests of thechild ……"

7. It was also, inter alia, observed that the superior financial capacity of the husband cannot be sole ground for disturbing the children from his mother'scustody.

8. The said question posed in Paragraph 18(2) was discussed from Paragraph-26 onwards. In Paragraph-28 it was observed as follows:—

"28…….. On appeal to the Privy Council, Lord Simonds held that in proceedings relating to custody before the Canadian Court, the welfare andhappiness 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 oneof 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 consistently followed in latter cases. This view was reiterated by the House of Lords in J. v. C. This is the law also in USA (See 24 American Jurisprudence, para 1001) andAustralia. (See Khamis v. Khamis.)"

9. It was further observed in Paragraph-29 as follows:—

"29 …….In the case of (a) a summary inquiry, the Court would returncustody to the country from which the child was re moved 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 layand ignore the order of the foreign Court or treat the fact of removal of thechild from an other 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…….. It has been firmly held that the concept offorum conveniens has no place in wardship jurisdiction".

10. In Paragraph-33 it was observed as follows:—

"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 ofthe 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. Mckeeunless the Court thinks it fit to exercise summary jurisdiction in the interests ofthe child and its prompt return is for its welfare, as explained in L., Re. As recently as 1996–1997, it has been held in P (A minor) (Child Abduction : Non-Convention Country), Re: 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 provisionsof Article 13 of the Convention by ordering the child's return unless a grave riskof harm was established. See also A (A minor) (Abduction : Non-Convention Country) [Re, The Times 3-7-97 by Ward, L.J (CA) (quoted in Current Law, August 1997, p. 13]. This answers the contention relating to removal of the child from USA."

11. In the case of Sarita Sharma (supra), Sarita had picked up the children from husband's residence in exercise of her visitation rights and then she came with them to India against the orders of the U.S.A Court. It was inter alia observed as follows:—

"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 ……..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 ……."

12. In the case of Shilpa Aggarwal (supra), heavily relied by Mr. Mehta, order was passed directing Shilpa Aggarwal to take her 3 & ½ years old girl child to England in terms of orders passed by U.K Court. The judgment of Dhanwanti Joshi and Sarita Sharma were simply referred in the judgment of Shilpa Aggarwal (supra). It was inter alia observed that except for insisting that the minor be returned to its jurisdiction, the English Court did not intend to separate the child from the mother until a final decision was taken with regard to her custody; and that the ultimate decision in that regard has to be left to the English Courts, having regard to the nationality of the child; and that the fact that both the parents had worked for gain in U.K and they also acquired permanent status of citizen in U.K

13. Even in the subsequent case of V. Ravi Chandran (supra) in Paragraph-29 it was observed as follows:—

"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 childincluding stability and security, loving and understanding care and guidanceand 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."

14. However, keeping in view the facts and circumstances of that case, the wife was directed to take the child to America. It was noticed that keeping in view the welfare andhappiness of the child-Adithya and in his best interests, the parties had obtained a series of consent orders concerning his custody/parenting rights, maintenance etc. from the competent Courts in America; and against such orders the wife had taken Adithya to India and they could be traced only with the help of CBI. It was also noticed that Adithya was citizen of U.S.A and having bora and brought upand having spent his initial years there, his natural habitat was U.S.A

15. Now the facts of the present case. Amit was working at New Zealand. He got married with Sheena on 20-1-2005 at Ranchi. They went to New Zealand. On 12-12-2006, Mitali born there. On 14-12-2006, Amit got citizenship of New Zealand. On 19-11-2008, Sheena came with Mitali to India with return tickets with consent of Amit. In February, 2009 Sheena filed the said Matrimonial Suit for judicial separation before the Principal Judge, Family Court, Ranchi. Notice of the said suit was served on Amit at New Zealand. Thereafter he filed a petition for parenting order under Sections 47 and 48 before the Family Court at Manukau on 19-9-2009. Sheena sent her written statement by courier. Amit filed a writ petition before the Supreme Courtof India being Writ Petition (Crl.) No. 35 of 2010 in March, 2010, for similar reliefs. The writ petition was dismissed as withdrawn on 29-3-2010 with liberty to move the High Court for appropriate relief. An ex parte order of judicial separation was passed in the said Matrimonial Suit on 29-4-2010. On 25-5-2010, Amit filed an interlocutory application before the High Court of New Zealand (i) for placing Mitali under the guardianship of High Court; (ii) directing Sheena to return Mitali to New Zealand within 14 days of service on her of Court order; (iii) on return Mitali's Passport to be lodged with the Registry of the High Court at Aukland and (iv) she may be directed to reside at Auckland area until further orders. The High Court ofNew Zealand allowed the said prayers till further orders.

16. Amit suppressed before the Family Court and in his interlocutory application filed on 19-8-2009 before the New Zealand High Court that a Matrimonial Suit filed by Sheena for judicial separation was pending

in India. Even after filing the said interlocutory application, he moved the Supreme Court of India for similar reliefs. The writ petition was withdrawn with liberty to move the High Court for appropriate reliefs, but he chose to move before the High Court of New Zealand, on which the said order was passed on 17-6-2010, on the basis of which it is contended by Amit that Sheena be directed to produce Mitali before that Court for deciding her parenting/guardianship. It is true that Mitali being a citizen of New Zealand, will have several privileges there. It also appears that the financial capacity of Amit is superior than that of Sheena, but Sheena has claimed that she has joined her father's confectionery shop. It also appears from the progress report of the School, that Mitali is doing well at present with Sheena. Mitali was with Amit and Sheena for less than 2 years at New Zealand then she is with Sheena at India for about 3 years. Naturally, she must have developed more attachment with Sheena by now. In our opinion and with great respect, only on the basis of the order dated 17-6-2010 passed by the High Court of New Zealand, it will not be proper to direct Sheena to take Mitali to New Zealand. At this tender age, she is likely to suffer psychological trauma of litigation, detachment, etc. which may cause personality disorders in Mitali.

17. In the facts and circumstances of the present case, as noticed above andkeeping in view the judgments relied by parties, we are not inclined to grant the reliefs, as prayed in this writ petition.

18. Before parting with this case, we may notice the order dated 28-3-2011 in which this Court expressed surprise on the filing of the maintenance case by Sheena on the one hand and claiming that she is capable of maintaining Mitali nicely, on the other hand. However, as already noticed, Sheena has given under taking to withdraw the Maintenance Case No. 157 of 2009 as well as the G.R Case No. 660 of 2010 arising out of Mahila Sadar P.S Case No. 3 of 2010 pending before the Chief Judicial Magistrate, Ranchi under Sections 498A and 34 I.P.C

19. She is directed to do so within two weeks from today failing which the matter will be viewed seriously. The concerned Courts will allow her to withdraw the said cases.

20. In the result, this writ petition is dismissed. However, no costs.

21. Petition dismissed.

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ANJANI KUMAR VERSUS SRI SHAMBHU PRASAD & ORS.

2014 SCC OnLine Pat 487 : (2014) 140 AIC 844 : AIR 2014 Pat 218

(Before Hon'ble Mr. Justice Navin Sinha & Hon'ble Mr. Justice Jitendra Mohan Sharma, JJ.)

Anjani Kumar, son of Nand Kumar Gupta, resident of Mohalla-Uttari Hazipur, Ward No. 13, P.O, P.S & Dist-Khagaria ..... Appellant/s

v.

1. Sri Shambhu Prasad, son of Late Rajniti Prasad Sah, 2. Smt. Sadhana Devi, wife of Sri Shambhu Prasad Sah, Both resident of Gogari Jamalpur, P.O & P.S Gogari, District-Khagaria ..... Respondent/s

For the Appellant/s: Mr. Dronacharya, Adv.

For the Respondent/s: Mr. Rakesh Chandra, Adv.

Miscellaneous Appeal No. 947 of 2010

Decided on June 19, 2014

Hindu Minority and Guardianship Act, 1956- custody of minor-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------pendency of proceedings under Section 304B of the Indian Penal Code for the death of the mother of the minor agaist the Appellant father ---- minor child since his birth, six months before the death of his mother was continuously residing with ,his maternal-grandparents.--- the maternal-grand-parents were better suited to look after the minor child and the Appellant was not in a position to provide the same level of care and upbringing for financial andother reasons. --Appeal dismissed.--with visitation rights to the Appellant father.

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE NAVIN SINHA)

We have heard counsel for the parties.

The present Appeal arises from order dated 26.10.2010 passed by the Principal Judge, Family Court at Khagaria dismissing Guardian & Ward Case No. 04 of 2008 filed by the appellant declining his prayer for custody of the minor child. It was opined, that considering the pendency of proceedings under Section 304B of the Indian Penal Code for the death of the mother of the minor child it would not be in the paramount interest of the minor child to handover custody to the Appellant, especially when since his birth, six months before the death of his mother, he was continuously residing with his maternal-grandparents. It was further opined that the maternal-grand-parents were Patna High Court MA No. 947 of 2010 dt.19-06-2014 better suited to look after the minor child and the Appellant was not in a position to provide the same level of care and upbringing for financial andother reasons.

Learned counsel for the Appellant submitted that his wife died of an accident while boiling milk for the minor child. Institution of prosecution under Section 304B was an afterthought to falsely implicate him. Final form had been submitted by the police differing with which cognizance has been taken. The Appellant in good faith, after the demise of his wife, had left the minor child in the custody of the maternal-grand-parents. He never intended to part with and handover custody of the minor child permanently to the maternal-grand-parents devoid of his responsibility as the father, but did so only temporarily for the purpose ofconvenience of

the minor child as circumstances existed at that time. Reliance was placed on (2001) 4 SCC 71 (R.V Srinath Prasad v. Nandamuri Jayakrishna) in supportof the submission that the custody of the minor child must be given to the Appellant.

Counsel for the respondent supported the order under Appeal. It was submitted that in view of the pendency of prosecution under Section 304B I.P.C it was not conducive to the interest of the minor, in the prevalent environment, to handovercustody to the Appellant. He also invited our attention to the Patna High Court MA No. 947 of 2010 dt.19-06-2014 discussion how the maternal-grand-parents were better suited to take care of the minor child including financial capacity andincapacity of the parties respectively. It was also emphasized that it was the Appellant himself on the death of his wife himself handed over the minor child to the maternal-grand-parents not wishing to take any responsibility.

We have applied our mind to the submissions. Section 13 of the Hindu Minorityand Guardianship Act, 1956 (hereinafter called the Act) provides 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. R.V Srinath(supra) relied upon by the Appellant reiterates that principles opining that thecustody of a minor child was an extremely sensitive issue where question ofsentimental attachment was also involved. These matters were required to be approached with great caution and tact striking a balance where the considerationof the minor child and his welfare was to be of paramount importance. Thechild is not to be treated as a chattel to be tethered at will.

The Appellant was married to the deceased on 10.07.2005 The child was born on 31.07.2006 The deceased passed away soon on 29.01.2007 because of the burn injury. We purposefully refrain from any discussion of the issues in the Patna High Court MA No. 947 of 2010 dt.19-06-2014 prosecution under Section 304B I.P.C except to notice it as a fact lest it prejudice either the prosecution or the defence.

At the time of death, the minor child was handed over to the maternal-grand-parents at the Appolo Burn Hospital by the Appellant. It is significant to notice that the child who is approximately 8 years of age was left with his maternal-grandparents when he was hardly six months old. Having grown up with his maternal-grand-parents, quite obviously he identifies them as his relatives and will have a sense of attachment towards them. At the age of 8 years, he undoubtedly would have the capacity to understand the absence of parents though he may not be able to appreciate or know reasons for the same. From the physical appearanceof his maternal-grand-parents whom he has been seeing since he assumed senses, coupled with the behavioural aspects of a grand parent, the nature of bonding between a grand parent and grand child, undoubtedly the appellant would be a stranger for him. The psychology of an 8 year child has also to be kept in mind. We do not find any infirmity in the reasoning of the Principal Judge that in the background of the pendency of the Section 304 B prosecution, the environmental difference that it makes, it was not in the interest of the minor child to be handed over to the Appellant. We are also of the opinion that if the minor child is suddenly handed over to the Patna High Court MA No. 947 of 2010 dt.19-06-2014 appellant whom he has never seen since birth or is put in the company of the paternal grand parents whom he has also never seen, the child may suffer from trauma which may make things more difficult for him having lost his mother soon after birth. The security and togetherness which he shall experience with his maternal-grand-parents having lived with them from the time of his birth shall be replaced by an entirely strange environment suddenly. This shall certainly not be in the interest ofthe minor child. Any sentiments of the appellant or the paternal grand parents cannot be the lone guiding factor.

The Principal Judge has adequately discussed the financial capacity of the maternal-grand-parents and the Appellant/paternal grand parents to hold that the former were better suited to look after the minor child. True it is that financial capacity or incapacity cannot be a conclusive factor, yet in an indifferent competitive world, good and quality education also has a price, and without education no human being is complete, especially in the formative years of life, we cannot ignore the aspect.

The Appellant filed his application under Section 25 of the Guardian & Ward Act, 1890, the Section provides that if a ward leaves or is removed from the custody ofa guardian of his person, the Court, may direct for the welfare of the ward for Patna High Court MA No. 947 of 2010 dt.19-06-2014 custody to be returned. In

our opinion, the application itself was misconceived as the ward never left or was removed from the custody of the Appellant. It was the Appellant himself who voluntarily parted with custody of the child.

In (1992) 3 SCC 573 (Kirtikumar Maheshankar Joshi v. Pradipkumar Karunashanker Joshi) the husband was facing criminal charges under 498A when death took place. The question related to custody of the minor child whether it should be with the father or with the maternal uncle. It was observed at paragraph-7 as follows:

'7. ……. We are conscious that the father, being a natural guardian, has a preferential right to the custody of his minor children but keeping in view the factsand circumstances of this case ……., we are not inclined to hand over thecustody of Vishal and Rikta to their father at this stage……

In (2009) 7 SCC 322 [Anjali Kapoor (Smt) v. Rajiv Baijal] the question related to thecustody of the minor child when the mother died at the time of his birth. The father claimed custody as a natural guardian while the maternal-grand-parents claimed that it was in the interest of the minor that custody be allowed to continue with them. It was observed at paragraph-26 as follows:

"26. Ordinarily, under the Guardian and Patna High Court MA No. 947 of 2010 dt.19-06-2014 Wards Act, the natural guardians of the child have the right to thecustody of the child, but that right is not absolute and the courts are expected to give paramount consideration to the welfare of the minor child. The child has remained with the appellant grandmother for a long time and is growing up well in an atmosphere which is conducive to its growth. It may not be proper at this stage for diverting the environment to which the child is used to. Therefore, it is desirable to allow the appellant to retain the custody of the child".

Likewise in (2010) 10 SCC 314 (Shyamrao Maroti Korwate v. Deepak Kisanrao Tekam) the question related to the custody of the minor children after death of the mother, between the father and the maternal-grand-parents. Declining to interfere with the order of custody in favour of the maternal-grand-parents it was observed at paragraph-23 as follows:

"23. Though the father is the natural guardian in respect of a minor child, taking note of the fact that welfare of the minor to be of paramount consideration inasmuch as the respondent father got married within a year after the death of his first wife Kaveri and also having a son through the second marriage, residing in a rural village, working at a distance of 90 km and of the fact that the child was all along with the maternal grandfather and his family since birth, residing in a taluka centre where the child is getting good education, we feel that the District Judge was justified in appointing the appellant maternal grandfather as Patna High Court MA No. 947 of 2010 dt.19-06-2014 guardian of the minor child till the age of 12 years. The High Court reversed the said conclusion and appointed the father of thechild as his guardian".

Learned counsel for the respondent fairly submits that he does not opposevisitation rights after circumstances show perceptible change.

We find no merit in the Appeal. The Appeal is dismissed.

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BIMLA DEVI VERSUS SUBHAS CHANDRA YADAV 'NIRALA'

1990 SCC OnLine Pat 253 : AIR 1992 Pat 76 : (1991) 39 (2) BLJR 829 : (1991) 1 PLJR 187

Patna High Court

(Before Hon'ble Mr. Justice Bhuvaneshwar Prasad, J.)

Bimla Devi … Appellant;

v.

Subhas Chandra Yadav 'Nirala' … Respondent.

A.F.O.O No. 307 of 1986

Decided on October 16, 1990

Hindu Minority and Guardianship Act, 1956- custody of minor-Case filed by Maternal grandfather of the three minor girls contested by his widow under S. 7 of the 1890 Act for being appointed as their guardian was dismissed-custody given to respondent father --allegation against the respondent is that he had killed his wife----the paramount consideration before the Court at the time of appointing a guardian for a minor is the welfare of the minor childitself,- Court below has come to the wrong conclusion by handing over the person and property of the minor girls to the respondent by holding him to their guardian in the eyes of laws. --appeal allowed and the judgment of the learned trial Court reversed. The appellant maternal grandmother appointed as a guardian of the minor girls and the respondent directed to deliver the custody of the girls to the appellant.

JUDGMENT

1. This is an appeal filed under S. 47(a) of the Guardians and Wards Act, 1890 (hereinafter referred to as the '1890 Act'). It is directed against the judgment dated 15-7-1986 passed by Shri Bharat Prasad Sharma, IVth Additional District Judge, Gaya, in Guardian Case No. 4 of 1985/163 of 1983.

2. It appears that originally one Raj Nath Mahto, Maternal grandfather of the three minor girls, had filed this case before the learned District Judge, Gaya, under S. 7 of the 1890 Act for being appointed as their guardian. It was registered as Guardian Case No. 163 of 1983. Subsequently on his death the present appellant his widow has been substitued in his place. From the petition filed by Raj Nath Mahto before the learned District Judge it would appear that one Bharati Kumari was his daughter who was married to the present respondent in the year 1976. At that time, the respondent was working as Chargeman in the C.L.W Chittranjan, Eastern Railway and Bharati Kumari, the deceased daughter, was auxiliary Nurse Midwife in Jamtara Block, she however, resided at Chittarajan with her husband. Three daughters were born to her out of this wed-lock. However, since Bharati Kumari herself was in service, she had left the three daughters under the guardianship the present appellant who was her mother. It was further urged that the three daughters were born at Gaya and they had been looked after and brought up by the present appellant. The respondent was a man of bad temperament. Bharati had sufficient bank account with her which the respondent wanted to be transferred in his name. On her refusal, he was annoyed and he killed her by burning her with petrol on 5-5-1983 for which U.D Case No. 13 of 1983 was registered at Chittaranjan Police Station. The three daughters, namely, Radha alias Bulbul, Laxmi Kumari and Sunita Kumari are living with the present appellant. It was, accordingly, prayed that Raj Nath Mahto the petitioner be appointed as guardian of the minor girls to look after their person and property.

3. The case of the present respondent, before the learned Court below, was that he is the father and natural guardian of his minor daughters and he had happy conjugal life with Bharati who accidentally died leaving behind the three daughters. He further denied that Bharati had any separate bank account or that he ever demanded the transfer of her money to him or that he even mal-treated andthreatened her (Bharati). He had asserted before the learned Court below that he had full love and affection for her three minor daughters and he wanted to keep them under his own guardianship. He has denied that the girls were ever born at Gaya of that his wife Bharati ever entrusted the present appellant to look after them and for upbringing them. They were living with their parents till the death ofBharati Kumari and were taken away by the present appellant surreptitiously for which he had filed a case before the Sub-Divisional Judicial Magistrate, Asansole, West Bengal. The learned IVth Additional District Judge, Gaya, after hearing the parties dismissed the petition filed on behalf of Raj Nath Mahto and continued by the present appellant. He held that here was no reason to deprive the present respondent of his right for the custody and guardianship of his minor daughters. Accordingly, he directed the present appellant to deliver the custody of the girls to the respondent at the earliest. It is against this order that the present appeal has been filed.

4. In this appeal it has been contended that all the witnesses of the appellant had supported her claim as will appear from paragraph 5 of the impugned judgment. The learned Court below should have held that the minor girls were brought up andnursed by the appellant since their birth. The learned lower appellate Court has based his judgment on the 1890 Act which is not applicable since the procedure as contained in the Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as the '1956 Act') would be applicable in the present case. The learned Additional subordinate Judge should have held that the respondent had got two young from his first wife and the three minor daughters from his second wife would naturally get step motherly treatment. The learned Court below should also have held that the respondent had killed the mother of the girls for wrongful gain in order to lay his hand on her bank deposit and her life insurance policy. Even during the lifetime ofBharati there were altercation between the husband and the wife. There was atleast some prima facie evidence to show that the respondent was involved in the killingof his wife. Under these circumstances, it was prayed that the order and judgment passed by the learned Additional District Judge, IVth Court, Gaya, be set aside.

5. Before proceeding to the discuss the respective cases of parties I will firstly like to make the position of law clear. The petition before the learned Court below, was filed under S. 7, 1890 Act. Its sub-sec. (1) runs as follows:

   (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 guardian the Court may make an order accordingly.

   xxxxxx

   As stated above, the learned Court below had dismissed this petition filed under S. 7 of the Act and had directed the custody of the minor girls to be delivered to the respondent at the earliest.

6. In the present appeal it has been contended that the learned Court below had based its judgment on the 1956 Act which was not legally permissible since he should not have gone beyond the purview of 1890 Act. However, the law on this point appears to be quite clear. S. 2 of 1956 Act provides that the provisions of this Act shall be in addition to, and not, save as hereinafter expressly provided in derogation of, the Guardians and Wards Act, 1890. From this section itself it would become clear that 1956 Act should be treated to be supplement to 1890 Act and, therefore, there is no question of any exclusion of the one by the other. In this connection, a reference may also be made to sub-sec. (b) of S. 5 of the 1956 Act which runs as follows:

   "5. Overriding effect of Act.— Save as otherwise expressly provided in this Act,—

(b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act".

This will show that 1956 Act has got over riding effect but only over those provisionsof 1890 Act which are inconsistent with any of the provisions contained in 1956 Act.

7. The next question that would arise for consideration would be what should be guiding factor to be taken into consideration, according to law in the appointmentof a guardian of a minor. I have quoted above S. 7(1) of 1890 Act. It clearly shows that before any guardian is appointed for a minor the Court has to be satisfied that it is for the welfare of the minor. Further a reference may also be made to sub-sec. (1)of S. 17 of 1890 Act which runs as follows:

"17(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".

From this also it would become clear that the paramount consideration before the Court at the time of appointing a guardian for a minor is the welfare of the minor childitself and this appears to be the main consideration on which the Court is required to take a decision in the matter. Sub-sec. (2) of S. 17 of 1890 Act provides that in considering what will be for the welfare of the minor, the Court shall have regard to the character and capacity of the proposed guardian and his nearness of kin to the minor, and any existing or previous relations of the proposed guardian with the minor or his property.

8. Coming to the 1956 Act I will firstly refer to S. 13 which runs as follows:

"13. Welfare of minor to be paramount consideration

(1) 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.

(2) No person shall be entitled to the guardianship by virtue of the provisionsof this Act or of any law relating to guardianship in marriage among Hindus, if the Court is of opinion that his or her guardianship will not be for the welfare of the minor".

It is well settled that the word "welfare" used in this section 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.

9. On behalf of the respondent it has been submitted that under 1956 Act the father is a natural guardian of a Hindu minor. In this connection my attention has been drawn to S. 6 of 1956 Act which provides that the natural guardianship of a Hindu minor, in respect of the minor's person as well as the minor's property, in the case of an unmarried girl is the father and after him, the mother, provided that thecustody of a minor who has not completed the age of five years shall ordinarilly be with the mother. In the present case admittedly the mother is dead and the contest is between the father and the maternal grand father of the minor daughters. However, on the basis of S. 6 of the 1956 Act the learned counsel for the respondent has submitted that the father should be treated to be the natural guardian and, therefore, the order to this effect passed by the learned Court below cannot be challenged. In this context, it is important to mention that in both the Acts, as noticed above, the minors interest has to be paramount interests to be kept in mind at the time of the making the appointment. This is quite clear from what has been noticed above in the earlier part of the judgment.

10. The learned counsel for the respondent has also placed reliance on the caseof Mrs. G.A Ayyadorai Pillai v. E.H.B David, AIR 1960 Mad 519. This is a single Bench decision of Madras High Court in which it was held that the father ought to be the guardian of the person and property of the minor under ordinary circumstances. It was further held that the fact that he had married a second wife after the deathof his first wife would be no ground for depriving him of his parental right ofcustody of his child from the first wife. It was observed in this decision that if the Court forms the impression that the father is a normal and intelligent young manand shows no indication of imbalance of mind in him, then it should not refuse to him the custody of his minor child from his first wife.

11. The learned counsel for the respondent placed reliance on the case of D. Rajaiah v. Dhanapal, AIR 1986 Mad 99. No doubt, in this case it was held by the learned single Judge of Madras High Court that the rule of Hindu Law is that no one other than the further and failing him the mother has an absolute right to have the guardianship over and custody of an unmarried Hindu minor girl. It was further held that the Hindu Law recognises primarily the father as the legal guardianand the custodian of his unmarried minor daughter when he is alive. Failing the father only the mother comes into the picture and she could assume such guardianship and custody only in such a contigency. However, in paragraph 3 ofthe judgment it has been mentioned that the dominant factor for consideration ofthe Court is the welfare of the child. This has found statutory recognition both in Sec. 17(1) of 1890 Act and Section 13 of 1956 Act. Both the provisins that the powers of the Court are to be exercised for the welfare of the minor, which should be the paramount consideration. It was held that since the Hindu Law recognised the father to be the natural guardian and custodian of his unmarried minor daughters, the maternal grandfather cannot straightway insist that he should be declared or appointed as the guardian and custodian of such minors more so when the mother is no more, under this circumstance it was held that the maternal grand father has to demonstrate that there are peculiar and strong circumstances which warrant deprivation of such a parental right of the father.

12. However, in this very judgment in paragraph 7 at page 105 it has been observed as follows:

"The welfare of the minor children is not to be measured only in terms ofmoney and physical comforts. The word "Welfare" 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".

13. In this connection a reference may be made to the case of Bhola Nath v.Sharda Devi, AIR 1954 Patna 489, which is a Division Bench decision of this Court. In this judgment it has been held that under the Hindu Law, the father is the legal guareian of the minor child and under the Guardians and Wards Act, 1890 also he is so. But the most important consideration which must always weigh with the Court in making orders for the appointment of guardians of minors is the welfareof the minor, and in that view of the matter, the legal rights of the father must be understood subject to provisions of S. 17. Under S. 17, the Court should be guided by the sole consideration of the welfare of the minor, and what would be for the welfare of the minor must necessarily depend upon the facts andcircumstances of each particular case. From this Division Bench decision of this Court it becomes clear that the paramount consideration in the appointment ofguardian is the welfare of the minor and what would be for the welfare of the minor will depend upon the facts and circumstances of each particular case.

14. The matter appears to have been settled in a recent decision of the Hon'ble Supreme Court in the case of Elizabeth Dinshaw v. Arvand M. Dinshaw (1987) 1 SC 42 : (AIR 1987 SC 3). In this decision Ss. 7 and 17 of 1890 Act were under consideration. There was a divorce between the father and the mother of thechild. The mother used to live with the child in U.S.A The American Court granted decree for child's custody to the mother and visitation right to father of thechild. The father; however, secretly brought the child to India against express orders of the American Court. Habeas corpus petition was filed by the mother before the Supreme Court of India for restoration of child's custody. It was held that the mother was entitled to the child's custody with liberty to take the child to the U.S.A In this decision 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 only on considerations of legal rights of parties but on the sole and predominant criterion of what would best serve the interest and welfare of the minor. Under the circumstances of the above mentioned case it was held that in view of the facts the petitioner mother had genuine love and affection for the child and she could be safely trusted to look after mim, educate him and attend in every possible way to his proper upbringing, that the child had not taken root in India and he was still accustomed to the conditions obtaining in the place of his origin in the U.S.A that the child's presence in India was the result of an illegal act of abduction and the father who was guilty of the said act could not claim any advantage out of it stating that he had already put the child in some school in India, it would be in the best interests of the minor child that he should go back with his mother to the United States and continue there as a ward of the concerned court having jurisdiction. From this decision also it would

become clear that the paramount consideration with the court in appointing a guardian of a minor child is the interest and the welfareof the minor and this fact appears to be concluded by the decision of various Courts as noticed above.

15. In the present case the allegation against the respondent is that he had killed his wife, Bharti Kumari the mother of three minor girls by burning her with petrol on 5-5-1983 for which U.D Case No. 13 of 1983 was registered in Chittranjan Police Station. The learned counsel for the respondent has submitted that this was a false implication against him and that Chitranjan police after investigation did not find the allegation to be true. The plain true copy of the diary of Chittranjan P.S Case No. 12 of 1983 dated 5-5-1983 has been filed on behalf of the respondent. From this also it would appear that there was no denying the fact that Srimati Bharati Kumari had died after having received burn injuries. The question whether it was suicidal, accidential or an illegal act of murder on the part of the respondent is not the subject matter of the present case. It is enough that there is such an allegation against the respondent that he had murdered his wife setting fire to her person. Even if for a moment it be presumed that this allegation is false, it cannot be denied that, this incident will create an impact on the immature minds of the three minor girls of tender age. Obviously, the girls would be scared to be left in the custodyof their father against whom there were allegations of murder of his wife. Furthermore, it has come in evidence that the girls were born in Gaya and that they were brought up by the present appellant and her husband where they were properly looked after. It is the admitted position that both the father and the mother of the girls were in service. Under these circumstances, it would be only natural to think that girls were under the guardianship of their maternal grand father who happened to be the husband of the present appellant. This is also a circumstance in favour of the appellant.

16. I have gone through the impugned judgment and order. No doubt the learned Court below has taken into consideration a number of decisions on this point. However, it appears to have been mislead by the fact that under law it is the father of minor girls who would be the natural guardian. Referring to S. 6 of 1956 Act he has held that the law treats the father as the natural guardian of a minor unmarried girl and in his absence the mother can be treated as a natural guardian. Since in the present case the dispute was not between the father and the mother but between the father and the maternal grand father, it was held by the lower Court that the father would be the natural guardian of the minor girls. Normally speaking it is well recognized under law that the father is the natural guardian ofthe minor daughters. However that would always be subject to certain exceptionsand facts and circumstances of each case and cannot be said to be universally applicable as held in the case of Bhola Nath, (AIR 1954 Patna 489) (supra). The learned Court below should have also taken into consideration the facts andcircumstances of this case in which there is allegation of the murder of his wife against the present respondent.

17. So far as the oral evidence is concerned, A.W 4 is the appellant herself. She had supported her case and has stated that the three minor daughters of Bharati Kumari were living all along with her and she is looking after their upbringing andeducation. So far as A.W 1, Mahabir Prasad Yadav is concerned, he has stated that the wife of the respondent had died on account of some dispute over money matter A.W 2, Narain Rai, has also stated that the respondent had killed his wife since she was not prepared to apart with money. Since, however, he could not give any detail of this account he appears to have been disbelieved. Similarly, A.W 1 appears to have been disbelieved on the ground that he had no personal knowledgeof the affairs of the family of the respondent. However, under the facts andcircumstances of this case, it is clear that the learned Court below has come to the wrong conclusion by handing over the person and property of the minor girls to the respondent by holding him to their guardian in the eyes of laws. Under the factsand circumstances of this case, this finding of the trial Court has to be reversed.

18. In the result, this appeal is allowed and the judgment of the learned trial Court is reversed. The appellant is appointed as a guardian of the minor girls andthe respondent is directed to deliver the custody of the girls to the appellant within two weeks from the date of the passing of the Judgment, failing which the appellant shall have a right to obtain the custody of the person and property of the girls through the processes of law.

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DR. SEEMA KUMARI VERSUS STATE OF BIHAR AND OTHERS

2011 SCC OnLine Pat 579 : (2012) 111 AIC 775 : (2012) 1 PLJR 186

Patna High Court

(Before Hon'ble Mr. Justice S.K. Singh & Hon'ble Mr. Justice Shivaji Pandey, JJ.)

Between

Dr. Seema Kumari

v.

State of Bihar and others

Cr. W.J.C No. 484 of 2011

Decided on October 21, 2011

Hindu Minority and Guardianship Act, 1956 & Guardians and Wards Act, 1890---section 6(a) read with section 13-- custody of minor child--no absolute right to the custody of the minor child lies with the mother and the paramount consideration for the Court is to find out the welfare of the child.-- the matter of custody of a minor child the statutory provisions in favour of the mother is only one of the circumstances requiring consideration but the major concern of the Court has to be the welfareof the child. The welfare, as explained in various judgments include not only physical welfare but also moral and ethical welfare.---Cutody given to the grand parents-mother allowed un-hindered visitationrights.-- with liberty to apply for grant of custody of her minor son through appropriate legal proceeding before the Civil Court/Family Court when the boy grows up and developes some maturity and/or if the situation undergoes major change.

The Judgment of the Court was delivered by

SHIVA KIRTI SINGH, J.:— Petitioner has preferred this criminal writ petition seeking writ of habeas corpus for release of her minor son presently aged about one andhalf years from alleged illegal detention of respondent Nos. 3 and 4 who are her mother-in-law and father-in-law. She has also prayed for being handed over the physical custody of the minor son to her forthwith.

2. The writ petition is founded on the following facts which are not much in dispute. The petitioner was married on 20th February, 2009 with Late Dr. Shashi Shekhar son of respondent Nos. 3 and 4. A male child was born out of this marriage on 7th March, 2010 in the Nursing Home of a doctor at Patna. Her husband was admitted in post graduate course in Medical College, Dharan, Nepal. She joined post graduate course in Medicine at a Medical College at Katihar on 24th July 2010. She is continuing her studies at Katihar and the duration of the course isof three years. In the writ petition details have been given of an unfortunate incident in the night of 3/4.12.2010 when allegedly petitioner was assaulted by her husband when she declined to go with him to Dharan, Nepal for a few days. The husband had come to Katihar and stayed in the Hostel room allotted to the petitioner. The petitioner was admitted for treatment of her injuries in the night. The husband of petitioner visited her in the emergency ward of Katihar Medical College and after sometime when his request to discharge the petitioner was not accepted, he went back in the room of the petitioner in the morning of 4.12.2010 and locked the room from inside. On information by the College administration the local police came to the room. The room was allegedly locked from inside. From the window it was seen that husband of the petitioner was hanging

by a rope tied to the hook of ceiling fanand thereby he had committed suicide. According to respondents No. 3 and 4, however, the death was due to some foul play.

3. A case of un-natural death was registered by the police on 4.12.2010 The petitioner was discharged from hospital on 6.12.2010 On 8.12.2010 respondent No. 4 lodged an F.I.R leading to Katihar (Muffassil) P.S Case No. 105 of 2010 under section 306/34 of the Indian Penal Code against the petitioner and her family members with an allegation that on account of threat and torture by the accused persons the occurrence leading to death of her son had taken place.

4. In the counter-affidavit filed on behalf of respondents 3 and 4 a plea has been taken that the writ petition for habeas corpus is not maintainable because the respondents are in lawful custody of the child since his birth. For this reliance has been placed upon Fardbeyan of the petitioner recorded on 4.12.2010 in connection with the U.D case (Annexure-D) which contains a statement to the effect that petitioner and her deceased husband have a son aged about 8 months who lives with his grand-father and grand-mother at Patna. In the counter-affidavit it has been highlighted that the minor boy is being brought up and looked after by the respondents 3 and 4 since his birth. A transcript of talk allegedly dated 18th September, 2010 between petitioner and one doctor has been annexed as Annexure-A in support of an allegation that petitioner was having extra marital relation with a doctor friend. It has been alleged that the claim for custody of thechild is mala fide and the child may be killed and petitioner may enter into another marriage. It has further been submitted that petitioner is still studying in Katihar with two years still remaining to complete her course and that the busy syllabus of the course requires her engagement in hospital round the clock which will leave no time for the petitioner to look after the child. Annexure-E contains copies of the medical reports to show that the child has a heart condition known as S.V.T An Out-door ticket of Indira Gandhi Heart Diseases Institute, Patna dated 11th February, 2011 shows that the disease causes restlessness and if there is a temporary relapse then immediately the child has to be brought to emergency for D.C Cardio-version. The respondents live in their own house at Patna where they can look-after the grand-son who is the only solace in their life after the death of their son in mysterious circumstances. It has been claimed that substantial money has been deposited in favour of the child.

5. There are materials on record brought by the petitioner through reply to show that she has filed a complaint petition against respondents 3 and 4 and their family members under sections 498-A, 323, 325, 307, 379, 406, 504 and 364, 120-Bof the Indian Penal Code and section 3/4 of the Dowry Prohibition Act on 30.12.2010 leading to complaint case No. 3352(C) of 2010 pending in the Court ofSub-divisional Judicial Magistrate, Patna. The allegations, inter alia, are to the effect that after the Shradh of her husband at Patna on 9th December, 2010 the accused persons snatched petitioner's minor son from her and attempted to kill her, deprived her of jewellery and other belongings and forced her out of the house.

6. Although lengthy arguments were advanced on behalf of respondents 3 and4 alleging that their son was killed under a conspiracy hatched by the petitioner in her hostel room at Katihar Medical College andHospital, but admittedly, the investigation into U.D case No. 9 of 2010, which has now been merged with Katihar (Muffasil) P.S Case No. 105 of 2010 is still pendingand this Court has no hesitation in holding that it will not be proper for this Court at this stage to make any comments in respect of the said criminal case or in respectof the subsequent complaint case filed by the petitioner. Any observation in this judgment is only for the purpose of deciding the habeas corpus petition and shall have no effect on the on going investigation or out-come of the criminal cases.

7. The law on the issue of guardianship and custody of a minor is no longerres integra. So far as claim for guardianship over the custody or property of a minor is concerned, the same is required to be decided by a competent Civil Court or Family Court in accordance with provisions such as section 6(a) read with section 13of the Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as the Guardianship Act) as well as under the provisions of Guardians and Wards Act, 1890 which is to

supplement the Guardianship Act as provided in section 2 thereof. It is also well established that welfare of child is of paramount consideration while determining issue relating to child custody and visitation rights. In the case of Gaurav Nagpal v. Sumedha Nagpal1, the Apex Court noticed sections 13and 6 of the Guardianship Act to reiterate the aforesaid principle. It was highlighted that when conflicting demands are made by the parties for custody, a mature humane approach is required to be taken by the Court because the purpose is not merely physical custody of the minor but due protection of the rights ofhis health, morals, maintenance and education. In paragraphs 49 to 51 of the Judgment, the Apex Court has made it explicit that claim of a natural guardian by virtue of section 6 of the Guardianship Act cannot supersede the paramount consideration as to what is conducive to the welfare of the minor. The provisionsof special statutes governing the rights of the parents or guardians are to be taken into consideration but nothing can stand in the way of the Court exercising itsparens patriae jurisdiction arising in such cases. Ultimately, the Court, in the aforementioned case allowed mother to have the custody of the child in preference to claim of the father in view of peculiar facts of the case.

8. On behalf of petitioner the main and principal reliance is on section 6 of the Guardianship Act which declares mother of a minor to be a natural guardian andallows preferential treatment even against father if the child is less than five yearsof age. In view of such statutory provision, a large number of cases decided in favour of the claim of a mother for custody of minor child were cited at the Bar. Majority of those cases arose out of proceedings under the Guardianship Act or under the Hindu Marriage Act and in the peculiar facts of those cases the issue relating to guardianship and custody were decided in favour of one or the other parties. However, the principle of law noticed at the beginning that paramount consideration is the welfare of the child was never in doubt and has always remained guiding principle.

9. In Manju Tiwari v. Rajendra Tiwari2 the Court passed a very short order to hand-over custody of a child less than five years of age to the appellant-mother in view of facts and circumstances which did not require even any mention. In the case of Chandra Kant v. Superintendent of Police3, custody was given to the mother in preference to grand-father. In that case the Court found no ground for accepting the submission that it was not in the welfare of the child to be put in the custody of mother. In the case of Mohini v. Virendra Kumar1, Counsels played a major role in bringing about a solution under which custody of a 11 years old child was given to mother in preference to father although the latter had a better statutory claim to be the natural guardian. This was done with deepest consideration for the welfare of the child as mentioned in the very first paragraph of the judgment. In the case of Surinder Kaur Sandhu v. Harbax Singh Sandu2, custody of a minor boy above five years ofage was given to the mother on account, of a judgment by an English Court in favour of the mother as well as welfare of the minor. In that case the father had been convicted on a criminal charge. Considering this aspect and the fact that mother was employed and having her own income, custody was given to mother notwithstanding section 6 of the Guardianship Act. In the case of Gohar Begum v.Suggi3, custody of a illegitimate minor daughter was given to the mother on account of a conclusion in paragraph-9 that the interest of the child would be better served if she was left in the custody of the appellant-mother compared to the custody of the respondent who was appellant's mother's sister. In the case of(1987) 1 SCC 42 the mother was given custody of a 9 years old male child in viewof an order of an American Court and upon a finding that no serious harm would come to the child on account of such custody.

10. In the case of Poonam Datta v. Krishnlal Datta4, the mother of a child less than five years of age was allowed to have custody in the facts and circumstancesof that case. In the case of Sarita Sharma v. Sushil Sharma5, the father was deniedcustody in spite of an order of an American Court on account of consideration for the welfare of minor children because the Court found that the father was in the habit of consuming excessive alcohol and in his house there was only his 80 years old mother who could not be expected to take good care of the children. Similar views have been taken by the Delhi High Court in the case of Chandra Prabha v.Premnath6, and by the Punjab and Haryana High Court in the case of Sarabjit v.Piaralal7. In both the cases children below five years of age were placed in thecustody of mother on

account of statutory provisions and concern for the welfare of the child in the facts and circumstances of those cases.

11. Replying to the aforesaid legal stand on behalf of petitioner, learned Counsel for respondents 3 and 4 has placed reliance upon the judgment of the Supreme Court in the case of Sumedha Nagpal v. State of Delhi8. In that case the Supreme Court considered the plea of the father of a minor child of 2 years of age that the mother had abandoned the child and did not interfere with the custody ofthe father in spite of noticing the proviso to section 6(a) of the Guardianship Act. The Court held that the writ proceeding being of summary nature, it was not possible to reach a proper decision as there were disputed questions of facts involved. The parties were directed to settle their rights under the Guardians andWards Act 1890 or to seek matrimonial relief. The Court after noticing section 6 ofthe Guardianship Act constituting exclusive guardianship in the mother, in paragraph-5 held that there was no clinching material to show that the welfare ofthe minor child is at peril and calls for interference with the custody. The Court held that "the trauma that the child is likely to experience in the event of change of such custody, pending proceedings before a Court of competent jurisdiction, will have to be borne in mind". The law settled by the Supreme Court in the case of Gaurav Nagpal (supra) has already been discussed earlier. It was highlighted on behalf of contesting respondents that in view of law settled in that case, no absolute right to the custody of the minorchild lies with the mother and the paramount consideration for the Court is to find out the welfare of the child.

12. Similar view, as noticed above, has been taken by the Supreme Court in the case of Veena Kapoor v. Varinder Kumar Kapoor1, and in the case of Mausmi Moitra Ganguli v. Jayant Ganguli2. In the latter case, in the context of sections 7and 17 it was held that in so far as factual aspects of such cases are concerned, precedents are not binding. It was emphasized that financial condition of the parties or the statutory presumption cannot be the sole determining factor and "a heavy duty is cast on the Court to exercise its judicial discretion judiciously in the background of the relevant facts and circumstances, bearing in mind the welfareof the child as the paramount consideration."

13. A strong reliance was placed by learned Counsel for the contesting respondents upon judgment of the Apex Court in the case of Kirtikumar Maheshahkar Joshi v. Pradipkumar Karunashankar Joshi3. In this case custody was denied to the father and given to the maternal uncle because the father was facing charge under section 498-A of the Indian Penal Code and the children were not willing to live with their father. Similar view of Patna High Court in the case ofBimla Devi v. Subhash Chandra Yadav4, was also strongly relied upon. In this case while considering the appeal preferred by maternal grand-mother under the Guardians and Wards Act, this Court appointed the maternal grandmother as guardian of three minor girls while rejecting the claim of father since he was alleged to have murdered his wife. In this case reliance was placed upon section 13of the Guardians and Wards Act and several judgments including that in the caseof Elizabeth Dinshaw (supra) for the proposition that in matters of custody ofminor, welfare of minor is of paramount consideration. The Court noticed the submission on behalf of the father that after investigation the police did not find the allegation to be true, but relied upon the fact that the mother of the minor children had died after having received bum injuries and allegation of murder was levelled against the father. It was observed that the question whether the death was suicidal, accidental or an act of murder, was not the subject matter of proceeding but the allegation itself was enough to require careful consideration. The Court held that fear in the mind of the minor girls, living with the father who had allegedly killed their mother, was a relevant circumstance for not changing the custody ofthe girls who were being brought up by the maternal grand-mother.

14. There is no difficulty in accepting the legal contention advanced on behalf ofcontesting respondents that in the matter of custody of a minor child the statutory provisions in favour of the mother is only one of the circumstances requiring consideration but the major concern of the Court has to be the welfareof the child. The welfare, as explained in various judgments include not only physical welfare but also moral and ethical welfare. On facts, however, it is indeed a difficult task to find-out whether the welfare of the

child requires grant ofcustody to the petitioner who is the mother or to allow the custody to remain with the grand-mother and grand-father. In this context it would be relevant to notice two recent judgments of the Supreme Court. In the case of Anjali Kapoor v. Raju Baijal1, the contest was between father and maternal grand-mother. Like in the present case, the child was an infant. Her mother died at the time of delivering the baby. The infant was brought to the residence of the grand-father and grand-mother but unfortunately the grand-father also died within, a short period of about two months but the grand-mother continued to take care of the minor child. The High Court allowed the case of the father but the Supreme Court gave custody to the grand-mother. The Court relied upon the American Jurisprudence, 2nd Edition, Vol. 39 for the proposition that the custody of a child is addressed to the discretion of the Court, and it may be withheld from the parent by reason ofunfitness for the trust or of other sufficient causes if it appears that permanent interests of the child would be sacrificed on a change of custody. The Court also noticed judgment of the New Zealand Court in the case of Walker v. Walker & Harrison2, for the proposition that while material considerations are important, more important are the stability and security, the loving and understanding careand guidance. The Court looked into the photographs produced by the grandmother and found that she had considerable amount of care, affection andlove for the child of her only daughter who died in tragic circumstances. The Court also went into the strong emotional bonding between the maternal grand-daughterand the grand-mother who was financially sound. Oh the other hand, the father was found to have a meagre income and his lack of concern for the child was noticed alongwith the fact that the father had got married for a second time andwas having a child from that lady also. Hence, the alternative of sending the minorchild to the care of step-mother did not find favour and the Court allowedcustody of the child in favour of the grand-mother. In paragraph 21 of the judgment it has been noticed that the child had remained with the grand-mother for a long time and was growing up well in an atmosphere conducive to its growthand hence it may not be proper at this stage for changing, the environment to which the child has become used to. In the case of Athar Hussain v. Syed Siraj Ahmad3, the dispute related to interim custody of two minor children in a proceeding under the Guardians and Wards Act. The appellant-father had married second time and the children were in the custody of their maternal aunt anduncles. It was held that although the second marriage of the father was not a disentitling factor but it was an important factor. The Court pointed out that guardianship and custody are two distinct issues. Father was found fit to be guardian and was allowed to continue as such but was denied custody. In paragraphs 37 and 38 of this judgment the Court noticed two earlier judgments reported in R.V Srinath Prasad v. Nandamuri Jayakrishna4 and in the case ofMausmi Moitra Ganguli v. Jayant Ganguli (supra) for coming to the conclusion that in proceedings relating to interim custody the Court is required to determine whether there are sufficient and compelling reasons to persuade the Court to change thecustody of the minor children with immediate effect. The Court ultimately rejected the claim of the father for custody.

15. The task of judging the claim of petitioner for custody as a mother vis-a-visthat of grand-father and grand-mother of the minor child is indeed delicate as well as tough. On the one hand the petitioner as a mother is bound to have natural affection and yearning for her minor child and the law also recognizes her as a natural guardian. On the other hand, respondents 3 and 4 are unfortunate father and mother whose son, who was already a doctor has met tragic unnatural death - be it on account of suicide or on account of foul play. They were entrusted with the custody of the child soon after his birth because the petitioner had to pursue her Post Graduate course in medicine in a hospital at Katihar where she stays in a hostel room all by herself. Post-graduate course in medicine requires hard work and devotion of time as well as energy while the grand-parents are living in their own house and are in, a position to take care of the health of the child, which is shown to be of some concern on account of a heart condition which is of course, not fatal but may require emergent attention as well as other material needs. There is no dispute that the grand-father is a successful doctor and has sufficient financial source to take care of the material needs of the child. Further, the grand-mother who has been looking after the minor child since his birth is bound to have developed strong emotional bonds specially when she has lost a grown up son

and the child is his only living memory. On the other hand, the petitioner is yet to settle down in lifeand has to undergo two more years of study in post graduate course while living in a hostel room. No doubt, it was submitted on behalf of petitioner that her mother is prepared to stay with her at Katihar in the hostel room but that would be only on account of pressing compulsion at the cost of her own duty to her husband andfamily.

16. We had a meeting with the contesting parties in Chambers. The grand parentsof the child could not be persuaded to opt for giving up custody in favour of the petitioner. They believe that petitioner was the reason for the unnatural death oftheir son in her hostel room under mysterious circumstance. They believe that thecustody of the child is only a tool which may be used by the petitioner for mala fide reasons. On the other hand, the petitioner also claimed that she would not many again and hence the child would be happy with her. This was in respondense to our suggestion that she has a long future and being young and talented she should consider to marry again with a suitable person. Although the apprehensionof the respondents 3 and 4 may be mistaken but there is every possibility that in the present modem era the petitioner may find a suitable person to marry andresettle in a life in which the child may not have very welcome or healthy place. These practical aspects of life are difficult to be ignored and we have taken them into consideration, even at the risk of some conjecture, only for coming to a conclusion as to whether change of custody of the minor child would be conducive to his all round welfare or not. With great difficulty but without any doubt we come to the conclusion that change of custody of the concerned minor, a oneand half year old child, in the aforesaid facts and circumstances is unwarranted. It is most likely to be traumatic and may not be conducive to his welfare. Being a male child he is a coparcener in the Hindu Family of his grand-father and he has legitimate claims upon the family which is expected to honour such claims with utmost care and devotion.

17. In our considered view, no case of illegal custody is made out in this caseand in any event the welfare of the child does not require change of custody at the present stage. Hence, we are constrained to dismiss this writ petition.

18. However, it is made absolutely clear that we have not held the petitioner unfit for being the legal guardian of her minor son. We allow her un-hindered visitationrights so that she may meet her son whenever she gets time and opportunity after giving notice to respondents No. 3 or 4. The latter shall ensure that no hindrance is caused in the petitioner's desire to meet her child at appropriate hours. As andwhen the boy grows up and developes some maturity and/or if the situation undergoes major change, the petitioner would be at liberty to apply for grant of custody of her minor son through appropriate legal proceeding before the Civil Court/Family Court.

19. Before parting with the judgment, we want to spell out our feelings that it would be in the interest of the minor and both the contesting parties if they are able to sort out their differences amicably so that the minor may not be deprived ofmatured guidance and strong support of his grand parents as well as the love andaffection of his mother. The present bitterness should give way to better feelings, may be with passage of some time. The true well wishers of both the parties can help in bridging the differences easily, if not for other reasons, for the happy andbright future of the petitioner as well as the minor child.

20. With such thoughts as indicated above, we are constrained to dismiss the writ petition.

21. We order accordingly.

22. **SHIVAJI PANDEY, J.:—** I agree.

23. Petition Dismissed.

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LANDMARK JUDGMENTS ON

ADOPTION

SRI VIKAS PANDEY VS SMT. VANDITA GAUTAM

Allahabad High Court

(Before Hon'ble Mr. Justice Dinesh Gupta, J.)

FIRST APPEAL No. - 1006 of 2000

Sri Vikas Pandey

v.

Smt. Vandita Gautam

Decided on 8 October, 2012

Petitioner :- Sri Vikas Pandey

Respondent :- Smt. Vandita Gautam

Petitioner Counsel :- Rajesh Tandon,Komal Mehrotra,Manoj Kumar Sharma,Some Narayan Mishra

Respondent Counsel :- P.K.Jain,P.K. Jain Hon'ble Dinesh Gupta, J

Hindu Adoption and Maintenance Act-sec 18- Hindu Marriage Act-sec 25---the trial court wrongly came to the conclusion that the word 'wife' mentioned in Section 25 of the Hindu Marriage Act is similar to the word 'wife' mentioned in Section 18 of the Act- Section 18 of the Act or Section 25 of the Hindu Marriage Act deals with the situation where the wife is unable to maintain herself --the wife is highly educated particularly more than the husband and is clearly in a position to earn more-- disentitles her to get any maintenance.--plaintiff-respondent is not entitled to any maintenance .-- decree of maintenance awarded by the trial court is liable to be set aside and the appeal deserves to be allowed.

1. This appeal has been preferred by the appellant against the judgment and decree dated 30.11.2000 passed by Sri V.K.Jaiswal, III Additional District Judge, Muzaffar Nagar in Original Suit No.351 of 1997 Smt. Vandita Gautam vs. Sri Vikas Pandey.

2. The brief facts giving rise to this appeal are that the plaintiff-respondent filed Original Suit No.351 of 1997 against the defendant-appellant u/s. 18 of the Hindu Adoption and Maintenance Act (in brief Act) with the allegations that -

   The plaintiff-respondent was married on 21.6.1991 with the defendant-appellant at his residential house at Dehradun. Her family members spent an amount of Rs. 4, 50,000/- in the marriage and sufficient articles, gift and dowry was given at the time of the marriage, but the family members of the defendant-appellant were not happy with the amount spent in the marriage and further demanded a car in dowry. However, the plaintiff-respondent explained to the defendant-appellant and his family members regarding financial status of her family that they were not in a position to provide a car.

   When the demand of the defendant-appellant and his family members were not met, they threw the plaintiff-appellant out of their house and sent the plaintiff-respondent to her parental house at Meerut and at present she is living with her mother at Meerut. All the articles, clothes, ornaments etc. given by the family members of the plaintiff-appellant were kept by the defendant-appellant and his family members.

In November, 1996 the plaintiff-respondent came to know that the defendant-appellant obtained an ex-parte decree from the court of Civil Judge, Dehradun and an application to restore the proceedings has already been moved by the plaintiff-respondent which is pending.

The defendant-appellant has not taken care of the plaintiff-respondent since 27.6.1991 and has not given her any amount of maintenance and the plaintiff-respondent is living with her widowed mother. Though the plaintiff-respondent is a literate lady having no means to maintain herself, she is not doing any service and factually she is a burden on her parents.

The defendant-appellant is a senior Geologist in Oil and Natural Gas Commission and at present he is posted in District- Shiv Sagar (Assam) and is getting Rs.15000/- per month as salary and he can easily pay a sum of Rs.5000/-to his wife to maintain herself.

The plaintiff-respondent is also entitled to get the maintenance of Rs.5000/- per month which the defendant-appellant is liable to pay.

The plaintiff-appellant has also come to know that the defendant-appellant has performed second marriage with some lady named Kalpana. However, the plaintiff-respondent reserved her right to file a civil suit in this regard.

3. The defendant-appellant filed written statement and denied all the allegations made in the plaint and submitted that-

The marriage between the defendant-appellant and plaintiff-respondent was solemnized on 21.6.1991 at Meerut according to Hindu rites and rituals. It was also admitted that after the marriage the plaintiff-respondent lived with him for certain period at Dehradun. However, it was denied that Rs.4.5 lacs was spent in the marriage. It was also denied that the plaintiff-respondent was thrown out of the house by the defendant-appellant without any clothes and ornaments. In fact whatever ornaments were given in the marriage the same was taken away by the plaintiff-appellant.

It was also denied that the defendant-appellant or his family member ever demanded any dowry or ill-treated the plaintiff-respondent. The real facts are that soon after the marriage the behaviour of the plaintiff-respondent with the defendant-appellant and his family members was not proper and she left the house of her own free will and is living with her mother at Meerut.

The defendant-appellant filed a suit for divorce and the plaintiff-respondent after receipt of notice appeared before the court but later on deliberately absented herself and the court was compelled to pass a decree of divorce between the parties. The plaintiff-respondent did not file any appeal against the decree of divorce dated 26.11.1993.

The allegation in the plaint that the plaintiff is living with her mother, she is not doing any job and is not having any means is wrong. In fact, the plaintiff-respondent is a highly educated lady with M.A. in English and B.Ed.and is at present also doing Ph.D. and she is a teacher earning at least Rs.5000/- per month from tuition and the job of a teacher.

It is not denied that the defendant-appellant is a Geologist in Oil and Natural Gas Commission. However, he gets only Rs.10000/- as monthly pay and after the decree of divorce he has already married one Alpana and at present is living in Assam with his wife and one daughter. The demand of Rs.5000/- per month as maintenance is wholly excessive. In fact the behaviour of the plaintiff-respondent with the defendant-appellant soon after the marriage was very cruel and unnatural and because of this the defendant-appellant was compelled to file a suit for divorce which was decreed and the plaintiff-respondent preferred no appeal against the same and the suit is liable to be dismissed.

4. On the pleading of the parties, the trial court framed the following issues:-

Whether the plaintiff has no sufficient means to maintain herself?

Whether the defendant neglected his wife in her proper maintenance?

To what relief the plaintiff entitled? and Whether the plaintiff is entitled to any amount of maintenance?

5. In support of his allegation the plaintiff-respondent examined herself as P.W.1while the defendant-appellant examined himself as D.W.1 and also filed some documentary evidence including some letters written by the mother of the plaintiff-respondent.

6. After hearing the parties and considering the evidence on record, the trial court decreed the suit of the plaintiff and granted maintenance of Rs.3000/- per month to her.

7. Feeling aggrieved, the defendant-appellant has filed this appeal.

8. At the time of hearing, learned counsel for the parties were present. However, Sri P.K.Jain, learned counsel for the plaintiff-respondent submitted that he tried his level best to contact the plaintiff-respondent but he did not receive any response from her. In this view of the matter, the court has been left with no option but to decide the appeal ex-parte.

9. Learned counsel for the defendant-appellant submitted that -

The trial court has decreed the suit without taking into consideration the provisions mentioned in clause (a) to (g) of Section 18(2) of the Act.

The plaintiff-respondent was not entitled to any maintenance u/s. 18 of the Act after decree of divorce.

The defendant-appellant was not guilty of desertion, cruelty and living with another wife which is mandatory for grant of maintenance u/s. 18 of the Act.

The divorce was granted only on the ground that the plaintiff-respondent was not able to maintain cordial relation with the family members of the defendant-appellant.

In order to grant a decree u/s. 18 of the Act, it was mandatory for the plaintiff to prove the ingredients contained in clauses (a) to (g) of sub section(2) of Section 18 of the Act.

The capacity to earn by the plaintiff-respondent has been fully ignored by the trial court while granting maintenance to her.

The defendant-appellant has proved by documentary evidence that the plaintiff-respondent being a literate lady and doing job of a teacher and earning more than Rs.5000/- per month was not entitled to the maintenance.

9. Even at the appellate stage by means of supplementary affidavit the defendant-appellant has filed documents to show that the plaintiff-respondent is continuously doing job as lecturer since the year 2000 in Radha Govind Engineering College, Grah Road, Meerut in the Department of Humanities and thereafter she is employed in Moti Lal Nehru College, University of Delhi, South Campus, Delhi in English department and at no point of time she had got less than Rs.10,000/- per month as salary which is more than sufficient to maintain herself. She is highly educated being M.A. in English with B.Ed. and also having Doctorate degree. Learned counsel referred to the statement of the plaintiff-respondent in which she admitted that at the time of giving that statement she was doing Ph.D.

10. Learned counsel for the defendant-appellant further submitted that the trial court has wrongly considered the legal position that even a divorced lady is also entitled to maintenance u/s. 18 of the Act and has wrongly relied on the judgment in the case of Vitthal Mangal Das Patil vs. Mayaben Patel (1996) DMC 432. The said authority was not at all applicable in the present case. In that case the court held that u/s. 25 of the Hindu Marriage Act the word 'wife' includes a divorced wife and putting the same analogy to Section 18 of the Act the court presumed that it also included 'divorcee wife'.

11. Learned counsel for the appellant further argued that the trial court has also taken a wrong view of the fact that the plaintiff-respondent has already applied for setting aside the ex-parte decree of divorce while in fact after the decree of divorce although an application being Misc. Case No.201/1996 was moved by the plaintiff-respondent to restore the original suit but the same was rejected vide order dated 9.9.1985 which clearly shows that the divorce decree is still maintained and has not been set aside and the plaintiff-respondent is admittedly a divorcee and is not entitled to any maintenance u/s. 18 of the Act.

12. Learned counsel for the appellant relied upon Chand Dhawan (Smt) Vs. Jawahar Lal Dhawan (1993) 3 Supreme Court Cases 406 and submitted that the apex court clearly held that a divorcee cannot get maintenance u/s. 18 of the Hindu Marriage Act. In a recent case Mrs. Manisha Sandeep Gade Vs. Sandeep Vinayak Gade, AIR Bombay 2005 page 180 the Bombay High Court also took the same view and clearly held that after grant of divorce, the wife is not entitled to maintenance.

13. Lastly learned counsel argued that since the decree of divorce has not been set aside as yet, the plaintiff-respondent is not entitled to any maintenance u/s. 18 of the Act and the trial court has wrongly decreed the suit.

14. So far as legal position is concerned, admittedly a divorce decree was passed between the parties and an application to set aside that decree was also rejected. There is no documentary evidence produced by the plaintiff-respondent to show that the said divorce decree has been set aside or any proceeding is pending to set aside that divorce decree. Hence, for all purposes the plaintiff-respondent is a divorcee and according to Section 18 of the Act the word 'wife' does not include a 'divorcee wife' and as such she is not entitled to any maintenance. The case laws fully supports the contention of learned counsel for the defendant-appellant.

15. In Mrs. Manisha Sandeep Gode (supra) it was clearly held that the trial court was equally right in rejecting the petition for maintenance u/s. 18 of the Act. This was because once the divorce was granted the petition u/s. 18 of that Act could not be maintained.

16. So far as the case law relied on by the trial court Vitthal Mangal Das is concerned, I am of the view that the trial court has taken a wrong approach in interpreting the said authority and wrongly came to the conclusion that the word 'wife' mentioned in Section 25 of the Hindu Marriage Act is similar to the word 'wife' mentioned in Section 18 of the Act.

17. So far as the merit of the appeal is concerned, the appellant has proved by documentary evidence that the plaintiff-respondent being a highly educated lady and engaged as lecturer in different colleges at different time, was receiving salary much more than the appellant.

18. The Bombay High Court has also held that the wife is not entitled to maintenance when it was clearly established that the income of the wife was better than the husband. It is also important to mention here that Section 18 of the Act or Section 25 of the Hindu Marriage Act deals with the situation where the wife is unable to maintain herself. The word 'unable' means that a person is not able to do what he is supposed to do. In the present matter, it is not a case that the wife is an illiterate lady or is not in a position to do any job, on the contrary the wife is highly educated particularly more than the husband and is clearly in a position to earn more. This also disentitles her to get any maintenance. Therefore, in view of the legal and factual aspects of the matter, plaintiff-respondent is not entitled to any maintenance and the decree of maintenance awarded by the trial court is liable to be set aside and the appeal deserves to be allowed.

19. In the result, the appeal succeeds and is allowed. The judgment and decree dated 30.11.2000 passed by III Additional District Judge, Muzaffar Nagar in Original Suit No.351 of 1997 Smt. Vandita Gautam vs. Sri Vikas Pandey is hereby set aside.

20. There shall be no order as to costs.

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VISHAMBHER ALIAS GENDA RAM VERSUS KATHTHURAM AND ORS.

2009 SCC OnLine Chh 147

(Before Hon'ble Mr. Justice T.P Sharma, J.)

Vishambher alias Genda Ram ..... Petitioner

v.

1. Kaththuram, 2. Manohar Ram, 3. Ramcharan, 4. Sonsai, 5. Dharamdeo, 6. Birchha Ram, 7. Ghuran Ram, 8. Shankar Ram, 9. State of Madhya Pradesh ..... Respondents

Dr. N.K Shukla, Senior Advocate with Mr. Dilip Dubey, counsel for the appellant

Mr. Sushil Dubey, counsel for respondents No. 1 to 8

Mr. Rajendra Tripathi, Panel lawyer for respondent No. 9.State

Second Appeal No. 25 of 1992

Decided on August 7, 2009

Hindu Adoptions and Maintenance Act, 1956 -Section 15 ---- subsequent cancellation of valid adoption. --. Valid adoption not to be cancelled.-No adoption which has been validly made can be cancelled by the adoptive father or mother or another person, nor can the adopted child renounce his or her status as such and return to the family of his or her birth.---the present appellant became natural son of Bechni Bai(adoptive mother) since the date of adoption i.e 17.12.63 and legally he was born in the family of Bachni Bai on 17.12.63.

JUDGMENT

By this appeal, the appellant has challenged the legality and propriety of the judgment & decree dated 16.12.91 passed by the Second Additional District Judge, Ambikapur, in Civil Appeal No. 62A/86, affirming the judgment and decree of declaration and permanent injunction dated 7.3.86 passed by the Second Civil Judge Class-II, Ambikapur, in Civil Suit No. 157A/85.

2. Judgments & decree are challenged on the ground that once son is adopted by the adoptive father and mother, then subsequently adoption cannot be cancelled andadoptive son become natural son in the family of adoptive father and mother.

3. Brief facts giving rise for filing of this appeal is that Bechni (original plaintiff) andher husband Baldev had executed the document in the style of adoption deed (Ex.D/3). Baldev was originally owner of the property including the suit land. He executed gift deed Ex.P/1 in favour of his wife original plaintiff Bechni Bai and gifted his all property on 22.11.63 about one month. After execution of sale deed on 17.12.63, they have executed alleged adoption deed (Ex.D/3). After lapse of 17 years on 30.11.81 and after death of Baldev, Bechni Bai has again executed cancellation of adoption deed vide Ex.P/4.

4. Suit for declaration and permanent injunction against the present appellant (alleged adoptive son) was filed by Bechni Bai (alleged adoptive mother). Suit was decreed. The present appellant has preferred an appeal against the judgment anddecree of the trial Court. During pendency of the appeal and after judgment anddecree of the suit, sale deed relating to property in dispute was executed by Bechni Bai in

favour of respondents No. 1 to 8 on 17.7.86 The present appellant alleged adoptive son has contested the suit and pleaded that he is adoptive son and was adopted by the valid adoption deed (Ex.D/3) and he become natural son in the family of Bachni Bai. Any subsequent cancellation of the adoption deed is invalidand illegal. Once person becomes adaptive son having the status of natural son then subsequent deed of cancellation on adoption deed is of no use. The present appellant was co-owner of the property during the life time of Bechni Bai and after death of Baldev and Bechni Bai their properties devolved only upon the present appellant.

5. For the decision of the present appeal, the following substantial question of law was formulated vide order dated 15.10.1992:-

Whether the finding that the adoption of the appellant is not, in accordance with law, is legal and valid, in view of registered Adoption-Deed (Ex.D/3)?

6. I have heard Dr. N.K Shukla, Senior Advocate with Mr. Dilip Dubey, counsel for the appellant, Mr. Sushil Dubey, counsel for respondents No. 1 to 8 and Mr. Rajendra Tripathi, Panel lawyer for respondent No. 9.State and perused the judgment impugned and records of the Courts below.

7. Learned counsel for the appellant vehemently argued that once adoption is made in accordance with the Hindu Adoptions and Maintenance Act, 1956 (in short 'the Act, 1956') then same is irrevocable and cannot subsequently be revoked by any deed of revocation. The Court may presume the valid adoption in accordance with Section 16 of the Act, 1956. For lawful adoption, the parties are required to satisfy all essential ingredients of Sections 6 to 9 of the Act, 1956. Any adoption cannot be cancelled by adoptive father or mother and even by adoptive child in accordance with Section 15 of the Act, 1956. Learned counsel further submits that on the basis of registered adoption deed, the Court was under obligation to presume the valid adoption under Section 16 of the Act, 1956. After valid adoption child cannot go back to his original family and will be natural son of the adoptive parents born from the date of adoption. Learned counsel also submits that any cancellation deed of adoption is illegal and the appellant will inherit the property of his adoptive parents. His interest has already been created over the property of his adoptive parents on the date of his adoption and rights once vested cannot be divested. Sale or any transfer of property by deceased Bechni Bai is not legal and will not effect the interest of the present appellant.

8. On the other hand, learned counsel for the respondents No. 1 to 8 supported the judgment and decree impugned and argued that adoption was not in accordance with law. Alleged adoption deed (Ex.D/3) is not original adoption deed for raising any valid presumption under Section 15 of the Act, 1956. Even such deed does not reflect the signature of the person who has given the child in adoption. Learned counsel further argued that at the time of alleged adoption, the appellant was not below the age of 15 years as required under clause (iv) of Section 10 of the Act,1956. Learned counsel also submits that after appreciating the material available on record, the trial Court has arrived at a finding that alleged adoption deed was illegaland ineffective which has been confirmed by the judgment and decree impugned.

9. Learned counsel placed reliance in the matter of Madhusudandas v. Narayanibai1 in which the Apex Court has held that burden of proof of adoption is heavily on the person claiming benefit out of the adoption and such person requires to prove the necessary ceremonies for valid adoption. Learned also counsel placed reliance in the matter of Bishan Maheshwari v. Girish Chandra Verma2 in which the High Court of Allahabad has held that adoption of the child above the age of 15 years is illegal. Learned counsel also placed reliance in the matter of Nemichand Shantilal Patni v.Basantabai3 in which the High Court of Bombay has held that in the absence of adoption ceremony, adoption is not valid adoption. Learned counsel also placed reliance in the matter of Mahalingam v. Kannayan4 in which the High Court of Madras has held that exception relating to age of adoption is required to plead andprove. In the absence of pleading and proof, presumption of valid adoption would not be possible. Learned counsel also placed reliance in the matter of Salekh Chand (Dead) by LRs. v. Satya Gupta5 in which the Apex

Court has held that the parties are required to prove existence of such custom and are required to prove that custom must derive its force from the fact that by long usage it has obtained the force of law.

10. It is not disputed that the present appellant has not filed any original document of adoption. Section 16 of the Act, 1956 for presumption of valid adoption. Ex.D/3 is certified copy of the alleged adoption deed does not reflect the sign of the person who has given the child in adoption or age of the child at the time of such adoption, but both the parties have pleaded and led their evidence in support of the legality of adoption. Allegation of the plaint reveals that Bechni Bai and her husband has adopted the appellant vide registered deed dated 17.12.63 and voluntarily executed adoption deed. But she has not admitted the factum of adoption in her evidenceand has deposed that she did not know the fact that her husband has adopted the appellant pr not. Kariya Ram (PW-2) has also not supported the factum of adoption, but appellant Vishambher (DW-1) himself has deposed in his evidence that when he was aged about 15 years he was adopted by Baldev. Even he performed his marriageand adoption deed was written. Certified copy (Ex.D/3) reveals that natural father of Vishambher was present at the time of adoption and he has given his son to Bechni Bai and her husband Baldev, but subsequently Ex.D/4 cancellation of adoption deed shows that the adoption deed executed vide 17.12.63 was cancelled on the ground that Vishambher has not complied with the terms of adoption and has not acted as natural son. Deceased Bechni Bai has specifically pleaded in para-3 to para-7 of the plaint that they have adopted Vishambher (present appellant) by registered deed of adoption, Vishambher has not complied with the condition of adoption and has not acted as natural son of Bechni Bai and her husband, therefore, deceased Bechni Bai has pleaded in para-12 of the plaint and para-12 of her evidence that subsequently she has cancelled the deed of adoption executed on 17.12.63 by cancellation deed of adoption dated 13.11.81, though Ex.D/3 copy of adoption deed does not contain signature of the natural father, does not satisfy the requirement of valid adoption in terms of Section 16 of the Act, 1956 for raising valid presumption, but deceased Bechni Bai has specifically pleaded the factum of valid adoption and such pleading has also been admitted by the appellant up to the extent of valid adoption, therefore, subsequently departure from pleading of original plaintiff is not permissible under the law unless same has been legally withdrawn by suitable amendment.

11. Both the Courts below have not considered the pleading of the plaintiff relating to the valid adoption and admission of the appellant in his written statement which was sufficient to establish and prove the fact of valid adoption.

12. Section 15 of the Act, 1956 deals subsequent cancellation of valid adoption. Section 15 of the Act, 1956 reads as under:-

"15. Valid adoption not to be cancelled.-No adoption which has been validly made can be cancelled by the adoptive father or mother or another person, nor can the adopted child renounce his or her status as such and return to the family of his or her birth."

13. In the present case, it is not disputed that prior to execution of valid adoption, property in dispute were gifted by deceased Baldev to his wife deceased plaintiff Bechni Bai (Ex.D/1). Such gift deed has not been challenged by the present appellant after adoption or has not been declared any competent Court as sham and bogus. As a result of such gift, plaintiff deceased Bechni Bai was absolute owner of the property in dispute. She has not transferred by way of sale or gift the property to the present appellant during her life time. After dismissal of the suit, sale deed dated 17.7.86 has been executed on behalf of Bechni Bai in favour of present respondents No. 1 to 8 and on the basis of such sale deed, present respondents No. 1 to 8 have been impleaded as legal representatives of deceased Bechni Bai during pendency of the first appeal before the first appellate Court. Present respondents No. 1 to 8 have filed an application under Order 22 Rule 4 read with Section 10 and 11 of the C.P.Cand on the basis of such application, the Court has permitted the parties to implead as a legal representatives of deceased Bechni Bai. Present appellant has not filed any suit for declaration or cancellation of that sale deed. Even he has not filed any application for amendment on the basis of subsequent event.

14. It is clear from the pleading and documents of the parties that after date of such adoption i.e 17.12.63 deceased Baldev and deceased Bechni Bai have not acquired the disputed land. On the basis of gift deed (Ex.D/1), deceased Bechni Bai was absolute owner of the disputed property since 22.11.63 prior to the execution of adoption deed and adoption of the present appellant which was subsequently sold to present respondents No. 1 to 8. Admittedly, the present appellant became natural son of Bechni Bai since the date of adoption i.e 17.12.63 and legally he was born in the family of Bachni Bai on 17.12.63

15. For the foregoing reasons, substantial question of law formulated for decision of this appeal is decided as positive. Even after decision on the substantial question of law formulated for decision of this appeal, it would be of no help to the appellant because land in dispute was self-acquired property of deceased Bechni Bai who had transferred the property to present respondents No. 1 to 8 and unless transfer is challenged or cancelled it will not effect the right of the respondents over the property.

16. As a result, finding relating to adoption of the Courts below is not sustainable. The appeal deserves to the allowed and it is hereby allowed. The finding of the Courts below relating to declaration of adoption deed as illegally and in effective is hereby set aside.

17. Parties shall bear their casts.

18. Advocate fee as per schedule.

19. Decree be drawn up accordingly.

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JASWINDER SINGH VERSUS MR. PORRO MASSIMO & ORS.

2014 SCC OnLine Jhar 1283

(Before Hon'ble Mr. Justice R.R Prasad, J.)

Jaswinder Singh ..... Petitioner

v.

1. Mr. Porro Massimo, 2. Mrs. Camillo Gloria, 3. Miss Prabha Tete ..... Respondents

For the petitioner: Mr. Jagdeep Kishore, Sr. Advocate Mr. Ramawatar Sharma, Advocate

For the Respondents: Mr. Anil Kr. Tiwary, Advocate

W.P (C) No. 2150 of 2014

Decided on August 19, 2014

Inter-country adoption-Juvenile Justice (Care and Protection of Children) Act, 2000, sec 41--'Guidelines Governing the Adoption of Children 2011-- Principal Judge dismissed the application by holding that giving the child in adoption to respondent nos. 1 and 2 would be against the welfare of the child. The reasons for reaching to this conclusion, are the same which have been referred to above, but those reasons have been recorded without taking into account the guidelines issued in the year 2011, which has virtually flavour of statutory effect and as such, the matter requires to be remanded back.

ORDER

This application is directed against the order dated 22/01/2014, passed by the Principal Judge, Family Court, Ranchi in Guardianship/Adoption Case No. 43 of 2013, holding therein that keeping in view the welfare of the child Allie, she cannot be ordered to be given in Inter Country Adoption in favour of respondent nos. 1 and 2 and, thereby, the said case was dismissed for the reasons recorded hereinunder:-

(1) Prospective Adoptive Parent (PAP) has not been examined.

(2) PAP is required to come to the country to take the child to his country, whereas in this case respondent no. 2 has been authorized.

(3) After matching the child the Specialized Adoption Agency (SAA) should have advised PAP to see the child physically before she gives her acceptance, which has not been done.

(4) Sufficient proof is not there that the recognized agency had made effort to place the child in adoption within the country.

2. Challenging the said order, Mr. Jagdeep Kishore, learned senior counsel appearing for the petitioner submits that the matter relating to inter-country adoption never seems to have been decided as per the guidelines issued by the Central Government named as 'Guidelines Governing Adoption of Children, 2011' and, thereby, the Court committed illegality in dismissing the application for adoption.

3. Before adverting to the further submissions advanced in this regard, one needs to take the background under which the aforesaid guidelines regarding adoptionwere issued by the Central Government. The law with regard to inter-countryadoption was in state of flux until the principals 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 the Hon'ble Supreme Court in a case of "Lakshmi Kant Pandey v.Union of India [(1984) 2 SCC 244]". That

case has been instituted on a letter addressed to the Court by one Lakshmi Kant Pandey, practicing advocate of the Supreme Court with regard to alleged malpractices indulged in by social and voluntary organizations engaged in the work of offering Indian children in adoptionto foreign parents. After an elaborate consideration of the various dimensions of the questions, which were raised before the Court by several entities including Government functionaries 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 adoptionby foreign parents. The Court also laid down the approach that is required to be adopted by the Courts while dealing with the applications under the Guardians and Wards Act seeking orders for appointment of foreign prospective parents as guardian of Indian Children. The Hon'ble Court on amongst the other suggestions came with the following suggestions:-

"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 centers 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."

4. Pursuant to the said decision, the Government of India formed a body known as Central Adoption Resource Agency (CARA). At the same time, it came with a guideline named as 'Guidelines For Adoption From India 2006', laying down the elaborate provisions to regulate the matter relating to adoption including inter-country adoption. In course of time, significant development in the law governingadoption took place, whereby Section 41 of the Juvenile Justice (Care and Protection of Children) Act, 2000, was amended by Act, 33 of 2006 by substituting Sub-sections 2, 3 and 4 in Section 41. The said amendment, which was made effective from 22/08/2006, are as follows:-

"41 (2) Adoption shall be resorted to for the rehabilitation of the children who are orphan, abandoned or surrendered through such mechanism as may be prescribed.

41(3) In keeping with the provisions of the various guidelines for adoption issued from time to time, by the State Government, or the Central Adoption Resource Agency and notified by the Central Government, children may be given in adoptionby a court after satisfying itself regarding the investigations having been carried out, as are required for giving such children in adoption.

41 (4) The State Government shall recognize one or more of its institutions or voluntary organizations in each district as specialized adoption agencies in such manner as may be prescribed for the placement of orphan, abandoned or surrendered children for adoption in accordance with the guidelines notifiedunder sub-section (3).

Provided that the children's homes and the institutions run by the State Government or a voluntary organization for children in need of care and protection, who are orphan, abandoned or surrendered, shall ensure that these children are declared free for adoption by the Committee and all such cases shall be referred to theadoption agency in that district for placement of such children in adoption in accordance with the guidelines notified under sub-section (3)."

As per sub-section (3), children may be given in adoption by a Court keeping in view various guidelines for adoption issued from time to time by the State Government or the Central Adoption Resource Authority. In the year 2011, the Central AdoptionResource Authority (CARA) laid down a guideline, which has been named as 'Guidelines Governing the Adoption of Children 2011', having virtually statutory effect as by virtue of the provisions of Rule 33 sub-clause 2, the said Guidelines of 2011 has been notified under Section 41 sub-clause 3 of the Juvenile Justice Act, which will now govern all the matters pertaining to inter-country adoption. Some of the salient features of the Guidelines, which are required to be followed by the different agencies and also by the Court, are being given herein-under:-

"(a) Before any child is offered in adoption by Recognized Indian Placement Agency (RIPA) it is obligatory for Specialized Adoption Agency (SAA) to fulfill obligations in terms of the said Guidelines and obtain a declaration from Child Welfare Committee that a child is an abandoned or surrendered child and is legally free for adoption.

(b) After the child is declared legally free for adoption, every such child has to be offered to an Indian family within the same socio cultural milieu, ethnic and religious background.

(c) If such a child is not accepted by any local Indian Family, the said child can then be offered in inter-country adoption.

(d) All such children residing with RIPA are placed on the Data Base Management system of CARA (Carings Portal) and CARA refers families on its waiting list to RIPAS for offering them a child in inter-country adoption.

(e) RIPA, on receiving such referral from CARA matches a child who could be offered to such a family and sends Child Study Report and Medical Examination Report (CSR & MER) and photo of the child to Prospective Adoptive Parents (PAPs) through Authorized Foreign Adoption Agency (AFAA).

(f) When the Prospective Adoptive Parents accept the child they endorse their signature on CSR and MER and send the same to RIPA.

(g) Thereafter, RIPA forwards the dossier/documents of the Adoptive Family (PAPs) to the State Government/Adoption Recommendation Committee (ARC) for issuing Recommendation Certificate.

(h) The Adoption Recommendation Committee (ARC) after scrutiny of the said documents in terms of the Guidelines, issues a Recommendation Certificate and forwards the dossier/documents alongwith Recommendation Certificate to CentralAdoption Resource Authority (CARA).

(i) CARA, on receipt of these documents from ARC/State Government on being satisfied about the suitability of the adopted parents issues No Objection Certificate (NOC), which is then forwarded by CARA to RIPA.

(j) On receipt of such NOC from CARA, RIPA has to file the petition in the Court for giving the minor in adoption to the adopted parents named in the NOC.

(k) On case being allowed and registration of the Adopted Deed, RIPA has to apply for the Passport for the adopted child.

(l) After the Passport is ready and the child is ready to travel, the Adoptive Parents, living at abroad, have to come to India and accompany the child to their country."

5. Mr. Jagdeep Kishore, learned senior counsel submits that Miracle foundation is the registered institution and happens to be a Specialized Adoption Agency (SAA)/Recognized Indian Placement Agency (RIPA) by CARA, Ministry of Social Justiceand Empowerment, Government of India and also by the Government of Jharkhand, to which the petitioner is the Adoption Incharge. One female child namely Allie, born on 24/10/2008 at Simdega, Jharkhand was admitted at Miracle Foundation, Khunti. After expiry of 60 days, no person turned up to claim the said child and, therefore, when the matter was moved before the Child Welfare Committee, Ranchi, it declared the child legally free for adoption. After the minor child was not accepted by any of the Indian Family, the Committee of Miracle Foundation took decision to give Allie to foreign Prospective Adoption Parents and submitted Child Study Report and Medical Examination Report, Legal Free Certificate to Associazione Mehala_Child and Family via Campi (LC), Italy through AFFA. Respondent nos. 1 and 2, husband and wife issueless both working having good financial condition capable to bring up and educate the minor child and has been found suitable by Associazione Mehala_Child and Family via Campi (LC), Italy to adopt the child, having accepted the said minor child by putting her signature on CSR-MER of the minor child, sent it back to the petitioner. On such acceptance by respondent nos. 1 and 2, the petitioner forwarded the dossier/documents of the said family to the State Government/ Adoption Recommendation Committee for issuance of AdoptionRecommendation Certificate, which was granted. Thereafter, the matter was scrutinized by CARA in terms of the Guidelines and after satisfying

itself about the suitability of respondent nos. 1 and 2 to adopt the minor child, CARA issued NOC. Upon receiving the NOC from CARA, the petitioner filed a petition under Section 41(6) of the Juvenile Justice (Care and Protection of Children) Act, 2000 before the Principal Judge, Family Court, Ranchi, for giving Allie in adoption to respondent nos. 1 and 2, which was registered as Adoption Case No. 43 of 2013.

6. It was further pointed out that before the Court all the documents original as well as photocopies such as Home Study Report, Financial Status, Marriage Certificate, Medical Fitness and other related documents, were filed but only the photocopies of those documents on being proved were marked as exhibits though original of all those documents were there on the records, but the application was dismissed for the reason that PAP has not been examined and that the PAP should have come to the Country to take the child with them, which ground is never tenable as respondent nos. 1 and 2 (PAP) had executed a power of attorney in favour of respondent no. 3 to take all the steps on their behalf in the proceeding of the Court and in that event PAP was never supposed to come to the Country and may not be insisted on to come to the Court in view of the decision of the Hon'ble Supreme Court rendered in a case of "Lakshmi Kant Pandey" (supra), holding therein that the Court dealing with an application for appointment of foreign parents as guardian need not therefore insist on the foreign parents or even one of them coming down to India for the purpose of approving the child.

7. In that event, the Court is also wrong in dismissing the application on the ground that PAP should have come to India before they had given their acceptance. The Court is also wrong in holding that sufficient proof is not there that the adoptive agency had made effort to place the child in adoption within the country as the documents filed in this respect, go to show that sufficient measures had been taken by the agency in finding out the the adoptive Indian parents but had failed and only thereafter the matter was referred by the petitioner to respondent nos. 1 and 2 (PAP) by sending CSR/MER of the said child through AFAA, for her adoption.

   Thus, it was submitted that the trial Court without adhering to the guidelines as referred to above, did dismiss the application and, thereby, the impugned order is fit to be set aside.

8. Having heard learned counsel appearing for the parties and on perusal of the records, I do find that the learned Principal Judge did dismiss the application by holding that giving the child in adoption to respondent nos. 1 and 2 would be against the welfare of the child. The reasons for reaching to this conclusion, are the same which have been referred to above, but those reasons have been recorded without taking into account the guidelines issued in the year 2011, which has virtually flavour of statutory effect and as such, the matter requires to be remanded back.

   It be also noted that one of the grounds for dismissing the application for adoptionis that the parties failed to get the original documents to be taken into evidence though the photocopies of those documents were proved and have been marked as exhibits but as per the statement made by the counsel appearing for the petitioner the original documents of all those documents, photocopies of which have been marked as exhibits, were there on the records. Therefore, the parties are required to get all those original documents bring on the records by proving it in accordance with law.

9. Further, it is recorded that the impugned order had been passed by the Principal Judge, Family Court, Ranchi on 22/01/2014, which was challenged by way of this writ application. While the matter was pending before this Court, a new Judgeship at Khunti has been created and the jurisdiction of this case falls within the territorial limit of Khunti Judgeship and, as such, the matter is remanded to the Court of Principal District Judge, Khunti, in stead of sending the matter to the Court of Principal Judge, Family Court, Ranchi, so that the matter be decided in accordance with the guidelines laid down under 'Guidelines Governing the Adoption of Children 2011' as early as possible preferably within a period of one month from the date of receipt/production of a copy of this order. Let the L.C.R and the original documents filed before this Court be sent down immediately to the court of Principal District Judge, Khunti.

   Thus, this writ application stands disposed of.

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KRISHNA PRASAD MANDAL VERSUS SABITA DEVI

Patna High Court

Equivalent citations: I (2003) DMC 94

(Before Hon'ble Mr. Justice N Rai, J.)

Krishna Prasad Mandal

v.

Sabita Devi

Decided on 25 April, 2002

Section 18 of the Hindu Adoption and Maintenance Act, 1956 ,Sections 24 and 25 of the Hindu Marriage Act-- Addl. District Judge allowed the petition filed by the opposite party/wife under Section 18 of the Hindu Adoption and Maintenance Act, 1956 read with Sections 24 and 25 of the Hindu Marriage Act and ordered for payment of interim maintenance when no proceeding was pending before the Court below-- Section 24 of the Act provides that only when any proceeding under the Act for divorce, is pending the Court is empowered to pass order for interim maintenance.

Section 25 of the Act empowers the Court to pass an order for maintenance after passing a decree. As admittedly, no proceeding for passing a decree under the Act has been filed the order cannot also be passed under Section 24 or 25 of the Act-----order passed by the Addl. District Judge is without jurisdiction and the same is set aside.

ORDER

Nagendra Rai, J.

1. This revision application is directed against the order dated 31.1.2001 passed in Matrimonial Case No. 35 of 1996 by Addl. District Judge 1st, Bhagalpur by which he has allowed the petition filed by the opposite party/wife under Section 18 of the Hindu Adoption and Maintenance Act, 1956 read with Sections 24 and 25 of the Hindu Marriage Act (hereinafter referred to as the Act) and ordered for payment of interim maintenance at the rate of Rs. 1,000/- per month to her.

2. The facts necessary for disposal of the present application are that the opposite party was married with the petitioner. It appears that the relationship between the parties became strained. An application under Section 125 of the Code of Criminal Procedure was filed by the opposite party/wife for maintenance, but later on the same was withdrawn. Thereafter an application under Section 18 of the Hindu Adoption and Maintenance Act, 1956 read with Sections 24 and 25 of the Act was filed before District Judge and the same has been disposed of by the impugned order.

3. The learned Counsel appearing for the petitioner submitted that the order passed by the Court below is without jurisdiction in the sense that no order for maintenance can be passed under Section 24 of the Act which speaks of interim maintenance during pendency of any proceeding under the provisions of the Act. As no proceeding was pending before the Court below, no order for maintenance can be passed under Section 24 of the Act. He further submitted that so far Section 25 of the Act is concerned that empowers the Court concerned to pass an order for maintenance after passing a decree as provided

under the said Act or thereof. As no decree has been passed under the aforesaid Act, the order for maintenance cannot be passed under Section 25 of the Act.

4. Learned Counsel appearing for the opposite party on the other hand submitted that the application for interim maintenance was filed before the Court below and it rightly ordered for maintenance under Section 18 of the Hindu Adoption and Maintenance Act read with Sections 24 and 25 of the Act.

5. The submission advanced on behalf of the petitioner is well founded. Sections 24 and 25 of the Act are not applicable in this case. Section 24 of the Act provides that only when any proceeding under the Act for divorce, is pending the Court is empowered to pass order for interim maintenance. Here no such case was pending at the time of passing of the order.

6. Section 25 of the Act empowers the Court to pass an order for maintenance after passing a decree. As admittedly, no proceeding for passing a decree under the Act has been filed the order cannot also be passed under Section 25 of the Act.

7. So far as Section 28 of the Hindu Adoption and Maintenance Act, 1956 is concerned that gives substantive right to the wife to claim maintenance but no procedure has been provided under the said Act for maintenance and only remedy available is to file a suit for recovery of the maintenance accrued.

8. Thus, the order passed by the Addl. District Judge 1st, Bhagalpur is without jurisdiction and the same is set aside. However, the opposite party, if so advised may again file an application for maintenance under Section 125 of the Code of Criminal Procedure or may pursue the other remedy available in law.

9. In the result, the revision application is allowed.

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LANDMARK JUDGMENTS ON

ROLE AND DUTIES OF FAMILY COURT

PRABHAT NARAIN TICKOO VERSUS SMT. MAMTA TICKOO AND OTHERS

1998 SCC OnLine All 327 : (1998) 33 ALR 253 : (1999) 1 ICC 670 (All) (DB) : (1998) 2 AWC 1551

(Allahabad High Court)

(Before Hon'ble Mr. Justice M. Katju & Hon'ble Mr. Justice S.L Saraf, JJ.)

Prabhat Narain Tickoo

v.

Smt. Mamta Tickoo and others

C.M.W.P No. 43736 of 1997

Decided on May 5, 1998

Role and Duty of Family Court- Section 9 and 13 of the Family Courts Act, 1984 - whether the petitioner is entitled to appear through counsel---- the correct approach should be that the Family Court should not permit lawyers to appear before it when it is trying to seek reconciliation between the parties under Section 9 of the Family Courts Act.-- It may be mentioned that it is the first duty of the court hearing matrimonial cases to try to reconcile the parties as envisaged by Section 9 of the Act. At this stage lawyers are not at all necessary, and it is for the court to try to persuade the husband and wife to get reconciled. Lawyers may also not be allowed to appear in cases under Section 13- B of the Hindu Marriage Act (divorce by mutual consent).

However, if the reconciliation attempt fails, and the matter has to be adjudicated, the court should ordinarily allow lawyers to appear on behalf of the parties.

The Judgment of the Court was delivered by

M. KATJU, J.:— Heard Sri Sunil Ambwani for the petitioner, Sri P.K Srivastava for respondent No. 1 and learned Standing Counsel.

2. The petitioner is an officer in the Indian Nevy and he has filed a Divorce petition under Section 13 of the Hindu Marriage Act which is pending before the Additional Principal Judge, Family Court, Kanpur Nagar being Divorce petition No. 750 of 1996. Learned counsel for the petitioner has confined his argument only to the third prayer in the petition viz. that the petitioner should be allowed to appear through his counsel before the Family Court.

3. The petitioner is an officer in the Indian Navy. He was married to respondent No. 1 in 1992. Presently he is posted in Bombay and he has difficulty in getting leave as he is in the Naval service. The petitioner filed the aforesaid Divorce case No. 750 of 1996 against respondent No. 1, and respondent No. 1 filed Misc. Case No. 603 of 1995 under Section 125 Cr. P.C against the petitioner and both these cases are pending before respondent No. 3. On 26-4-97 the court concerned passed the following order:

4. Thereafter the petitioner moved an application dated 3-11-97 which is Annexure-14 to the writ petition and in that application he prayed that a date in the case be fixed and he may be heard through his counsel. On this application the following order was passed on 4-11-97:—

5. A perusal of the above order shows that on 26-4-97 the court concerned had ordered that the case be consigned to the record but it further directed that it shall proceed when the petitioner personally appears. In our opinion this does not mean that the petition was rejected on 26-4-97. As a matter of fact no court can pass an order consigning a judicial case to the record. The court can either allow the petition or dismiss it or dispose it off in some other manner or adjourn the case, but it cannot pass an order finally consigning the case to the record. If the petitioner is not appearing, the court can dismiss the petition for default, but the court cannot finally consign a case to the record. Such an order can only be passed in an administrative proceeding, not in a judicial proceeding. In our opinion if such order consigning the case to the record is passed it is to be treated as an order adjourning the case sine die, but it will not amount to dismissal of the case. Hence, we set aside the order dated 4-11-97 and direct that the Divorce petition and the petition under Section 125 Cr. P.C shall continue and be decided expeditiously.

6. The question remains as to whether the petitioner is entitled to appear through counsel. In this connection Section 13 of the Family Courts Act, 1984 states:—

"Right to legal representation.—Notwithstanding anything contained in any law, no party to a suit or proceeding before a Family Court shall be entitled, as ofright, to be represented by a legal practitioner:

Provided that if the Family Court considers it necessary in the interest ofjustice, it may seek the assistance of a legal expert as amicus curiae."

7. In our opinion the correct interpretation of Section 13 of the Act is that a lawyer has no absolute right to appear on behalf of a party before the FamilyCourt, but it is the discretion of the Family Court to permit the lawyer to appear or not. This interpretation becomes evident when we notice the words 'as of right' in Section 13 of the Act. If the intention of the Parliament was to debar the advocates absolutely from appearing in the proceedings of the Family Courts the words 'as of right' would not have been there. The presence of the aforesaid words indicates that the intention of the Parliament was that it should be left to the discretion of the Family Court to allow lawyers to appear or not. As regards the proviso to Section 13 this only deals with the appointment of amicus curiae, and it has nothing to do with the representation of the parties. In fact the Bombay HighCourt in Leela Mahadeo Joshi v. De. Mahadeo Sitaram Joshi1, has held in para 17 that Section 13 does not prescribe a total bar to representation by a legal prectioner. This view had been followed by Bombay High Court in Smt. Lata Pimple v. Union of India1.

8. The question then arises as to how the Family Court should exercise its discretion in this connection, in other words when should the court permit representation by lawyers and when it should not. The Bombay High Court has taken the view that the Family Court should permit representation by lawyers where complicated questions of law and facts are involved. In our opinion this approach will lead to unnecessary wrangles in almost every case on the question whether complicated questions of law and fact are involved or not, and this will take a lot of time, and parties will very often go upto the higher courts on this preliminary point, causing great delay. Morever, the criterion laid down by the Bombay High Court is, in our humble opinion, vague and subjective. Whether complicated questions are involved or not will differ from Judge to Judge. Hence, a simpler, clearer, and more objective guideline is required.

9. In our opinion, the correct approach should be that the Family Court should not permit lawyers to appear before it when it is trying to seek reconciliation between the parties under Section 9 of the Family Courts Act. It may be mentioned that it is the first duty of the court hearing matrimonial cases to try to reconcile the parties as envisaged by Section 9 of the Act. At this stage lawyers are not at all necessary, and it is for the court to try to persuade the husband and wife to get reconciled. Lawyers may also not be allowed to appear in cases under Section 13-Bof the Hindu Marriage Act (divorce by mutual consent). However, if the reconciliation attempt fails, and the matter has to be adjudicated, in our opinion the court should ordinarily allow lawyers to appear on behalf of the parties. This is necessary because Divorce law and other Family law has now become a complicated branch of law, and an ordinary layman cannot be expected to know this law. It may be mentioned that there is a catena of decisions both in

Englandand India on this branch of law, and without a knowledge of the same a party cannot properly represent himself/herself in the case, and only a trained lawyer can do so. For example, Section 13(1)(ib) of the Hindi Marriage Act provides that separation for two years is a ground for divorce. A layman would probably think that proof of two years of physical separation alone is required for divorce on this ground, but the case law on this point is that mere physical separation for 2 years is not sufficient and the petitioner has also to prove animus deserendi i.e intention to bring cohabitation permanently to an end. Similarly, cruelty is ground for divorce,and the layman would ordinarily regard cruelty to mean physical cruelty, but by judicial decisions it has been interpreted to mean mental cruelty also. There is a catena of case law on this subject, and no layman can be expected to know this case law as it takes years, to study and understand it. Moreover, a layman would be ignorant of procedure/rules, also. Hence, it is obvious that a layman cannot ordinarily represent himself properly in such cases. Representation by lawyers will not only be of great assistance to the parties, it will also be of great assistant to thecourt to do justice expeditiously. Some people say that lawyers will cause delay in the proceedings. In our opinion far from delaying the proceedings, a lawyer will greatly expedite it because by his knowledgeof law and procedure and his training he can quickly come to the relevant points. Moreover, lawyers know the art of the cross-examination, and the rules ofprocedure, which a layman does not. Hence we are of the opinion that the discretion in granting/refusing representation by lawyers must be exercised in the manner aforementioned, namely that at the stage when the court is trying to reconcile the parties or when divorce is sought by mutual consent no lawyer should ordinarily be permitted, but otherwise when the matter is being adjudicated lawyers should ordinarily be allowed to represent the parties.

10. The view we are taking may appear to be judicial legislation. However, it is now well settled in India, England, America, Australia etc. that Judges do legislate. The 19th Century positivist jurisprudence of Bentham and Austin has been largely replaced in the 20th Century by the sociological jurisprudence of Jhering, Roscoe Pound, Julius Stock which permits legislative activity by the judiciary.

11. Thus in the Constitution Bench decision of the Supreme Court in Sarojini Ramaswatni v. Union of India1, it was observed in paragraph 92;

"In this context, it is also useful to recall the observations of R.S Pathak, C.J speaking for the Constitution Bench in Union of India v. Raghubir Singh (Dead) by Lrs.2, about the nature and scope of judicial review in India. The learned Chief Justice stated thus:—

"…..It used to be disputed that Judges make law. Today, it is no longer a matterof doubt that a substantial volume of the law governing the lives of citizensand regulating the functions of the State flews from the decisions of the superior Courts." There was a time, observed Lord Reid, "when it was thought almost indecent to suggest that Judges make law—they only declare it …….. But we do not believe in fairy tales any more."

12. In fact even in England with its Parliamentary Supremacy the theory that Judges do not legislate was really a fiction. What is the entire British Common Law but Judge made law? What is Rylands v. Fletcher, Donoghue v. Stevenson, Rookes v.Barnard? These epoch making judgments were law creating judgments, as everyone recognizes today. In our own country Keshavanand Bharti's case, Maneka Gandhi's case, the cases in which new dimensions have been given to Articles 14 and 21, etc. are all law making judgments.

13. The dispute today in all countries following the Common Law System is net whiter Judges can legislate (everyone accepts that they can and do) but to what extent, in what circumstances, in what manner, etc? Thus Prof, Friedmann ofColumbia University in his article 'Limits of Judicial Law Making' (29 MLR Ne. 6, 1996) writes:

"The Blackstonian doctrine as the 'declaratory' function of the courts, holding that the duty of the court is not to pronounce a new law but to maintain andexpound the old one, has long been little more than a ghost. From Holmes andGeny to Pound and Cardozo, contemporary jurists have increasingly

recognisedand articulated the law making functions of the courts …. It is therefore time to turn from the stale controversy over whether Judges make law to the much more complex and controversial question of the limits of judicial law making."

14. It seems that judicial law making has passed through three stages. The first stage was where the Judges would make law while pretending not to. The classic example of this can be given of the decision of Blackburn, J. in Rylands v.Fletcher,1 where in fact the Judge created a new law (the law of strict liability) while pretending to follow existing law. This approach was adopted particularly by British Judges since in England there is no written Constitution and Parliament is Supreme, and hence the Judges had to maintain the fiction that they are not legislating, otherwise there would be violation of the principle of Parliamentary Supremacy.

15. In the second stage, while giving up the fiction that Judges do not make law, it was proclaimed that they make law only interstitially. The classic statement in this connection is of Mr. Justice Oliver Wendell Holmes who said "I recognize without hesitation that judges must and do legislate, but they do so only interstitially, they are confined from molar to molecular motions" (see 'The Mind and Faith of Justice Holmes'). Thus, while accepting that Judges make law, the intersitial theory permitted judicial legislation on a modest and limited scale.

16. A similar view was taken by Lord Denning in England. In Seaford CourtEstates v. Asher2, he observed: "It would certainly save the Judges trouble if Acts ofParliament were drafted with divine prescience and perfect clarity. In the absenceof it, when a defect appears a Judge cannot simply fold his hands and blame the draftsman. A Judge must not alter the material of which it (the law) is woven, but he can and should iron out the creases."

17. This view was no doubt overruled by the House of Lords in Magor and St. Mellons Rural District Council v. Newport Corporation3, which declared it as 'a naked usurpation of the legislative function' but our own Supreme Court has preferred the view of Lord Denning to that of the House of Lords vide Directorate ofEnforcement v. Deepak Mahajan4, State of Karnataka v. Hansa Corporation5;Bangalore Water Supply & Sewerage Board v. Rajappa6.

18. In his book 'The Nature of the Judicial Process' Mr. Justice Cardozo of the U.S Supreme Court said, "He (the Judge) legislates only between gaps. He fills the open spaces in the law."

19. This 'interstitial' theory proceeds on the basis that the legislative draftsman is also a human being and hence there are bound to be some omissions and other defects in the statute he has drafted. Hence the gaps in the law have to be filled in by the Judges.

20. The third stage of judicial law-making has best been described by Mr. Justice Murphy, former Judge of the Australian High Court who said "Now it is the function of the Judges, I believe to bring the laws uptodate with the expectationsand the needs of our changing society. They should produce laws which are rational, humane, just and simple" (see 'Judging the World' by Garry Sturgess andPhilip Chubb, p. 17). Roscoe Pound expresses the same idea when he says "Law must be stable, and yet it cannot stand still" (see Pound's Jurisprudence').

21. This third stage or dynamic theory (which is still in the process of formation) is based on the view that modem society is dynamic and fast changing, and it cannot be expected of the legislature to conceive of every situation which may develop in the future and cater to it. Hence the Judges have to play the role ofsocial engineers, they have to help society in its onwards progress and not just remain as by-standers. In fact sometimes the Judge should make a law which is not in accordance with the predominant opinion in society (as some jurists advocate) but one step ahead of it, so as to pull society forward. This third stage (or dynamic) theory is bolder and more socially conscious than the interstitial theory, and gives greater scope to the Judges for making law.

22. In the present case the interstitial theory can be adopted. According to our interpretation, Section 13 of the Family Court Act gives a discretion to the Judgeto permit or not to permit representation by lawyers. However, Section 13 does not mention as to when and in what circumstances, permission should be granted andwhen it should not. Hence this gap in the law has to be filled in by Judge made law, which we have tried to do as best as we could.

23. In our opinion, therefore, the petitioner as well as respondent No. 1 are both entitled to representation by lawyers and we direct accordingly. We further direct that both the cases shall be decided within six months of the production of a certified copy of this order before the court concerned. Before parting with this case, we would like to say that divorce cases usually cause a great deal ofpsychological trauma to the parties and hence they must be decided expeditiously. It is evident that if divorce cases take ten years or more to decide (as it often happen) it would lead to the parties becoming psychological wrecks. Hence, such cases must be decided quickly. We, therefore, issue a general mandamus that all divorce andother family cases must be decided within a year of filing of the same by thecourt concerned.

24. Let a copy of this order be sent by the Registrar of this Court to all theFamily Courts and District Judges in U.P Copies of this judgment shall also be sent to the President/Secretary of all District Bar Associations in U.P as well as to the President/Secretary, High Court Bar Association.

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SMT. SHASHI SHAH VERSUS KIRAN KUMAR SHAH

1998 SCC OnLine All 643 : (1999) 35 ALR 232

(Allahabad High Court)

(Before Hon'ble Mr. Justice Binod Kumar Roy & Hon'ble Mr. Justice R.K Mahajan, JJ.)

Smt. Shashi Shah

v.

Kiran Kumar Shah

First Appeal No. 419 of 1996

Decided on September 21, 1998

Role and Duty of Family Court-- Family Court Judge should take care of the aims and objects of the Family Courts Act which is "An Act to provide 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. -- The emphasis is on promoting conciliation and thereby preserving the marriage . The judgments of Family Courts should be precise, and points for determination, brief discussion of evidence and criticism of the same and the efforts made for settlement. Otherwise the very purpose of establishing Family Courts for expeditious disposal of matrimonial disputes will be frustrated

The Judgment of the Court was delivered by

R.K MAHAJAN, J.:— This appeal raises interesting questions in the context ofstrained family life of husband and wife. The plea of wife appellant is that she is entitled to the company of husband who is an Engineer at the places of his posting. Her repeated grievance is that she wants company of her husband at Siliguri where he is presently posted, to enjoy the marital rites. The plea of husband respondent is that the wife should reside at his parents house and he cannot take her at different places of his posting. There is one more factor in this case which come up during the negotiations held in our Chambers as required under the Statute, that the husband is not ready and willing even to have a separate residential accommodation at Agra where he has settled whereas the wife is ready to live with the husband even in small accommodation. Thus, the main question for determination by this Court is whether in the circumstances narrated above the conduct of husband amounts to desertion and cruelty?

2. The Trial Court has passed decree of divorce believing the version ofhusband to be correct and has granted maintenance of Rs. 1000/- per month to the wife. The second question involved in this appeal is whether the wife is entitled to get custody of the child namely Anupam Shah (alias Shrenik Shah) aged about 4 years at the time of filing of the plaint who is presently living with his real maternal uncle and is getting education there. The wife appellant is living at Loharia with her brother.

3. The husband respondent is an Engineer. His two wives died earlier on accountof different reasons which will be stated later on. Similarly the wife appellant had also given divorce to her former husband on the ground of impotency.

4. The appeal has been filed against the decree and judgment dated 9.9.96 passed by the Judge Family Court Agra granting decree of divorce and allowing the custody of the child to the respondent, the father and granting maintenanceof Rs. 1000/- per month to the wife appellant.

5. It is not disputed that the marriage took place between the parties in accordance with Hindu rites at Agra on 17th July, 1986 and after having a peaceful married life for some time a male child was born on 8th May, 1987 namely Anupam Shah. The version of husband respondent is that the wife's pressure was to persuade the husband respondent to live separately from his parents to which he did not agree. She created problems in the house by way of abusing the parentsand other members of family. She used to threaten the family members to implicate in false criminal cases. She did not spare even her husband from using derogatory language. It is alleged that while the husband was posted at Siliguri she left the house for her parents house without permission of husband or his familymembers. He sent his close relations i.e, brother-in-law, sisters and friends to bring her back but she did not return back. Later on, since the wife has withdrew from the society of husband without reasonable excuse, hence he moved a petition for restitution of conjugal rights under Section 9 of Hindu Marriage Act. Thereafter the petition under Section 9 was converted into petition under Section 13 of Hindu Marriage Act and it is also alleged that the said conversion of the petition was allowed with the consent of wife. It appears that another application was also filed by the husband for the custody of the child.

6. The wife appellant has denied desertion and cruelty on her part to the husband. She has stated that prior to her marriage with the respondent he had married one Smita of Kanpur and treated her with cruelty as a result of which that marriage was dissolved. Thereafter he again married one Annu of Jaipur who died in suspicious circumstances at the house of the respondent. In her statement the wife appellant has denied to have pressurised her husband respondent to live separately from his parents and has stated that she has been behaving respectfully with the husband and his family members as is expected of a married lady. She has further alleged that the husband respondent wanted a child from her andthereafter he started creating a situation of divorce so as to get the custody ofchild. The wife appellant has further stated that on the eve of "Raksha-bandhan" in the year 1990 her brother came to Agra to take her to Gwalior but he was not properly treated by thefamily members of the husband and he was told that he could take his sister (wife/appellant) but the child would not be sent at any cost. The appellant's brother conveyed it to her parents at Gwalior, then family members came to take her even then the husband and his family members did not agree to send the child with her mother i.e, wife appellant. It is denied that she went Gwalior at her own account or she was forcibly taken to Gwalior as stated by the husband respondent.

7. In her statement the wife appellant has further stated that she was not treated as wife by the in laws but as a maid servant. No proper fooding and clothing was provided to her. She has also stated in her statement that she did not take any valuable thing with her while going to Gwalior on 4.5.90 whereas her father had given Rs. 30,000/- in cash, 9 Tolla gold etc. But it all remained with her husband. In her written statement the appellant has stated that her husband respondent had beaten her on 27.6.87, 12.10.87, 11.7.90, 12.7.90 and 13.7.90 Even her husband's brother Anil Kumar beaten her on 14.9.88 She was beaten and ousted from the house. It is further alleged that after 990 her husband never came to take her to his house.

8. The husband respondent examined 5 witnesses including himself as P.W 1, Radha Kishan P.W 2, Radha Vallabh P.W 3, Som Chand Shah P.W 4 and Varma Shah P.W 5. The wife appellant examined herself as D.W 1 and her brother Prem Kumar as D.W 2.

9. The Judge Family Court has believed the version of husband respondentand has found the cruelty by wife proved and the cruelty by husband not proved. The issue of desertion has been decided in favour of the husband.

10. It is very unfortunate that the judgment of the Judge Family Court is running into 38 pages. Writing of lengthy judgments by the Family Courts is not the statutory expectation but it appears that they are behaving like civil courts. The judgments of Family Courts should be precise, and points for determination, brief discussion of evidence and criticism of the same and the efforts made for settlement. Otherwise the very purpose of establishing Family Courts for expeditious disposal of matrimonial disputes will be frustrated

as the Judges ofFamily Courts would spend more and more time in writing lengthy judgmentsand will go on prolonging the proceedings.

11. In the grounds of appeal it is averred that the Judge Family Court has committed mistake in converting the petition under Section 9 of Hindu Marriage Act into petition under Section 13 of Hindu Marriage Act. It has committed further illegality: in rejecting the application for refund of Stridhan and directing the custody of minor child to the father from mother. It is further averred that theFamily Court erred in arriving at the finding recorded by it in view of the fact that the husband respondent was serving in All India Radio Siliguri (Assam) and did not took his wife there and the question of separation does not arise. It is further averred that the findings of desertion and cruelty are not sustainable. It is also averred that the Family Court did not weigh properly the evidence on record. In ground No. 18 it is also alleged that the wife appellant was not given proper opportunity to cross-examine the P.Ws

12. We would like to consider the substance of the evidence adduced by both the parties. P.W 1 Kiran Kumar Shah has supported his version mentioned in the plaint. From his statement we find that his main grievance is that his wife started pressurising him to have a separate residence from his parents immediately after birth of the child and on this issue quarrel started between husband and wife. The wife went to Gwaliar without his consent. During cross-examination wife put some suggestions regarding looking after the child and imparting education which the husband has denied. 13. P.W 2 is a witness of the fact that the in laws of the wife came to the houseof the husband in the absence of husband, they were quarrelling, he asked them to tell him the reason of quarrel and came to know that the relations of wife wanted to take with them the appellant (wife) with child to Gwalior and they took with them the appellant and the child after signing the paper No. 70-Ga. It is alleged that some injuries were received by the brother of the husband but no medical examination took place.

14. P.W 3 Radha Vallabh is also a neighbour. He also deposed the fact that the relations of wife had come to take the child and the appellant with them as the school had opened. There was some quarrel going on over taking of the child when he reached there. The paper No. 70-Ga was written and signed in his presence. The appellant and the child went.

15. P.W 4 father of the husband has supported the version regarding coming ofrelations of the appellant and taking of the child to Gwalior after signing the paper No. 70-Ga. He has also stated that the behaviour of the appellant was not proper. She was abusing but he has not stated the exact words of abuse.

16. The statements of P.W 2 and 3 have been criticised by the counsel for the appellant saying that they are not reliable as they are the chance witnesses.

17. D.W 1 is the wife appellant. The substance of her statement shows that she was not allowed to be treated as BAHU in the house. She was not allowed to feed the child nor was kept in a position to feed the child timely. Whenever she asked the husband about his visits he replied that she was not concerned with it. His intention was to take birth of a child and thereafter to kick her out. She further stated that she is living at her parents house since 4.5.90 She had delivered the child at Agraand her mother-in-law looked after her properly in the hospital.

18. Learned counsel for the appellant contended that there is no evidence on record regarding cruelty and desertion and the Judge Family Court has committed error in appreciating the evidence to arrive at the conclusion of crueltyand desertion. He has further contended that the P.W 2 and 3 are chance witnesses and they do not prove cruelty and desertion. He has also contended that the approach of the Judge Family Court regarding the custody of the child is not legal as welfare of the child lies with the mother. He also contended that the amount of maintenance is too meagure.

19. Learned counsel for the respondent has supported the judgment of FamilyCourt and gave an offer that the husband respondent is ready and willing to live with the wife appellant. He contended that there is

no question ofcruelty on the part of the husband respondent as the marriage in question was the third marriage.

20. Catena of authorities have been cited by both sides but they need not be referred, the relevant judicial precedents on the question of cruelty and desertion have been considered by us.

21. The Judge Family Court has given a wrong finding regarding desertion andcruelty. It has been repeatedly ruled by the Apex Court as well as the High Courtthat there should be intention to desert and to bring the cohabitation to an end permanently. There should be factum of separation and animus desrendi. Under Section 13(1)(i-b) of the Hindu Marriage Act there should be desertion for a continuous period of not less than two years immediately preceding the presentation of the petition. In Explanation of Section 13 the 'desertion' has further been explained. In this Explanation the expression 'desertion' means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly. In this case we find that the desertion is on the part of the husband. The husband is not taking her to Siliguri. He does not want to hire separate quarter. As regards the wish of the wife appellant to live separately from his parents, now a days the trend in the society is that newly married ladies want to live separately to have their separate life with the husband. Mere pressure by a wife on the husband to live separately from the parents is not a sufficient ground for divorce or cruelty. If that is held to be so it would create a chaos in the society and so many marriages would break. Son's duty to parents is not diluted and he is bound to look after his parents but he has to do so as far as possible because he has not to disturb the peace of his mind after his marriage if the wife wants to live separately from his parents. The married couple wants to start a separate matrimonial home. Even the parents would not mind if the son and the daughter-in-law live happily with the child and with the passage of time everything comes to a normal level. The husband has failed to explain as to why he did not take the wife if she wants company of husband at the place of his posting for satisfaction of conjugal relations as it is one of the basic essential features of a married life. The husband did not discharge the duty of a prudent husband by refusing to take her to Siliguri where he was posted. Then there was no course left for the wife except to go to her parents and to live there with the child. It become very unfortunate state of affairs in the society if the brother andclose relations of the wife have to bear the burden of maintaining sister and her children. In the married life there has to be give and take. So many small matters have to be tolerated. The role of abusing and throwing utensils etc. assigned to the wife appellant does not seem to be believable and there is no evidence ofphysical and mental cruelty on the part of the wife. The Legislature itself in its wisdom has mentioned the ground of cruelty in Section 13(ia) of Hindu Marriage Act in the following words:—

"(ia) ……has, after the solemnization of the marriage, treated the petitioner with cruelty;

22. The cruelty can be physical and mental. There is no evidence of cruelty in the instant case nor the wife who is an illiterate lady and is a divorcee prior to the marriage in question, in the normal course of business can be presumed to go to that extent. How it can be said that even if she went to her parents house she committed cruelty. It is repeatedly stated by the wife that the husband wanted a child from her and then to kick her out. Learned counsel for the wife appellant submitted that the husband respondent was misbehaving with previous wives also. We do not want to comment much on his behaviour with previous wives but the attitude of the husband respondent with the wife appellant in the instant case does not seem to be reasonable, rather it appears to be neglectful which can be termed as wilful also as he was not acceding to the request of the wife. We cannot believe the injuries alleged to have been inflicted by the relations of wife/appellant at the timeof taking the child, as no medical report is on record nor any report was lodged with the police. It seems that some quarrel by words was going on which was solved by writing of paper No. 70-Ga.

23. We reverse the findings of Family Court regarding desertion and cruelty as the approach of Family Court is thoroughly misconceived both on law and factsand as such is not sustainable. The Family Court appears to have not cared to read the aims and objects of the Family Courts Act which is as under:—

"An Act to provide 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."

24. The emphasis is on promoting conciliation and thereby preserving the marriage but while deciding the appeals we have seen that Family Courts are mostly passing the decree of divorce.

25. Learned counsel for the husband/respondent Sri Prakash Chand submitted that the wife/appellant is a lady of adamant nature and the respondent/husbandand his family members are keen to keep her specially when she has given birth to a male child but he could not substantiate it when he was asked about the fact as to why the husband did not take her at different places of his posting and to live separately and he could not reply it with cogent reasons. Therefore, we straightaway brush aside his submissions.

26. Learned counsel for the appellant has further submitted that the FamilyCourt should not have allowed the conversion of application for restitution ofconjugal rights to the divorce petition. We do not find any weight in this argument. The application under Section 9 is filed on the ground that the other party, without any reasonable excuse, withdrawn from his society and therefore, the conjugal rights be restituted. The courts have been granting permission for converting the applications for restitution of conjugal rights into the petitions for divorce, with a view to cut short the litigation. This submission of learned counsel for the appellant also falls to grounds in view of statutory provisions of Section 23-A of the Hindu Marriage Act which reads as under:—

"23-A. Relief for respondent in divorce and other proceedings.—In any proceeding for divorce or judicial separation or restitution of conjugal rights, the respondent may not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion, but also make a counter-claim for any relief under this Act on that ground; and if the petitioner's adultery, cruelty or desertion is proved, the court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground."

27. The above quoted provision has been brought on the statute book by Act No. 68 of 1976. If the relief of divorce is available on the ground of cruelty anddesertion in a counter claim it is not understandable as to how the proceedings for restitution of conjugal rights cannot be converted into those of divorce, in order to expedite the proceedings.

28. Now we would like to deal the issue of custody of child. The child is 9 years old now and is studying at Gwalior. The wife has been found with her brothers who are well of financially. The child is being given education in the best school andenvironment. She has already placed on record materials regarding schools in which the child is studying. The basic principle in deciding the custody of the child is as to with whom the welfare of child lies. It can be given even to third party if in the opinion of the Court the welfare of the child lies there. In this regard statutory provisions of Section 13 of Hindu Minority and Guardianship Act, 1956 are very relevant and they are as follows:—

"13. Welfare of minor to be paramount consideration:—(1) 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.

(2) No person shall be entitled to the guardianship by virtue of the provisionsof this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfareof the minor."

29. No doubt, father is natural guardian under Section 6 of aforementioned Guardianship Act but it cannot supersede the paramount consideration of welfareof the minor, but there is a non-substante clause regarding welfare of the minor. The boy, from his own point of view, ought to be in the custody of the mother. The boy will get more love and affection from his mother. There is no allegation ofunchastity or adultery against the mother. Had the father been anxious to give best attention to the child, he would have kept the mother and child at respective placesof his postings and he would have not refused the proposal of the wife to keep her at respective places of his postings. We do not want to burden the record unnecessarily by citing catena of authorities of Privy Council, Apex Court andvarious High Courts including this Court as the legal position on the point is well settled that the Court has to see the welfare of the child under the facts andcircumstances of each case. Thus in our view Family Court has erred in giving custody of the child in the facts and circumstances of instant case to the father, consequently we set aside the same and direct that since in our view the welfare of the child lies with the mother, the child be given in the custody of mother appellant.

30. Now we would deal with the maintenance part of the case. The husband is an Engineer.

31. The Family Court has erred in awarding a meagre amount of Rs. 1000/- only as maintenance. The amount of maintenance for wife should be such that she can maintain and keep herself in the same standard in which she could have lived with her husband. No doubt, the amount should not be excessive but however, it must be reasonable. Considering the fact that the wife has to maintain the child also apart from herself and keeping in view the standard of the husband and also his liability to maintain his parents, we enhance the maintenance amount of wife from Rs. 1000/- to Rs. 1500/- per month and reverse the findings of Family Court to that extent.

32. In the grounds of appeal one of the grounds is that the application does not lie for return of articles presented at the time of marriage. We do not agree with the findings of Family Court in this regard also. Section 27 of the Hindu Marriage Act postulates that the court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time ofmarriage, which may belong jointly to both the husband and the wife. Thus, it is clear that the application does lie. However, in the instant case, since we have preserved the marriage hence there is no necessity to pass any order regarding return of articles. In view of the discussions made above we are of the considered opinion that the appeal deserves to be allowed.

33. In the result the appeal succeeds and is allowed. The impugned judgmentand decree of divorce is set aside. The amount of maintenance to the wife is enhanced from Rs. 1000/- per month to Rs. 1500/- per month. The custody of minor child is directed to be given to the mother i.e, the appellant. There shall, however, be no order as to costs.

34. Appeal Allowed.

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BHOLARAM VERSUS SMT. PARWATI SAHU

2010 SCC OnLine Chh 233 : (2011) 99 AIC 625 : AIR 2011 Chh 38

Chhattisgarh High Court

(Before Hon'ble Mr. Justice I.M Quddusi & Hon'ble Mr. Justice N.K Agarwal, JJ.)

Between

Bholaram

v.

Smt. Parwati Sahu

F.A (M) No. 59 of 2009

Decided on October 7, 2010

Role and Duty of Family Court Judge- section 13 of the Hindu Minority and sec. 17 Guardianship Act, 1956, -- appointment as guardian of a Hindu minor by a Court- the welfare of the minor shall be the paramount consideration - the Court is under a duty to appoint the most suitable person amongst the rival claimants for guardianship, although a person who under the personal law would be entitled to the custody ofthe child in preference to any one else. Court has to see who of the several applicants has a preferential right to be appointed as guardian of the minor under the personal law keeping also in view the welfare of the minor. The Court should be guided by the sole consideration of the welfare of the minor. .... in each case the Court has to see primarily to the welfare of the child in determining the question or his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the Court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration.

The Judgment of the Court was delivered by

N.K AGARWAL, J.:— The instant appeal is directed against the order dated 21.7.2009 passed by IInd Additional Principal Judge, Family Court, Durg in Misc. Civil Suit No. 18/2008 whereby and whereunder, the appellant's application under section 25 ofthe Guardians and Wards Act, 1890 has been dismissed.

2. Fact of the case in brief are as under:—

(a) The appellant is father of minor Dhairya Kumar Sahu, aged about 6 years and the respondent is his maternal grand mother (Nani).

(b) The wife of the appellant i.e Smt. Yogita Sahu died of bum injuries sustained by her on 28.1.2005 For that, Sessions Trial No. 60/2005 for offence under section 306/34 of Indian Penal Code is pending against the appellant and his other family members. Since then, the minor is in custody of the respondent.

(c) The appellant i.e father filed an application under section 25 of the Guardians and Wards Act claiming custody of the child inter alia on the ground that he being the natural guardian of the child is legally entitled for the custody; his financial status is very good; it would not be proper to deprive the child from love and affection of father; in order to look after the welfare of the child, he

is the most suitable person. On the other hand, the respondent is a greedy old lady who only wants to realize the amount pertaining to Smt. Yogita Sahu lying deposited with her department.

(d) Denying the claim of the appellant, the respondent charged the appellant as a person of criminal back ground and bad character involved in the offenceof abeting the suicide of his wife; also contracted second marriage. It was further stated that she is maintaining the child with all due caution and care and the child is growing up well in an atmosphere which conducive to its growth.

(e) Both the parties have led evidence.

(f) Learned Trial Court on appreciation of material placed on record, dismissed the petition filed by the appellant with costs.

3. Learned Counsel for the appellant would submit that though the appellant has contracted second marriage, still it would be better in the welfare of the minor to be in the custody of the appellant. The appellant's financial position is sound; is natural guardian of the minor, entitled for the custody; the minor is not being properly maintained by the respondent; the appellant shall give the minor proper love and affection and education. Relying upon the judgment in the case of N. Nirmala (Smt.) v. Nelson Jeyakumar,1 it was further contended that learned Trial Court has also improperly dismissed the appellant's prayer regarding his visitation right. On the other hand, learned Counsel appearing for the respondent supported the impugned order and submitted that the Trial Court's order is well reasoned order and deserves to be upheld.

4. We have perused the order impugned and records of the Trial Court.

5. The appellant has already contracted second marriage; is facing sessions trial for offence under section 306 read with section 34, I.P.C for abetment of suicide ofhis wife; and the minor is in the custody of re-. spondent since the death of his mother.

6. As per section 13 of the Hindu Minority and Guardianship Act, 1956, 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. Under section 17 of the Guardians and Wards Act, 1890, the Court is under a duty to appoint the most suitable person amongst the rival claimants for guardianship, although a person who under the personal law would be entitled to the custody ofthe child in preference to any one else. The scope of section 17 of the Guardians and Wards Act, 1890 is that the Court has to see who of the several applicants has a preferential right to be appointed as guardian of the minor under the personal law keeping also in view the welfare of the minor. The Court should be guided by the sole consideration of the welfare of the minor.

7. The Apex Court in case of Sumedha Nagpal v. State of Delhi,2 while interpreting the proviso to section 6(a) of the Hindu Minority and Guardianship Act, held that decision on the question of custody should be made bearing in mind the welfare of the child—It cannot be made simply on the basis of right of the parties under the law, and observed in paras 4 and 5 of the judgment as under:—

"4. Even at this stage, Shri D.D Thakur, the learned Counsel for the petitioner laid great emphasis that we should not shirk our task at least with respect to the limited question of ordering restoration of the custody of the minor child to the mother. He submitted that though section 6 of the Act recognises guardianship of the minor child with both the parents, exclusive right of the mother is recognised in respect of the custody of a minor child below five years. This legislative recognition of the maternal instinct should be honoured by us by treating the custody of the child with the father as illegal and the custody should be handed over to the mother pending the proceedings suggested by us earlier in the course of this order.

5. In deciding such a question, what we have to bear in mind is the welfare ofthe minor child and not decide such a question merely based upon the rights ofthe parties under the law. In the pleadings and

the material placed before us, we cannot say that there is any, much less clinching, material to show that the welfare of the minor child is at peril and calls for an interference. The trauma that the child is likely to experience in the event of change of such custody, pending proceedings before a Court ofcompetent jurisdiction, will have to be borne in mind. We are conscious of the emphasis laid by the learned Counsel for the petitioner that the lap of a mother is the natural cradle where the safety and welfare of the child can be assured and there is no substitute for the same, but still we feel that at this stage of the proceedings it would not be appropriate for us to interfere in the matter and leave all matters arising in the case to be decided by an appropriate forum irrespective of whatever we have stated in the course of this order. Even though we have dealt with the contentions raised by Shri D.D Thakur as to grantof interim custody to the petitioner, we should not be understood as having held that a petition would lie under Article 32 for grant of custody of a minor child; we refrain from examining or deciding the same."

8. The Hon'ble Apex Court in the case of Elizabeth Dinshaw (Smt.) v. Arvand M. Dinshaw,1 while dealing with sections 7 and 17 of the Guardians and Wards Act, 1890 has held that when a question arises before a Court pertaining to custody of a minor child, the matter has to be decided not on consideration of the legal rightsof the parties but on the sole and predominant criterion of what would best serve the interest and welfare of the minor.

9. The Hon'ble Apex Court in case of Anjali Kapoor (Smt.) v. Rajeeu Baijal,2relying upon the two judgments referred to hereinabove has held in para 26 that "ordinarily, under the Guardians and Wards Act, the natural guardians of the child have the right to the custody of the child, but that right is not absolute and theCourts are expected to give paramount consideration to the welfare of the minor child. The child has remained with the appellant grandmother for a long time and is growing up well in an atmosphere which is conducive to its growth. It may not be proper at this stage for diverting the environment to which the child is used to. Therefore, it is desirable to allow the appellant to retain the custody of the child."

10. It will not be out of place to mention here that the facts of the above case are some what similar inasmuch in the above case, the rival claimants of the child were maternal grand mother and father and the minor was in the custody of the grand mother since the death of her daughter i.e mother of the minor and wife ofthe respondent.

11. The Supreme Court in case of Mohan Kumar Rayana v. Komal Mohan Rayana,3 Gaurav Nagpal v. Sumedha Nagpal,4 Athar Hussain v. Syed Siraj Ahmed,5have also held that welfare of the child is the sole and single yardstick to assess comparative merit of the parties contesting for guardianship.

12. The Hon'ble Supreme Court in case of Mausami Moitra Ganguli v. Jayant Ganguli,6 has observed in para 19 to 21 as under:—

"19. The principles of law in relation to the custody of a minor child are well settled. It is trite that 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 terest of the child and not the rights of the parents under a statute. Indubitably, the provisions of law pertaining to the custody of a child contained in either the Guardians and Wards Act, 1890 (section 17) or the Hindu Minority and Guardianship Act, 1956 (section 13) also hold out the welfare of the child as a predominant consideration. In fact, no statute, on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor.

20. The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head ofthe family, yet in each case the Court has to see primarily to the welfare of the child in determining the question or his or her custody. Better financial resourcesof either of the parents or their love for the child may be one of the relevant considerations but cannot be

the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the Court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration.

21. In Rosy Jacob v. Jacob A. Chakramakkal,1 a three-Judge Bench of this Court, in a rather curt language had observed that:

"15. …The children are not mere chattels: nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives oftheir 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 ofwelfare of the minor children and the rights of their respective parents over them."

13. The Hon'ble Supreme Court in case of Athar Hussain (supra) has held in para 44 of its judgment that The second marriage of the appellant, though a factor that cannot disentitled him to the custody of the children, yet is an important factor to be taken into account. It may not be appropriate on our part to place the children in a predicament where they have to adjust with their stepmother, with whom admitted they had not spent much time as the marriage took place only in March, 2007, when the ultimate outcome of the guardianship proceedings is still uncertain."

14. Now reverting to the facts of the instant case, it is not in dispute that the child is in the lawful custody of the respondent since the death of the mother, the appellant i.e father of the child is facing trial for abetment of suicide of his wife/mother of the child under section 306/34, of I.P.C. The appellant had contracted second marriage. The minor has not spent any time with the step-mother till now. The child has remained with the respondent/maternal grand mother for a long time and is growing up well in an atmosphere which is conducive of its growth. In the pleading and the material placed before us, we cannot say that there is any, much less clinching, material to show that the welfare of the minor child is at peril and calls for an interference. It is also not shown that the minor child is not happy with his maternal grand mother who is taking every care for his welfare, also imparting him proper education. In such a situation, we see no reason to disturb the custody of minor and give him in the custody of the appellant.

15. In view of the above, although we do not find any substance in the appeal and the appeal on this count deserves to be and is hereby dismissed, but at the same time, it cannot be overlooked that the father is to have visitation rights to the child. Therefore, the impugned order is partially modified and we direct that the appellant shall have the visitation right twice every month preferably on Saturday or Sunday or a festival day. The respondent shall allow the child to visit the father from morning to evening. The appellant/father shall take the child and leave him at the respondent's home on such day. With the above modification, the appeal is disposed.

16. Appeal Disposed Off Accordingly.

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SMT. HINA SINGH VERSUS SATYA KUMAR SINGH

2006 SCC OnLine Jhar 782 : AIR 2007 Jhar 34 : (2007) 2 AIR Kant R (NOC 195) 85 : (2007) 52 AIC 944 : (2007) 2 AIR Bom R (NOC 370) 133 : (2007) 1 JLJR 615 (HC)

Jharkhand High Court

(Before Hon'ble Mr. Justice M.Y Eqbal & Hon'ble Mr. Justice D.K Sinha, JJ.)

Smt. Hina Singh

v.

Satya Kumar Singh

F.A No. 67 of 2005

Decided on December 21, 2006

Duty of Family Court-Section 9 of the Family Courts Act,Section 23 of the Hindu Marriage Act-- Section 23 of the Hindu Marriage Act, 1955, Section 9 of the Family Courts Act, 1984, Section 89 and Order XXXIIA of the Code ofCivil Procedure make it obligatory for the Court to give a fair chance to a conciliated or negotiated settlement before adjudication is embarked upon. The matrimonial disputes are distinct from other types of disputes on account of presence ofcertain factors which are not found in other disputes. These factors are motivation, sentiments, social compulsion, personal liabilities and responsibilities of the parties, the views of the two parties regarding life in general and to the institution of marriage in particular, the securityof the future life, so on and so forth. Heavy responsibility, therefore, lies on the Court concerned to go for Court annexed mediation. The main role of the Court is to discover a solution instead of breaking the family relations. It is the mandate of law as also the social obligation of the Judge to make an earnest attempt for reconciliation. As noticed above, considering the importance of settlement in matrimonial disputes.

M.Y EQBAL, J.:— In this appeal under Section 19 of the Family Courts, Act, 1984, the appellant-wife has challenged the judgment and decree dated 18-3-2006 passed by the Principal Judge, Family Court, Dhanbad in Matrimonial Suit No. 2/2003 whereby he has ordered for dissolution of marriage by mutual consent.

2. The facts of the case lie in a narrow compass:

The respondent-Satya Kumar Singh married with the appellant, Smt. Hina Singh on 27-4-2001 in accordance with the Hindu rites and customs. In 2003 the respondent-husband filed an application under Section 9 of the Hindu Marriage Act for a decree of restitution of conjugal right alleging, inter alia, that after marriage the appellant lived with him for about three weeks and, thereafter, she went to Kolkata. It was alleged by the respondent that the appellant had gone to Kolkata but she did not come back with him. On 26-10-2001 the appellant came to her matrimonial home and started threatening and torturing the entire family membersof the respondent. On 10-12-2001, the father of the respondent along with his two nephews came to the residence of the respondent and took her to Kolkota. Thereafter, the respondent alleged to have made several attempts to take her back to her matrimonial home, but all efforts went in vain. Hence, the respondent filed the aforementioned suit for a decree of restitution of conjugal right.

3. On receipt of summon, the appellant appeared and filed application for time for filing written statement. On last date being 11-2-2005, the Principal Judgeallowed time to the appellant for filing written statement

by 18-3-2005. On 18-03-2005, the Principal Judge decreed the suit by passing order of dissolution ofmarriage on mutual consent. The said judgment and decree is the subject of the matter of this appeal.

4. Learned counsel appearing on behalf of the appellant assailed the impugned judgment and order as being illegal and wholly without jurisdiction. Learned counsel submitted that two cases, one under Section 125 Cr. P.C and another u/S. 18 of the Hindu Adoption and Maintenance Act are pending in the Family Court, Kolkata and interim maintenance was allowed in the said proceeding. Learned counsel further submitted that the appellant-wife neither filed any compromise petition nor gave consent for dissolution of marriage by mutual consent.

5. Admittedly, the respondent-husband filed an application under Section 9 ofthe Hindu Marriage Act, 1953 in the Court of the Principal Judge, Family Court, Dhanbad which was registered as Title Matrimonial Suit No. 2 of 2003. In the said application, the only relief sought for by the respondent-husband was for a decreeof restitution of conjugal right. However, the Court below in the said suit, passed the impugned judgment/order for dissolution of marriage by a decree of divorce on mutual consent.

6. Before considering the correctness of the impugned judgment and order passed by the Court below, I would first like to discuss the relevant provision ofHindu Marriage Act which deals with the dissolution of marriage on mutual consent. Section 13B of the Hindu Marriage Act was introduced by Amendment Actof 1976 which reads as under:—

"13B. 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 latter 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."

7. From bare perusal of the aforesaid provision, it is manifestly clear that a joint petition for dissolution of marriage by a decree of divorce can be filed by both the parties before the Court on the ground that they have been living separately for a period of one year or more and they have not been able to live together and that they have mutually agreed that the marriage should be dissolved. Sub-section (2) ofSection 13B of the Act provides that such application shall be considered by the Court not earlier than six months after the date of presentation of the petition and after six months the Court shall consider such application and pass appropriate order in accordance with law. Hence, the requirements of law under this Section are:—

"(i) There must be a petition jointly presented to the Court by both the parties to the marriage,

(ii) The grounds for dissolution of marriage by a decree of divorce must clearly and categorically show:—

(a) That the parties have been living separately for a period of one year or more before presentation of the petition,

(b) That they have not been able to live together and,

(c) That they have mutually agreed that the marriage may be dissolved."

8. Besides the above, the requirement of law is that the Court, before passing a decree for dissolution of marriage under Section 13B of the Act, must make an inquiry into the correctness of the ground set out in the application and thereafter the Court must be satisfied about the correctness of the statement made in the joint petition.

9. It is, therefore, clear that for getting a decree for dissolution of marriage under Section 13B of the Act, parties will have to wait for a minimum period of six months after which they have to move the Court once again under sub-section (2)of Section 13B of the Act. The Court shall have to record its satisfaction that the marriage was solemnized as per rules and that the parties have not resumed cohabitation during the period of six months or more before moving the Court under sub-section (2) of Section 13B of the Act.

10. The question, therefore, that falls for consideration is as to whether the Principal Judge, Family Court, Dhanbad, has complied the requirement of law or not before passing the impugned judgment/order of dissolution of marriage by mutual consent. As noticed above, on being summoned, the appellant-wife appeared in the suit and on her prayer, time was allowed for filing written statement. The records of the Court below was called for and from perusal of the order-sheets it reveals that the appellant-wife was allowed time for filing written statement. The order dated 5-1-2005 passed by the Court below reads as under:—

"Applicant is present and filed attendance. A time petition has been filed on behalf of the respondent for filing written statement. The respondent is directed to appear physically on 11-2-2005 and file written statement, if any."

11. Besides the above, in all matrimonial suits or proceedings before proceeding with the hearing of the suit or proceeding, a duty is Cast upon the Court to comply with the mandatory requirement of law.

12. Section 9 of the Family Courts Act casts a duty on the Court to make every endeavour and persuade the parties in arriving at a settlement. Section 9 of theFamily Courts Act reads as under:—

"9. Duty of Family Court to make efforts for settlement. — (1) In every suit or proceeding, endeavour 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 ofthe 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 FamilyCourt 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 in derogation of, any other power of the FamilyCourt to adjourn the proceedings."

13. Similar is the provision is Section 23 of the Hindu Marriage Act which again casts a duty on the Court to bring about reconciliation between the parties. Section 23 reads as under:—

"23. Decree in proceedings. — (1) In any proceeding under this Act, whether defended or not, if the Court is satisfied that—

(a) any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(b) where the ground of the petition is the ground specified in Clause (i) ofsub-section (1) of Section 13, the petitioner has not in any manner been accessary to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and

(c) the petition is not presented or prosecuted in collusion with the respondent, and

(d) there has not been any unnecessary or improper delay in instituting the proceeding, and

(e) there is no other legal ground why relief should not be granted, then, and in such a case, but not otherwise, the Court shall decree such relief accordingly.

(2) Before proceeding to grant any relief under this Act, it shall be the duty ofthe 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:

(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 fails 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 indisposing of the proceeding have due regard to the report.

(4) In every case where a marriage is dissolved by a decree of divorce, the Court passing the decree shall give a copy thereof free of cost to each of the parties."

14. Similarly by CPC (Amendment Act, 1976) a new order XXXIIA has been inserted to deal with certain suits and proceedings concerning the family. Rule (3) of Order XXXIIA cast a duty on the Court to make efforts for settlement. Rule (3) of Order XXXIIA CPC reads as under:

"R. 3. Duty of Court to make efforts for settlement:

(1) In very 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, assist the parties in arriving 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 proceedings."

15. Again Section 89 has been inserted in the Code of Civil Procedure by C.P.C Amendment Act, 1999 with a view to implement the 129th report of the Law Commission of India and to make conciliation scheme effective. It is proposed to make it obligatory for the Court to refer the dispute for settlement either by way ofarbitration, conciliation, mediation, judicial settlement or through Lok Adalat. It is only after the parties fail to get their disputes settled through anyone of their alternative dispute resolution mechanism, the Court shall proceed with the hearingof the suit.

16. It is, therefore, clear that Section 23 of the Hindu Marriage Act, 1955, Section 9 of the Family Courts Act, 1984, Section 89 and Order XXXIIA of the Code ofCivil Procedure make it obligatory for the Court to give a fair chance to a conciliated or negotiated settlement before adjudication is embarked upon. The matrimonial disputes are distinct from other types of disputes on account of presence ofcertain factors which are not found in other disputes. These factors are motivation, sentiments, social compulsion, personal liabilities and responsibilities of the parties, the views of the two parties regarding life in general and to the institution of marriage in particular, the securityof the future life, so on and so forth. Heavy responsibility, therefore, lies on the Court concerned to go for Court annexed mediation. The main role of the Court is to discover a solution instead of breaking the family relations. It is the mandateof law as also the social obligation of the Judge to make an earnest attempt for reconciliation. As noticed above, considering the importance of settlement in matrimonial disputes Order XXXIIA was inserted

as because for the sensitive area ofpersonal relationship special approach is needed keeping in view the forefront objective of family counselling as a method of achieving the ultimate object ofpreservation of the family.

17. Curiously enough, ignoring all these mandatory provisions, the Court below in a suit for restitution of conjugal right passed an order for dissolution of marriage on mutual consent.

18. From perusal of the order dated 11-2-2005. It transpires that both the parties were present and filed their attendance. However, the respondent was directed to file written statement by 18-3-2005. The Presiding officer was on casual leave on that date. On 18-3-2005, the suit was decreed by passing order of dissolution ofmarriage on mutual consent. The Judgment and order which is impugned in this appeal is quoted herein below:—

"The agitation by the petitioner-husband Satya Kumar Singh under Section 9 ofthe Hindu Marriage Act, 1955 as against the respondent-wife, Heena Singh for restitution of conjugal rights has undergone conversion to one under Section 13B of the Act in course of the proceedings of this case, seeking severance ofthe marital bond consensually as well as granting of the permanent alimony to the tune of Rupees One Thousand per month to the respondent-wife through money order.

2. The conjugal warmth and ecstasy proved transient and elusive inasmuch as the spouses were thrown separate before long in the wake of the typing of the nuptial knot on 27-4-2001. There has been no instance of observation ofmatrimonial obligations and relationship since December, 2002.

3. The spouses have been personally examined by the Court and they insisted upon granting of the relief of consensual dissolution which has been found expedient by this Court as well.

4. The instant invocation has emerged as a panacea in the otherwise grim and sombre backdrop of the matrimonial crisis and consequently, the relief is hereby granted and the marriage which was solemnized on 27-4-2001 is hereby dissolved on mutual consent. Furthermore, the petitioner Satya Kumar Singh is directed to pay a permanent alimony to the respondent to the tune of Rs. One Thousand (Rs. 1000/-) per month as undertaken by him from the month ofMarch, 2005 through moneyorder at his own expense. The office clerk is directed to prepare the decree and to furnish a copy thereof free of cost to the either side.

5. The petition is accordingly allowed on mutual consent."

19. From bare reading of the impugned order (so-called consent decree), it reveals that the Principal Judge himself thought it proper to convert the restitution proceeding into a proceeding for divorce by mutual consent with a condition ofpayment of one thousand rupees per month. There is no such application to that effect nor the order-sheet shows that on any date such proposal was made by the parties. Although the order speaks about personal examination of the parties but there is nothing on the record either deposition of parties or any order to the effect that parties were examined. In absence of any such joint application or evidence, the Principal Judge himself directed for payment of one thousand rupees by dissolving the marriage by mutual consent.

20. Prima facie, therefore, I have no hesitation in holding that the Court below has committed serious illegality in passing the impugned erroneous order of dissolutionof marriage by mutual consent. It is nothing but a whimsical and arbitrary order passed by the Court below which is not supposed to have been passed by an Officeof the rank of District and Sessions Judge. It appears that either the Presiding Officer has no elementary knowledge of law or he has failed to appreciate the requirement of law to be complied with before passing a judgment or order for dissolution of marriage by mutual consent as contemplated under Section 13B ofthe Hindu Marriage Act.

21. A common man cannot and shall not be able to understand the abbreviation and the words used in the impugned judgment. It is well settled that the use ofabbreviations or code words should be strictly avoided. It is equally well settled that the judgment should be so precise and so clear that a common man or a litigant must understand the judgment. The language of the judgment should be sober, temperate and clear.

22. Invariably every judgment almost gives the fact giving rise to the suit, appeal or any other proceeding. It mentions the provisions at which the parties were at issue or which requires the consideration of the Court. Lord Macmillan in his Memoirs "A Man of Law's Tale" said:—

"I never dictated my judgments. When I had made up my mind on the question involved I wrote out as a basis a rough draft in which I made sure that all the points were included and then I made a fair copy in which I arranged the sequence of the argument, cut out superfluities and tried to improve the writing."

In the words of Lord Bacon:—

"Judges ought to be more learned than witty, more reverent than plausible, and more advised than confidant. Above all things, integrity is their portion and proper virtue."

23. From perusal of the impugned order, I am of the definite view that the order does not at all fulfil the requirements of law. It suffers from serious infirmities.

24. Mr. Ashok Kumar Sinha, learned counsel appearing on behalf of the respondent-husband, instead of supporting the impugned order, mainly argued that the impugned order is a consent decree and, therefore, the instant appeal is not maintainable in view of Order 23 Rule 3 of the Code of Civil Procedure. In this connection learned counsel put heavy reliance on a decision of the Supreme Court in the case of Pushpa Devi Bhagat v. Rajinder Singh, AIR 2006 Supreme Court 2628 : 2006 (3) AIR Jhar R 883.

25. In the case before the Supreme Court there was a dispute between the landlord and the tenant. After terminating the tenancy the landlord filed a suit for recovery of possession of the suit property. It was alleged that the case was compromised between the parties and the defendant undertook to vacate the suit premises. Thereafter, one of the defendants filed appeal and the matter came up to the Supreme Court. The Supreme Court elaborately discussed the meaning ofconsent decree within the meaning of Order 23 Rule 3 of the Code and held that if a suit or proceeding is compromised and a consent decree is passed in terms ofOrder 23 Rule 3 CPC, then no appeal is maintainable against a consent decree having regard to the specific bar contained in Section 96(3) CPC. In my view the decision ofthe Supreme Court will not in any way help the respondent-husband for the reason that in a matrimonial suit particularly for passing a decree of dissolution ofmarriage by mutual consent as contemplated under Section 13B of the Hindu Marriage Act, the provision of Order 23 Rule 3 of the Code will not apply. The Court, before passing a decree for dissolution of marriage by mutual consent, has to comply the mandatory requirements of Section 89 and Order 23A of the CPC, Section 23 of the Hindu Marriage Act and Section 9 of the Family Courts Act. In my considered opinion, therefore, the impugned order at no stretch of imagination can be treated as a consent decree for dissolution of marriage by mutual consent and, therefore, the bar provided under Section 96(3) of the Code shall not apply.

26. Having regard to the entire facts and circumstances of the case and the law discussed hereinabove, I have no hesitation in holding that the impugned order (so called consent decree) cannot and shall not be sustained in law and being erroneous, is liable to be set aside.

27. For the aforesaid reasons, this appeal is allowed, the impugned judgment/order is set aside and the matter is remitted back to the Court below for proceeding with the suit in accordance with law.

D.K Sinha, J.:— 28. I agree.

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JAYESH THAKUR AND ANOTHER VERSUS SMT. ANJU BHATTA

1999 SCC OnLine Pat 1147 : (2000) 48 (1) BLJR 562

Patna High Court

(Ranchi Bench)

(Before Hon'ble Mr. Justice R.N. Sahay & Hon'ble Mr. Justice Deokinandan Prasad, JJ.)

Jayesh Thakur and Another

v.

Smt. Anju Bhatta

Appeal from Appellate Decree No. 3 of 1997 (R)

Decided on July 27, 1999

Duty of Family Court-Section 9 --- Duty of Family Court to make efforts for settlement—sub-section (1) of Section 9 that the Court may try for reconciliation.

Husband never appeared-The wife brought serious allegation against her husband and led evidence in support of her case. It was highly improbable in the facts and circumstances of the case to effect reconciliation. In my view, therefore, non-compliance of Section 9 ofthe Family Court Act, in the facts and circumstances of the case does not render the order of Family Court invalid. As the application for recalling the order was not moved the Court had no option but to proceed ex parte.

The Judgment of the court was delivered by

R.N SAHAY, J.:— Respondent Smt. Anju Bhatta, wife of appellant Jayesh Thakur filed an application under Section 13(1)(a) of the Hindu Marriage Act seeking divorce. The ground for divorce was cruelty. Notice on the application was issued to the appellant. Notice was received by the appellant but he did not appear to contest the case. The appellant appeared on 11-9-1995 and filed a petition for time. The case was adjourned to 4-11-1995. On that date, i.e 4-11-1995 the respondent was present. The appellant was absent. The appellant had filed an application for recalling of the order of listing the case for ex parte hearing. The petition was not moved and no order was passed on the application, the case was adjourned to 5-12-1995 for ex parte hearing. On 5-12-1995 also the appellate was absent. Counsel did not move the application filed earlier for recall of order of ex parte hearing. On 3-2-1996 theCourt concerned fixed the case for ex parte hearing on 11-3-1996. On 20-4-1996 the case was taken up for hearing in absence of the appellant. The witnesses were examined on the said date. On 4-5-1996 also another set of witnesses were examined. The appellant was not present. On 7-10-1996 the appellant filed an application to the effect that he could not appear due to illness. The appellant prayed for acceptance of their written statement.

2. The learned Judge on hearing the parties and by a reasoned order held that the appellant Jayesh Thakar was deliberately avoiding to appear in the case. The learned Judge ordered that the case shall proceed on 3-12-1996, a petition was filed on behalf of the appellant to the effect that he may be permitted to cross-examine the witnesses adduced on behalf of the respondent. The learned Judge did not find any merit in the application and accordingly rejected it and on the same day delivered the judgment in favour of the respondent. The Judge passed the decreeof divorce. This appeal has been preferred under Section 19(1) of the FamilyCourts Act. The only ground taken in this appeal is that the decree dated 3-12-1996 passed

in favour of the respondent is null and void, since the family Court did not comply with the mandatory provision contained in Section 23(2) of the FamilyCourts Act.

3. Shri Kalyan Roy, learned Counsel for the appellants submitted that since the appellant had appeared and filed an application for recalling of order of ex partehearing. It was incumbent upon the Family Court Judge to try reconciliation. Section 9 of the Family Courts Act is pari materia with Section 23(2) of the Hindu Marriage Act. Section 9 of the Family Courts Act reads as follows:

"9. Duty of Family Courtto make efforts for settlement— (1) In every suit or proceeding, endeavour shall be made by the Family Court in the first instance, where it is possible to do so consistent with, the nature and circumstances ofthe case, to assist and persuade the parties in arriving at a settlement in respectof the subject-matter of the suit or proceeding and for this purpose a FamilyCourt may, subject to any rules made by the High Court following such procedure as it may deem fit

(2) If, in any suit or proceeding, at any stage, it appears to the Family Courtthat there is a reasonable possibility of a settlement between the parties, theFamily 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."

4. Shri Kalyan Roy relied on adecision of Sushma Kumari v. Om Prakash (AIR 1993 Patna 156) in support of his contention and submitted that the Court did not make effort for reconciliation and the order of Family Court granting decree in favour of the respondent was invalid.

5. In V.K Gupta v. Nirmala Gupta, 1980 Hindu LR 290, dealing with a case ofdivorce under the Act, the Supreme Court made the following observations:

It is fundamental that reconciliation of a ruptured marriage is the first essayof the Judge, aided by Counsel in this noble adventure. The sanctity ofmarriage is, in essence, the foundation of civilisation and therefore, Court and Counsel owe a duty to society to strain, to the utmost repair the snapped relations between the parties. This task becomes more insistent when an innocent offspring of the wedding struggles in between the disputed parents. In the present case, there is a child, quite young, the marriage itself being young."

It has been observed that it is the duty of the Court as well as the Counsel for the parties to try reconciliation. That was a case where a divorce petition was dismissed by the trial Court and the High Court and the matter was before the Supreme Court when reconciliation was attempted and it appears that parties reconciled. The reconciliation of ruptured marriage is the foremost duty of theJudge and the Counsel.

6. In Chhote Lal v. Kamla Devi, AIR 1967 Pat 269, it has been held as follows:

"The law enjoins upon the Court a duty to make a sincere effort at reconciliation before proceeding to deal with the case in the usual course. The following observations have also been made in this judgment:

In order that the requirement of making "every endeavour" is fulfilled IT IS AT LEAST requisite that the Courts should have a first hand version of the pointof view of the lady from her own mouth so that the Court might be in aposition to appreciate what really has led to the estrangement between the husband and the wife. Merely because the lawyers for the parties submit that it is not possible to have a reconciliation the duty of making every endeavour for bringing about a reconciliation cannot be said to have fulfilled."

It thus appears, that even when the parties, Counsel state that reconciliation was notpossible it is the duty of the Court to direct the parties to appear in person and find out the facts and attempt reconciliation.

7. In Manju Singh v. Ajay Bir Singh (AIR 1986 Delhi 420), it was held as follows:

"The intention of the Legislature is that an attempt should be made by theCourt for reconciliation before proceeding with the hearing of the petition. The provision of mandatory and an effort for reconciliation is to be made by theCourt right from the start of the case by directing and giving reasonable opportunity to the parties to appear in person before the Court, even the filingof the written statement by the opposite party should not be insisted and reconciliation should be attempted by the Court. If reconciliation attempt fails, written statement be filed. The Court, however, is to watch the proceedings during trial and make further attempt for reconciliation at any stage deemedappropriate the Court. But, in any case duty is cast upon the Court, to try reconciliation between the parties before finally deciding the proceedings under the Act. The words "before proceeding to grant any relief" mean during the course of trial, i.e right from the date when the opposite party is served till the date of giving final decision."

8. In Sushma Kumari's case (supra), it was held that, non-observance of Section 23(2) of the Hindu Marriage Act did not make order of trial Court without jurisdiction. The contention of Kalyan Roy was that the decree impugned in this appeal is void has no force.

9. In Madhuri Verma v. Vijay Kumar Verma [1992 East Cr. C 425 (Pat) the learned Single Judge of this Court held that non-compliance of Section 23(2) of the Hindu Marriage Act may be a serious lacuna but it cannot be a ground to render the decree invalid. It was farther held that the failure of the Court below in reconciliation the matrimonial tie between the parties does not render ex partedecree invalid.

10. In this case, the husband was playing hide and seek with the Cottrt. He did not appear after receiving the summons. He appeal ed after the case was fixed for ex parte hearing and filed an application for recalling of order of ex parte hearing but he did not press the application. He sent one application for adjournment by post. He never appeared before the Court. The Court, therefore, proceeded ex partehearing. Ultimately, an ex parte decree was passed.

11. The background of these facts cannot be argued that it was possible for theFamily Court to try for reconciliation when the husband never appeared in theCourt.

12. Sri A. Sen, learned Counsel for the respondent, has argued that it is clear from sub-section (1) of Section 9 that the Court may tiy for reconciliation.

13. The wife brought serious allegation against her husband and led evidence in support of her case. It was highly improbable in the facts and circumstances of the case to effect reconciliation. In my view, therefore, non-compliance of Section 9 ofthe Family Court Act, in the facts and circumstances of the case does not render the order of Family Court invalid. As the application for recalling the order was not moved the Court had no option but to proceed ex parte.

14. In the result, the appeal is dismissed. In the facts and circumstances of the case, there shall be no order as to costs.

DEOKINANDAN PRASAD, J.:— I agree.

15. Appeal dismissed.

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LANDMARK JUDGMENTS ON

STRIDHAN

(Property of Women)

BHOLA UMAR VERSUS KAUSILLA AND ANOTHER

1932 SCC OnLine All 125 : ILR (1933) 55 All 24 : 1932 All LJ 941 : AIR 1932 All 617 (FB)

Allahabad High Court

**(Before Hon'ble Mr. Justice Shah Muhammad Sulaiman, C.J.,
Hon'ble Mr. Justice Lal Gopal Mukerji & Hon'ble Mr. Justice King, JJ.)**

Bhola Umar … (Defendant);

v.

*Kausilla and Another … (Plaintiffs).**

First Appeal No. 523 of 1928, from a decree of Chatur Behari Lal, First Additional Subordinate Judge of Jaunpur, dated the 13th of August, 1928

Decided on July 8, 1932

Hindu law — Remarriage of widow —Hindu Widows' Re-marriage Act (XV of 1856), section 2 — Preamble. --Section 2 of the Hindu Widows' Re-marriage Act, XV of 1856, does not apply to the case of those widows who are entitled-under the custom of their caste to remarry and are not bound to take advantage of the provisions of the Act. Accordingly there is no forfeiture, under the Act, of the widow's rights in the estate of her first husband on remarriage in such a case. We are further of opinion that the proof of mere custom of remarriage would not be sufficient to involve forfeiture under the Hindu law, and that it would be necessary for the party claiming that the estate has been forfeited on account of remarriage to prove that there is a custom of such forfeiture in such contingency.

Section 2 of the Hindu Widows' Re-marriage Act, XV of 1856, does not apply to the case of those widows who are entitled-under the custom of their caste to remarry and are not bound to take advantage of the provisions of the Act. Accordingly there is no forfeiture, under the Act, of the widow's rights in the estate of her first husband on remarriage in such a case.

Also, there is no forfeiture, under the Hindu law itself, on remarriage on such a case. There is no express text which lays down that a forfeiture of the widow's estate will follow upon her remarriage. It is now well settled, according to the authoritative pronouncement made by the Privy Council upon an interpretation of the texts relating to the conditions attaching to inheritance by the Hindu widow, that she is not divested of her estate by living in unchastity. When open unchastity does not entail forfeiture, it would prima facie follow that a remarriage would not; for if according to strict Hindu law and orthodox Hindu religion a remarriage be invalid, it is then tantamount to unchastity. Further, the strict and orthodox Hindu law cannot logically be invoked, in order to furnish a rule of forfeiture on remarriage, applicable in the case of those castes which, in derogation of that strict and, orthodox law, have recognized and permitted the remarriage of widows.

A custom of remarriage does not carry with it, as a legal incident thereof, a further custom of forfeiture upon remarriage. The proof of a mere custom of remarriage would not be sufficient to involve forfeiture, and it would be necessary for the party claiming that the widow's estate has been forfeited on account of remarriage to prove that there is a custom of such forfeiture in such a contingency.

Messrs B.E O'Conor and Ram Nama Prasad, for the appellant.

Messrs P.L Banerji, R.K Malaviya, Shiva Prasad Sinha, Kedar Nath Sinha and Lakshmi Saran, for the respondents.

The Judgment of the Court was delivered by

MUKERJI, J.:— The following point has been referred for decision to the Full Bench: "Does a Hindu widow, who remarries in accordance with a custom of her caste, forfeit hereby her rights in the estate of her first husband?"

I take it that in this case the Hindu widow contracted a valid marriage and the marriage was in accordance with and recognized by her caste, and would be recognized by the courts as a valid marriage.

The question put to us does not say whether we Have to consider the question on the basis of Act XV of 1856 (Hindu Widows' Re-marriage Act), or whether we should consider it from the point of view of the Hindu law. In certain cases decided by Courts other than this Court it has been held that where a Hindu widow remarries-validly according to the custom of her caste, she does not forfeit her late husband's estate under the Act (Act XV of 1856) but she does forfeit it under the Hindu law. As the question put to us is not restricted, we shall have to consider it from both points of view.

To start with, I proceed to consider the question with reference to Act XV of 1856. The Hindu Widows' Re-marriage Act of 1856 contains a rather long preamble which indicates that conflicting opinions were held in Hindu society as to the validity of Hindu widow's marriage, and on account of there being some uncertainty about the view that might be taken in the courts about the validity or otherwise of such marriages, the Governor General in Council was approached to pass a law legalizing such marriages. The preamble is rather long but is very important in order to find out whether the Act was meant or not to apply to the case of those Hindus among whom a custom sanctioned the validity of a widow marriage.

Before I read the preamble I must express my agreement with the opinion which has been expressed from time to time that if there be a conflict between the preamble and the Act itself the preamble cannot govern the Act. In such cases of conflict, it must be taken that the legislature in framing the Act has failed to achieve its object and therefore the language of the Act must prevail over the wishes of the legislative as expressed in the preamble. As an example I may cite the case of the Mussalman Wakf Validating Act of 1913, in which there was a conflict between the preamble and the Act; the preamble professed to give the waqf a retrospects effect, but the body of the Act failed to convey that idea, and it was held that in spite of the preamble the Act had no retrospective effect. The preamble of Act XV of 1856 runs thus: "Whereas it is known that, by the law as administered in the civil courts established in the territories in the possession and under the Government of the East India Company, Hindu widows, with certain exceptions, are held to be, by reason of their having been once married, incapable of contracting a second valid marriage and the offspring of such widows by any second marriage are held to be illegitimate and incapable of inheritingproperty; and whereas many Hindus believe that this imputed legal incapacity, although it is in accordance with established custom, is not in accordance with a true interpretation of the precepts of their religion, and desire that the civil law administered by the courts of justice shall no longer prevent those Hindus who may be so minded from adopting a different custom in accordance with the dictates of their own conscience; and whereas it is just to relieve all such Hindus from this legal incapacity of which they complain; and the removal of all legal obstacles to the marriage of Hindu widows will tend to the promotion of good morals and to the public welfare; it is enacted as follows, etc." The preamble notes that there are certain exceptions to the rule that the marriages of Hindu widows were held to be illegal and not sanctioned by the Shastras. The preamble then says that it is just to relieve "all such Hindus from this legal incapacity of which they complain" and the Act proceeds to remove the legal obstacles to the marriages of Hindu widows. It is clear therefore that the legislature wanted to give relief only to such Hindus as complained of their incapacity to contract for their widows a marriage. The Act therefore is an enabling Act and was never meant to create a disability where none existed. But, as I have said, if the body of the Act does create a disability which may not have been intended, that disability will have to be recognized.

Now let us read the Act itself.

The first section legalises the marriage of Hindu widows. It is in most general terms and nothing turns upon the language of this section. The section mentions the history of the legislation by pointing out that certain Hindus did hold that a widow marriage was against the true interpretation of Hindu law, while others hold that it was in accordance with Hindu law.

The second section is in most general language and lays down that whenever a widow contracts a second marriage she would forfeit all her right to maintenance or inheritance from or in her late husband's property. If this section were read literally, it would apply to widows who were, not Hindus but were Muhammadans or Christians, in fact, to all widows within British India. This could hardly have been intended and therefore this section must be read as being controlled by the preamble. If we have once to bring in the preamble to read the section, should we not see what was the object of the Act as expressed in the preamble? The preamble recognized that there are exceptions where a widow marriage was regarded to be valid, and those cases did not require any relief. It follows, therefore, that the Act was meant to apply only to the cases of those Hindus among whom a widow marriage was not permitted by the caste but as regards whom it was contended that although the caste did not permit such marriage the Shashtras permitted it. If we thus read section 2 and the preamble together, we shall find that there is no conflict between the preamble and section 2. On the other hand the preamble helps us to find out the true application of section 2. Thus read, section 2, in my opinion, applies only to cases where the custom of the caste does not permit of a valid widow marriage.

It is not difficult to see that the rule of forfeiture or loss of the right of maintenance was enacted by way of a compromise between extreme views. One party contended that a widow marriage was permitted by the Hindu law and another party contended that it was not so permitted and if allowed would create dissension and trouble in the family. The rule, therefore, was laid down that the widow of a caste where remarriage was not customary may have personally the benefit of the Act but she must cease to have anything to do with her late husband's property, so that feuds and disturbances in the family affairs and the property may be avoided.

Whether this be or not the real object and genesis of the rules, it seems to me clear, as already stated, that section 2 does not apply to the cases of widows who have a right to remarry and who are entitled to remarry validly under the rules of their castes.

Now let us consider the authorities of cases decided in the High Courts.

The learned Judges who have made the reference mentioned some cases, beginning with the case of Har Saran Das v. Nandi(1). Up to this date, for a space of over 40 years, this Court has consistently held the view that section 2 of the Hindu Widows' Re-marriage Act did not apply to the case of a widow whose remarriage was permitted by her caste. The cases are numerous and at least eleven reported cases have been cited before us. These are: Har Saran Das v. Nandi(1), Ranjit v. Radha Rani(2), Khuddo v. Durga Prasad(3), Gajadhar v. Kaunsilla(4), Mula v. Partab(5),Mangat v. Bharto(6), Ram Dei v. Kishen Dei(7), Nagar v. Khase(8), Bal Krishna Sharmav. Paij Singh(9) and Abdul Aziz Khan v. Nirma(10).

We have been told that the other High Courts, have taken a different view. The cases that have been cited before us are numerous and all the cases do not require any detailed discussion. Thus I propose to examine only the more important ones.

In Akora Suth v. Boreani(1) a Hindu died leaving, a widow, a minor son and a daughter. The son succeeded under the Hindu law and he died subsequently. Before the son died the widow had married again and on the death of the son claimed the inheritance as the mother. It was held that the suit was maintainable. It appears that there was a difference of opinion between the Judges who heard the case first and there was a Letters Patent appeal. Sir BARNES PEACOCK, C.J, in deciding the Letters Patent appeal expressed the opinion that the object of the Act was to remove all legal obstacles to the marriage of Hindu widows. In this case when the widow remarried she was not possessed either of her son's property or of her husband'sproperty and, therefore, she had nothing to forfeit and section 2 was no bar to her succeeding to the son's estate on the latter's death.

This case, therefore, is not in point and does not deal with the question of any remarriage under caste rules and forfeiting property already inherited. Unless there is a discussion of the question it cannot be said that the case is an authority for the proposition which it did not consider and expressly decide.

The next case that I consider is that of Matungini Gupta v. Ram Rutton Roy(2). This case does not consider the position of a widow who married according to the custom of the caste. It was a case here a widow declared that she was not a Hindu and remarried under the Special Marriage Act (Act III of 1872). It was held by the majority of the Full Bench that she forfeited her interest in her first husband'sproperty. The dissenting Judge, PRINSEP, J., held, that the Act applied only to those Hindus who remarried as Hindus and under the Hindu law. We have nothing to do with the controversy that was raised in that case. When the case was before the Division Bench, WILSON, J., expressed the opinion that if he had to decide the case under the principles of Hindu law and without reference to express legislative enactments, he would be disposed to hold that the widow's estate was determined by her marrying a second time and he thought that this would not in any way be inconsistent with what was held by the Privy Council in the case of Moniram Kolita v. Keri Kolitani(1). This dictum has been very much relied upon on the second question which I shall have to consider and I will consider it later on. I may, however, point out here that the lady who remarried was a lady of a twice born class, being a Vaidya by caste, and in Bengal a widow of her caste could not validly remarry according to the popular nations. This case, therefore, is no authority for the point before us.

The next case from Calcutta is the case of Rasul Jehan Begum v. Ram Surun Singh(2). This is a two Judge case and it was held by the learned Judges that a Hindu widow on remarriage forfeited the estate inherited from her former husband, although according to custom prevailing in her caste a remarriage was permissible. At page 594 the learned Judges remarked that the question whether a widow in whose caste remarriage was permitted lost her late husband's property owing, to re-marriage did not properly arise before them, but they said that if it was necessary they were prepared to follow the Madras case of Murugayi v. Vimmakali(3). In that case the view was taken which was approved of by WILSON, J., in the case already considered, Matungini Gupta v. Ram Rutton Roy(4), that a widow took her husband'sproperty as the surviving portion of her husband and that when she remarried it could not be supposed that the law which her caste followed would permit the remarried widow retaining the property. This point was decided if it was decided at all, on the basis of Hindu law and not on the basis of Act XV of 1856. In concluding the judgment the learned Judges said that their attention had been drawn to a case of the Allahabad High Court, Har Saran Das v.Nandi(1), already referred to, to the effect that a widow belonging to a caste in which remarriage is permitted did not upon her remarriage forfeit her interest and section 2 of Act XV of 1856 did not apply. Having said so, they further remarked that it appeared to the Judges that the true position of a Hindu widow inheriting the estate of her husband was not considered in that (Allahabad) case. It follows that the learned Judges decided the case on what they supposed were the principles of Hindu law and not on Act XV of 1856.

The next case is of Ganga Pershad Sahu v. Jhalo(2). This was a case relating to the right of guardianship of a widow who had remarried according to her caste rules. The Judges had to construe section 2 of Act XV of 1856 and held that the Act did not apply. At the bottom of page 870 the learned Judges accepted the second contention of the counsel for the lady and quoted the case of Parekh Ranchor v. Bai Vakhat(3) in support of their case. The learned Judges, however, remarked that the forfeiture of her first husband's property would take place under the Hindu law. This case, therefore, does not support the view that there would be a forfeiture under the Act.

In Mohammad Umar v. Mst. Man Kuar(4) their Lordships professed to follow the case of Rasul Jehan Begum v. Ram Surun Singh(5) and held that whether Act XV of 1856 applied or not, there would be a forfeiture under the Hindu law; see top of page 918, per SANDERSON, C.J The same view was expressed by the other Judge. This case, therefore, does not support the view that the Act applies.

The case of Santola Bewa v. Badaswari Dasi(1) was the, case of a widow belonging to a caste who had recently adopted the Hindu customs, being an originally non-Hindu of aboriginal tribe; yet it was held that the

widow forfeited her first husband'sproperty under the Hindu law. At page 735 the learned Judges remarked that in their opinion the case was governed by the ordinary. Hindu law and they further said that section 2 contemplated the case of any widow including the widow of a class among which remarriages are allowed. The case does not discuss any principle, does not discuss the language of the Act and follows what are supposed to be the earlier cases of the Court. I have already pointed out that some restriction will have to be placed on the words "a widow" in section 2 of Act XV of 1856, for it would, otherwise, cover the case of a Muhammadan widow or a Christian widow who, nobody would contend, came within its true meaning.

As a summary of The Calcutta, cases we find that the consensus of opinion is that Hindu law governs even those among whom a widow remarriage is permitted and there would be a forfeiture under the Hindu law whether the Act of 1856 applied or not. There is no discussion anywhere as to the effect of the preamble and the effect of the recognition by the legislature that there were certain exceptions in which a widow's marriage was regarded as valid.

Now let us look to the Bombay cases. They are not many that were cited before us. In Parekh Ranchor v. Bai Vakhat(2), which has already been cited in connection with a Calcutta case, it was held that section 3 of the Act did not apply to the case of a widow who had remarried.

The next case is the Full Bench case of Vithu v. Govinda(3). With all respect, the authority of this case is very much vitiated by the large assumption that was made that throughout India the practice prevailed that a widow of a caste among whom remarriage was allowed forfeited her first husband's property. This fact, it was further assumed, was known to the legislature and was acted upon in framing the Act. We may, however, point out that in none of the reported cases coming before this Court the plea, was ever raised that the widow claiming the inheritance of her first husband had forfeited, as a matter of custom, her husband's property. This case of Vithu v. Govinda(1) goes to the full length of supporting the contention that Act XV of 1856 applies. One of the learned Judges pointed out that the preamble was variance with the body of the Act and, therefore, must give way to the latter. I have already discussed the point and pointed out that such was not the case.

Coming to Madras, the case of Murugayi v. Viramakali(2) is based on the view of the Hindu law that a widow on remarriage forfeits her first husband's property. The matter came before a Full Bench in Vitta Tayaramma v. Chatakondu Sivayya(3). Three learned Judges took part in this case and there is no unanimity on any point decided. In this case a Hindu widow had become a Muhammadan and had remarried as a Muhammadan. It was held by two learned Judges, SESHAGIRI AYYAR, J., dissenting, that the claimant forfeited her right under the Hindu law. The two other learned Judges held that Act XV of 1856 did not apply, the third learned Judge being of a contrary opinion. SRSHAGIRI AYYAR, J., was of opinion that neither the Hindu law applied nor section 2 of Act XV applied and there was no forfeiture. It can hardly be said that the Madras view is that section 2 of Act XV of 1856 is applicable to the case before us. The question of custom does not seem to have been discussed in this case. In a later case, Gajapathi Naidu v. Jeevammal(4), a learned single Judge held that section 2 applied even where remarriage was permitted by the caste.

Coming to the Lahore High Court, only one case has been cited before us, namely, the case of Parji v. Mangta(1). It appears to have been held there that the Act did not apply in the circumstances of a case like this but there would be a forfeiture unless a contrary custom was proved.

In Patna the view seems to have been held that section 2 applied to all cases of Hindu widows' remarriage even if remarriage of a widow was permitted by the caste. In the case of Musammat Suraj Jote v. Musammat Attar Kumari(2) the widow had become a Muhammadan and had then remarried. The learned Judges remarked that it was a matter of first impression and that the decisions in Calcutta, Madras and Bombay were unanimous that a Hindu widow lost her property. As pointed out in this judgment, as to the decisions in Calcutta, Madras and Bombay it cannot be said that the three High Courts are unanimous that the Act applied. In the Madras Full Bench case (I.L.R, 41 Madras, 1078) two learned Judges held that the Act did not apply. In the Calcutta Full Bench case (I.L.R, 19 Calcutta, page 289) there is no unanimity, and in Bombay (I.L.R, 22 Bombay, 321) the Act was held to be applicable because it was based on an alleged custom believed to have been universal in the

whole of India. Then the learned Judge who delivered the judgment of the Bench agreed with the majority of the Judges in the Calcutta Full Bench case and held that section 2 applied. But he mainly based his judgment on the Hindu law. He said: "But even if this interpretation" (of section 2 of Act XV of 1856) "be wrong… in such circumstances we are relegated, in coming to a decision, to the general rule of Hindu law." The learned Judge does not discuss the effect of a custom and indeed it was not a case relating to a custom.

I have tried to show above that on an independent reading of Act XV of 1856 it is difficult to say that section 2 applies to the case before us. I would decide accordingly, and answer the question in the negative so far as Act XV of 1856 is concerned.

Now I turn to the question of Hindu law. I have read the judgments of the various High Courts which deal with the; Hindu law as affecting forfeiture of the widow'sproperty and I am afraid I cannot concur with the view taken. The main argument advanced is this; a widow inherits because she is one-half of the body of her husband (ardhangini as she is called), and if she remarries she ceases to be one-half of her husband's body and, therefore, forfeits the right of inheritance. Nothing can be more fallacious, with all respect, than this argument when applied to the case of people who permit the remarriage of their widows. If these people believed that a wife was one-half of the body of her husband and on the death of her husband one-half of his body survived in the widow, how could they possibly have allowed the widow to remarry? How could possibly one, who was one-half of one man's body, have become the one-half of another man's body by a second marriage? If a true rule of Hindu law be that a widow inherits because of being one-half of her husband's body, then a widow-marriage cannot possibly be legal under the Hindu law. Yet not only is there a considerable body of opinion which regards the remarriage of a widow valid according to the Hindu Shastras, but also there is a considerable body of people who are supposed to be within the fold of the Hindu religion and yet they permit widow marriages. It must follow that those people who allow their widows to make a valid remarriage never believe in the doctrine that a wife is a one-half of the body of the husband and that the widow survives the husband as one-half of his body.

If we look at the discussion in the Mitakshargi, for example, as to the right of a wife to inherit, we shall see how difficult the struggle of the author of the Mitakshara was in granting a right of inheritance to the widow. In the Mitakshara as translated by Colebrooke, Chapter II, section I. paragraphs 5 to 29 are devoted to discussions of the conflicting texts and the conclusion is drawn in paragraph 30 that a chaste wife inherits. Thereafter the author discusses the question whether the widow inherits only a portion just enough for her maintenance or the whole of the husband's property. A further discussion and struggle commences and in the last paragraph, 39, the conclusion is drawn as follows: "Therefore it is a settled rule that a wedded wife, being chaste, takes the whole estate of a man who, being separated from his coheirs and not subsequently re-united with them, dies leaving no male issue." Vijnaneswara does not even quote, much less does he consider, the text of Brihaspati quoted by Jimutvahana in Dayabhaga (Chapter XI, section I, paragraph 2) which says that a wife inherits because she is one-half of her husband's body. In view of this discussion of what are all regarded as sacred but conflicting texts, how can you say that this is the particular reason why a widow is permitted under the Hindu law to inherit and that because that rule is broken in the case of a remarriage the widow must forfeit what she has lawfully inherited? The Calcutta cases deal with Jimutvahana's commentary, the Dayabhaga, and even there you will find a discussion of the contradictory texts, some laying down the right of a widow to inherit and others denying it. The author of the Dayabhaga devotes no less than 66 paragraphs to the discussion and in paragraph 67 says, "Thus has the widow's right of succession been explained": See Chapter XI of Dayabhaga in Setlur's Hindu Law Books on Inheritance, published by V. Kalyanaram Iyer & Co., edition of 1911. The man would indeed be hold who would say that the only reason why a wife inherits under the Hindu law on the death of her husband is that she is one-half of her late husband's body. That, no doubt, is one of the reasons given by Jimutvahana when lie held that the widow should inherit. I have already pointed out that there was a considerable body of opinion against the right of a widow to inherit.

The fact of the matter is that Hindu law was a growing set of rules and, at any particular time, the practice of a particular body of people residing at a particular place generally determined the character of the law. It is

for this reason that so man schools of law have arisen, although each school of law holds in veneration the same sacred laws known as Smrities.

It is a matter of history and it is well known that the Hindu religion holds within its fold many people who have never had, in any sense of the term, anything to do with the Aryan civilization. When the (Hindu) Aryans came to India and conquered the aboriginal races and spread their dominion, they, naturally, drew within their folds many of the aboriginal tribes, who gradually, out of sheer veneration, started following some of the customs and manners of the Aryan races. The Aryan races never admitted most of these people entirely into, their own folds and kept them apart by calling them Shudras, as persons belonging to the fourth class. It was only the privilege of the first three classes, the Brahmans, the Kshatriyas and Vaishyas to read the Shashtras and the sacred laws and to abide by them. The duties of the Shudras as laid down by Kanu were to serve the three higher classes; Chapter I, verse 91. Indeed Manu himself says in the clearest terms that his laws were meant mostly for the benefit of the three regenerate or higher classes and not for the Shudras. The vedic rites were meant for the three higher castes alone who were known as twice-born ones. In Chapter II, verse 24, Manu states that the twice-born people were to make their home within a particular area known as Aryavarta or "the country of the Aryans", but the Shudra was allowed to adopt any country as his home. From verse 26, Chapter II, commence the rules for the purification of a child of the Dwija or twice-born class and the rules that fully relate to the duties of the twice-born. You may read through the whole of Manu and you will find that although in the beginning of his Smriti he says that he is laying down the rules for all the four castes, he concerns himself with only the three higher castes and only distantly with the Shudras.

This being the case, it is not correct that the fine reasons which have been advanced from time to time by be sages as the basis of the Hindu law apply equally to the Shudras simply because the latter call themselves Hindus.

As I have already observed, if we follow one of the reasons given by the founder of the Bengal School for the right of a widow to inherit, namely, her being one-half of her husband's body, she can never remarry and her remarriage cannot be valid. Thus it is clear that the caste which allows a widow to remarry does not recognize the reason given by some of the rishis for the right of inheritance of a widow and therefore it is not right to say that as those reasons fail in the case of a remarriage, there should be a forfeiture. The castes amongst whom widow-remarriage is recognized are mostly treated as Shudras and you cannot apply the fine reasonings of the rishis for deducing the logical result of the acts of those who are practically beyond the closed precincts of the laws for the three twice-born, castes. Gautama in Chapter XI, slokas 19 and 20, says that the administration of justice shall be regulated by the Vedas, the Institutes of the sacred law, the Angas, the Upavedas and the Puran. The laws of the country, castes and families, which are not opposed to these sacred records have also authority. Cultivators, traders, herdsmen, money-lenders and artisans have authority to lay down rules for their respective classes: See page 25 of Ghose's Hindu Law, 3rd edition, volume 1. Again there is a text of Vyasa quoted in Vyavahara Mayukhii which runs as follows (see the same book, page 35): "The customs of traders, artisans, etc., and those who earn their livelihood by means of agriculture or the stage are not capable of being ascertained by others. Disputes among them should be decided by those of their own class."

I think I have said enough to establish that even the framers of the Hindu law never professed to lay down rules for those who were never really within the narrow fold of the three regenerate classes.

In the case of Santola Bewa v. Badaswari Dasi(1) the dispute was among Rajbansis and they were originally non-Aryans belonging to Kooch Behar and a non-Hindu aboriginal tribe. It was because they had outwardly adopted Hinduism as their religion that the strict Hindu law was applied to them by the two learned Judges of the Calcutta High Court and, on the ground of oneness of the husband and wife's body, a widow was deprived of what she had inherited from her first husband. With all respect, this, was not administering the law of the parties before the court, but the law of a different people. Mr. T.N Mittra in his Tagore Law Lectures delivered as early as 1879 on Hindu Widows (at page 214) makes the following observations: "I have been considering up to this time the marriage of widows as authorized by Act XV of 1856. There are, however, certain classes

of Hindus among whom the marriage of a widow was allowed by custom. These, I take it, will be governed by the custom on the subject rather than by Act XV of 1856; as among them the remarriage of the widow owes its origin to custom, so the incidents connected with that marriage must be governed by the same custom." This opinion implies that there can be no forfeiture unless there is a custom to that effect. Loss of caste or ostracism from society or community for acts which, bring on "degradation" under the Hindu law cannot now involve loss of property (Act XXI of 1850).

Under no system of law other than the strict Hindu law, as the orthodox Hindus understand it, it is possible to say that a widow who has inherited some propertyfrom her husband should forfeit it because of her remarriage. No Muhammadan, no Christian can think of it. Therefore it cannot be said that it is a matter of natural justice that a widow on remarriage should forfeit the property of her first husband. Unless, therefore, we have got most cogent reasons or a clear rule of law for ordering a forfeiture, we must not do so. On the other hand, the widow is authorised to hold her inheritance for her life, by the following text of Katyayana: "Aputra shayanam bhartuh palayanti gurau sthita, bhunjitamaranat kshanta dayada urdhwam apnuyuh." (Quoted in Sarkar's Hindu Law, 6th edition, page 631.) It has been held by the Privy Council that the injunction that she shall maintain chastity was only a direction, the breach of which did not entail a forfeiture; see the case ofMoniram Kolita v. Keri Kolitemi(1).

There is yet another ground for holding in favour of the widow. Assuming that the strict rule of Hindu law applies to a caste which does not recognize the strict Hindu law, in that case the remarriage of a widow can only be regarded as an immoral act. The orthodox Hindus would wot recognize, the marriage as valid, although the caste people may recognize it as valid and although the British Indian courts may regard it as valid. It has been held by their Lordships of the Privy Council that a widow who has once inherited her husband's property does not forfeit it by reason of her subsequent immorality; see Moniram Kolita v. Keri Kolitani(1). The widow after inheritance may lead openly the life of a common prostitute, yet she may not forfeit her property under the Hindu law, as interpreted by their Lordships of the Privy Council. Yet it is said that if, instead of leading the life of a common prostitute, the widow should remarry and thereby lead what the world generally regards as a moral life, it must follow that she should forfeit her first husband's property. The orthodox Hindu, as I have said, does not regard the marriage as valid; to him it is no marriage; then why should the marriage be regarded as anything worse than the grossest immorality? Can it be an act of justice to say that living as the wife of one single man would be followed by a punishment, while the grossest immorality cannot be? It was argued that this may be so, but such was the Hindu law.

I, as a Hindu Judge, refuse to believe that such is the Hindu law. I emphatically deny that such is the Hindu law. The Hindu law lays down, not at one place, but at many places, that the Shashtras can never be interpreted apart from dictates of conscience and reason. In Chapter II, sloka 12, Manu says: "Vedah smriti sadacharah swasya cha priyamatmanah, etashchatur-bidham prahuh sakshat dharmasya lakskanam"; which when translated would mean, "the Vedas, the Smriti, good conduct and the dictates of one's own conscience are called by the wise the four sources of dharma." Dharma is nothing but good law. In Sanskrit the word "dharma" is the proper rendering for the word law. Again, Brihaspati says: "Kebalam shashtramasritya na kartabyohi nirnayah; yuktiheen bicharetu dharmahanih prajayate" (see Ghose's Hindu Law, 3rd edition, page 1034:); which when translated means "Do not arrive at a conclusion by merely discussing the Shashtra or following its letter; for if you follow the law or the Shashtras without recourse to reasons, you incur thereby a sin." Again, Narada says (Chapter IV, sloka 4), "Dharmashashtra birodhay tu yuktiyukto bidhi smritah" (see Ghose's Hindu Law, 3rd edition, page 1030). This means that where the texts of Shashtras are conflicting one should apply one's own reason. In the teeth of these injunctions to follow your conscience and your reasons, are you justified in saying that it is the Hindu law that the grossest immorality would not entail a forfeiture of property and yet a remarriage would?

The only answer can be an emphatic negative.

For the reasons given above I hold strongly that under the Hindu law, as strictly interpreted or as liberally interpreted, there can be no forfeiture and the answer to the question must be in the negative.

SULAIMAN, C.J:— There has undoubtedly been considerable controversy as to whether Act XV of 1856 was applicable to all Hindu widows or not. The Allahabad High Court from the very beginning has laid down that the Act does not apply to such Hindu widows as were entitled under their custom to remarry and who were not bound to take advantage of the Act. Opinion in the other High Courts has considerably varied, and the Allahabad view has been openly dissented from. But it appears that with the lapse of time opinion in the other High Courts, particularly the Madras High Court, has come round towards the view of this Court, at least so far as the applicability of the Act is concerned.

The Judges who have held that all widows are governed by the provisions of section 2 of the Act have based their view on the wide language of that section. It reads: "All rights and interests which any widow may have in her deceased husband'sproperty… shall, upon her remarriage, cease and determine as if she had then died." If the section were to be taken in its widest scope, it would have to be conceded, that the provision of law applies to any widow whatsoever. It would then include not only all Hindu widows, but even Christian and Muslim widows. Such a construction of the section would lead to absurdity. It is, therefore, impossible to say that section 2 of the Act can be interpreted without reference to the other provisions of the Act and without reference to the preamble. Were it possible to interpret section 2 standing by itself and independently of everything else, there might have been some force in saying that it applied to all Hindu widows. But we are forced to restrict its scope so as to exclude at least Christian, Muslim, Parsi or Buddhist widows. In order, therefore, to find out the true scope of the section, one is compelled to look to the previous provisions of that Act contained in section 1, as well as to the preamble. No doubt a preamble can never control or restrict the substantive provisions of an Act. It merely supplies a key to the interpretation of those sections. But where there is an ambiguity in the sections or where there is any doubt as to the true scope of the provisions of that enactment, the preamble may be of some guidance.

The Act was professedly passed with the object of removing all legal obstacles to the marriage of Hindu widows. The preamble stated that it was known that Hindu widows, with certain exceptions, are held to be, by reason of their having been once married, incapable of contracting a second valid marriage and the offspring of such widows by any second marriage are held to be illegitimate and incapable of inheriting, whereas many Hindus believed that this imputed legal incapacity, although in accordance with established custom, was not in accordance with, the precepts of their religion, and desired that the law should no longer prevent those Hindu widows who may be, so minded from adopting a different custom. The Act was intended to relieve all such Hindus from this legal incapacity complained of and remove all legal obstacles to the marriage of Hindu widows.

It is, therefore, obvious that the legislature recognized that there were certain exceptions to the general practice of widows not being allowed to remarry. Obviously the intention of the legislature was to remove the legal obstacles in the way of remarriage, and not to impose another penalty or restriction on those who did not stand in need of any legislation. It is, therefore, most unlikely that the legislature would have intended to deprive Hindu widows who by the custom of their caste were entitled to remarry and to retain the property of their husbands from holding the estate. The object of the Act professedly was to enable those widows, who were incapacitated from marrying, to remarry. But as it was considered that remarriage, where it is not allowed by custom, should not disturb the relations of the deceased husbands or their estate, there was an express provision made in section 2 that all their rights and interests in the deceased husband's property shall cease and determine.

The Allahabad High Court has accordingly held that the Act could never have been intended to apply and did not apply to those Hindu widows who by the custom of their caste had independently of the Act a right to remarry. The point does not appear to have been emphasized in any of the previous cases, nor does it appear to have been refuted in cases taking the contrary view, that there is no option but to restrict the scope of section 2. That section cannot apply to all widows. It can only apply to a particular class of widows for whom the. Act

was intended. To ascertain that class one is compelled to look to the preamble, which shows that class of widows consisted of those who were incapable of contracting a second valid marriage. This obstacle in their way was removed and their children were declared by enactment to be legitimate.

The Act was intended to render remarriage valid and to legalise the legitimacy of children. It conferred a benefit on those who could not remarry, but at the same time imposed a restriction on them. It was not intended to deprive those who already possessed the right to remarry, of whatever rights they enjoyed in their deceased husband's properties.

The cases of the various High Courts have been considered at length by MUKERJI, J., and it is unnecessary for me to cover the same ground. The Full Bench of the Bombay High Court in Vithu v.Govinda(1) proceeded on an assumption of prevalence of a custom of forfeiture on remarriage, which is not true so far as these provinces are concerned. In most cases where a custom of remarriage was established the right to retain the estate was also put forward and upheld. Indeed no case has been brought to our notice where a custom to remarry was established and yet the widow was held not to be entitled to retain the estate of her deceased husband. The later view in Calcutta appears to be based more on the supposed principles of Hindu law than on the provisions of the Act. In Madras, this is the opinion of the, majority of the learned Judges in the Full Bench case of Vitta Tayaramma v. Ghatakondu Sivayya(2). But in these cases it was simply taken for granted that the Hindu law enforces a forfeiture of the estate, and there appears to be neither any elaborate discussion of the point, nor direct reference to any authorities. The main argument appears to be that because in the Hindu conception of marital relations a wife is considered to be half the body of her husband and the surviving widow remains that half, she cannot retain his estate after remarriage. There is also the supposition that a widow can hold the estate only till her widowhood, and as she ceases to be the surviving half of the body of her husband on her remarriage and cannot thereafter confer spiritual benefit on his soul, she must give up the estate. The nation that a widow is the surviving half of her deceased husband has been called by Sir SESHAGIRI AYYAR, in the Full Bench case of the Madras High Court referred to above, as a "picturesque metaphor". Certainly this principle is not the sole basis of her right to succession to his estate. Similarly, when an unchaste widow, who could hardly be imagined to confer spiritual benefit on her deceased husband to whose marital relations the is disloyal, does not cease to hold the estate, the conferment of the spiritual benefit cannot be the indispensable condition for the retention of the estate. The question was thoroughly examined by their Lordships of the Privy Council in the leading case of Moniram Kolita v. Keri Kolitani(1). When considering the question of unchastity their Lordships had to examine the text of Vrihat Manu and of Katyayana, two verses of which are as follows:

"The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation and obtain his entire share."

"Let the childless widow, keeping unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it."

Their Lordships distinctly ruled that these texts related to the right of succession to the estate and not to its retention, and that the conditions of "keeping unsullied her husband's bed", "persevering in religious observances" and "abiding with her venerable protector" were not conditions precedent to the continuance of the widow's estate, and that even if any or all of these conditions were broken, no forfeiture was involved.

The right to hold the estate of her husband is based on distinct texts, and the nation of her being a half of her, husband's body has in no text cited before us been, made the sole basis for the continuance of her estate.

It is to be admitted that there is no express text which lays down that a forfeiture of the Hindu widow's estate will follow upon her remarriage; nor is there any text which expressly says that her right to hold the estate will terminate on her death or on remarriage. On the other hand, the verse of Katyayana quoted above allows her to enjoy the property until her death, and the heirs are to take it only after her. It has been suggested that the idea of a Hindu widow retaining her property is incompatible with the conception of Hindu law. But when once the estate has vested in her, there can Ire no forfeiture unless there is a clear authority for that view, and forfeiture cannot be inferred because of some national view deducible from some supposed principle underlying

the Hindu law of succession. When it is now well settled that unchastity does not involve any forfeiture, it would prima facie follow that remarriage would not. It would be putting a premium on unchastity to hold that she can retain the propertyso long as she remains notoriously unchaste, but the moment she remarries she will forfeit it. The expression "widow's estate" is an English expression and does not imply that the estate continues so long as she continues to be a widow. In one sense she still remains the widow of her deceased husband, even after her remarriage. The expression in Hindu law for "widow's estate" is "Stridhan", which would literally mean "woman's estate", and not necessarily widow's estate. It would be offering an inducement to a widow to be immoral if she were told that she would be in a worse position by validly remarrying than by living in open adultery. A change of religion, like a discontinuance of chastity, involves no forfeiture. There seems to be no good reason for holding that a remarriage recognized by law does so. In the absence of an express text, the Hindu law should be interpreted so as not to cause a shock to one's moral conscience. Obviously the strict Hindu law never contemplated a remarriage for the higher classes. The rules laid down, therefore, do not provide for remarriages. In the eye of the pure Hindu law remarriage was hardly anything better than concubinage. When remarriage was not recognized it was tantamount to unchastity. In this view of the matter her position should not be any worse than if she were unchaste. Undoubtedly the estate vests in her on the death of her separated husband dying issueless. The burden is on the party who alleges it to show that there is some well settled rule of law which divests her of her estate. In the absence of any authority to the contrary, her widow's estate must continue. If the Act does not apply, then her estate continues even though she remarries under the custom which allows it.

When nothing more than a mere custom of remarriage is established, there is no presumption that under the Hindu law she forfeits the estate. The party who is alleging that there has been a forfeiture must establish a further incident of the custom that forfeiture is a necessary consequence. Where such additional custom is established, she would, of course, lose the estate, if she were claiming it under the Act; and she would also lose it if she were claiming the right to remarry under the custom. But where nothing more is established than a mere right to remarry under a custom, it cannot be presumed that forfeiture is a necessary consequence. The burden to prove a custom involving forfeiture is on the party asserting it, and in the absence of such proof it must be held that she could remarry and retain the estate and would not forfeit it. Of course no custom can be established which would override the provisions of a statutory enactment, but where the Act does not apply at all, custom, being a part of the Hindu law, must override the general principles of that law. But a party must go the whole length of proving the full custom on which lie relies. By establishing only one part of it he cannot ask the court to infer the other. I would, therefore, have no hesitation in saying that unless it is affirmatively established that in addition to the custom of remarriage there is the further custom of forfeiture of the husband's estate, she is entitled to retain the estate even after remarriage and till her death.

I should like to add that even if I had not been independently convinced of the correctness of the view which has prevailed is this Court, I would have felt bound by the long course of unanimous decisions which have been given here. So far as these provinces are concerned, people have acted upon the belief that in the absence of any custom to the contrary a widow who is entitled to remarry under the custom of her caste does not forfeit her estate. Many a title would be upset if this interpretation of the law were to be reversed. There must be many transferees ofproperty who have purchased it in the expectation that their right would continue at least till the death of the widow, who would lose it by her voluntary act of remarriage. It would be extremely dangerous to shake the authority of long established decided cases of this Court, which, not being manifestly erroneous, have stood for a long period of time unchallenged in this Court and have been always followed. Affecting rights in property, they must be treated as having passed into the accepted law of these provinces. Of course where decisions are directly contrary to a statute, it is the duty of a Full Bench to overrule the previous decisions even though they might have stood for a very long time. But where the Act is at least ambiguous and the court does not feel absolutely able to overrule them, it would be unsafe to disturb the course of rulings. No doubt these decisions have been questioned in some of the other High Courts in India, but even there the opinion has varied and in recent times has been converging to the view taken in this Court. The reversion of the estate on remarriage would alter the course of succession and would let the property go to a different individual.

Many a reversioner must have refrained from, suing immediately on her remarriage in the expectation that succession would open out later on her death. The rulings of this Court must have affected diverse contracts and dealings between man and man. On the principle ofstare decisis it is our clear duty to adhere to those rulings so long as the legislature does not intervene or their Lordships of the Privy Council do not rule that they are wrong.

KING, J.:— The chief question for our determination is whether a Hindu widow, who remarries in accordance with the custom of her caste, forfeits thereby her rights in the estate of her first husband under section 2 of the Hindu Widows' Re-marriage Act, 1856. In other words, the question is whether section 2 of Act XV of 1856 applies to a Hindu widow who can remarry in accordance with the custom of her caste.

The language of section 2 is certainly very wide, and if the section is read alone, without regard to the preamble and to the other sections of the Act, it would undoubtedly apply to the present case. Section 2 purports to lay down a general rule that all rights and interests which "any widow" may have in her deceased husband'sproperty shall upon her remarriage cease and determine, as if she had then died. The words "any widow" would not only cover the case of a Hindu widow who is authorised by custom to remarry, but would also apply to a Christian or Muslim widow who had never been a Hindu at any time. I think it could not be seriously argued that a woman who has been a Muslim from her childhood and who married a Muslim husband who died in her lifetime would forfeit all rights in her deceased husband's property under section 2 of the Hindu Widows' Re-marriage Act if she married again. It is clear, therefore, that the wide language of section 2 must be controlled and restricted with reference to the preamble and to the provisions of the Act as a whole. The only question is how far should the language be restricted. The object and the scope of the Act can be ascertained from the preamble. The Act is described as "an Act to remove all legal obstacles to the marriage of Hindu widows". It is further explained that by the law administered in the civil courts, Hindu widows with certain, exceptions are held to be, by reason of their having been once married, incapable of contracting a second valid marriage, and as many Hindus believe that this imputed legal incapacity is not in accordance with a true interpretation of the precepts of their religion, and as it is just to relieve all such Hindus from this legal incapacity of which they complain, and the removal of all legal obstacles to the marriage of Hindu widows will tend to the promotion of good morals and the public welfare, therefore the Act has been passed. It is clear, therefore, that the legislature intended to remove all legal obstacles to the marriage of Hindu widows. It could not have been intended to apply to Christian widows or Muslim widows who were able ten remarry without taking advantage of the provisions of the Act. For the same reason I think the Act could not have been intended to apply to Hindu widows who were able to remarry in accordance with the custom of their caste without taking advantage of the provisions of this Act. Sections 1 and 2 seem to be closely connected and enact that a Hindu widow who is not permitted by custom or by any interpretation of Hindu law to remarry may nevertheless remarry, but if she does so, she must forfeit all rights and interests in her deceased husband's property. In other words, I think section 2 applies only to those Hindu widows who would not have been able to remarry if the Act had not been passed, and does not apply to Hindu widows who can remarry in accordance with the custom, quite apart from anything contained in the Act. The Act is an enabling Act for the benefit of Hindu widows who would not otherwise be allowed to remarry, and I think it could not have been the intention of the legislature to impose a penalty of forfeiture upon Hindu widows who can remarry in accordance with the custom and who need not rely upon the provisions of the Act to validate their remarriage. The Act was intended to remove legal obstacles to the marriage of Hindu widows and not to impose liability upon widows who could remarry apart from the provisions of the Act.

This interpretation of section 2 of the Act has been consistently adopted by the Allahabad High Court in a long series of decisions beginning with Har Saran Das v. Nandi(1). Certain Judges have expressed doubts regarding the correctness of this interpretation, but the current of authority has consistently been followed.

There has been a difference of opinion between the Judges of the Calcutta High Court 011 this point. The most important case is Matungini Gupta v. Ram Ruttori Roy(2), which was decided by a Full Bench. In that case a Hindu widow married a second husband, not a Hindu, in the form provided by Act III of 1872. The majority

of the Full Bench held that by her second marriage she forfeited her interest in her first husband's estate under section 2 of Act XV of 1856. The ruling is not directly applicable to the question now under consideration, because it did not deal with the case of a Hindu widow who remarried in accordance with the custom of her caste. The learned Judges, however, had to consider the meaning and scope of section 2 of Act XV of 1856 and some of their observations are applicable to the present question. WILSON, J., in his referring order (at page 294) holds that section 2 refers to any widow falling within the class to which the Act applies, and at page 293 he holds that the Act applies to Hindu widows other than those who could without the aid of the Act remarry according to the custom of their caste. His view is, therefore, that section 2 does not apply to a Hindu widow who could remarry without the aid of the Act according to the custom of her cate. BANERJEE, J., on page 296 holds that the words "any widow" in section 2 must be taken to mean any widow to whom the Act applies and for whom it was intended. It is doubtful whether he would have held the section to apply to a Hindu widow who could marry according to the custom of her caste, as it could hardly be held that the Act was intended for such a widow. The majority of the Full Bench interpreted section 2 in a wider sense and held that the section applied to all persons who being Hindus become widows.

According to that interpretation section 2 would no doubt apply to a Hindu widow who is entitled to remarry according to the custom of her caste, but it must be remembered that the learned Judges were not directly concerned with that question.PRINSEP, J., dissented from the opinion of the majority and held that section 2 was limited only to the cases provided for by the Act, namely Hindu widows remarrying as Hindus under Hindu law as provided by that Act. In his view, therefore, section 2 would not apply to a Hindu widow remarrying according to custom without the aid of the Act. It will be seen therefore that there was a conflict of opinion between the learned Judges on the point whether section 2 would be applicable to a Hindu widow who could remarry without the aid of the Act.

In Rasul Jehan Begum v. Ram Surun Singh(1) it was held that a Hindu widow on remarriage forfeits the estate inherited from her former husband, although according to custom prevailing in her caste a remarriage is permissible. This decision is based upon the general principles of Hindu law and not upon section 2 of Act XV of 1856. It is true that at the end of the judgment their Lordships referred to Har Saran Das v. Nandi(2) and dissented from it, but they did not expressly dissent from the view that section 2 of the Act does not apply. Their opinion seems to have been that, whether section 2 applies or not, a Hindu widow upon her remarriage forfeits her interest in her deceased husband's estate under the general principles of Hindu law.

In Ganga Pershad Sahu v. Jhalo(3) the learned Judges appear to agree with the Bombay High Court in holding that section 3 of Act XV of 1856 has no application to a case where the widow belongs to a caste in which remarriage is permitted; the object of the statute being to enable widows, who were unable to marry previously, to remarry, the statute ought to be considered as a whole, and such of its provisions as impose a disability ought not to be applied to cases where it is needles for the parties to seek the benefit of the provisions which recognize the right of a widow to remarry. They proceed to point out, however, that even if section 2 does not apply to such a case, the same result might follow from an application of the fundamental rules of Hindu law.

In Santola Bewa v. Badaswari Dasi(1) it was held that a Rajbansi widow after remarriage forfeits her deceased husband's estate even though there is a custom of remarriage in her caste. The learned Judges held that section 2 of the Act includes even a widow of a caste in which remarriages are permitted by caste custom. In support of their view they state that it is a fact that in almost all castes in which a remarriage is allowed by custom such marriages are followed by forfeiture of the first husband's estate. No authority is given for the statement of fact and there is reason to doubt, as I shall presently show, whether the alleged custom of forfeiture of the first husband's estate is by any means so universal as alleged.

The earlier view of the Bombay High Court in Parekh Ranchor v. Bai Vakhat(2) was that section 3 of Act XV of 1856 has no application to the case of a widow belonging to a caste in which remarriage is permitted. If section 3 does not apply to such a case, I think it would follow that section 2 would also not apply. In the later Full Bench case, Vithu v. Govinda(3), the contrary view was taken and it was expressly held that under section

2 a Hindu widow belonging to a caste in which remarriage has always been allowed, who has inherited property from her son, forfeits by remarriage her interest in such property.

In discussing the interpretation of Act XV of 1856 it as admitted that the preamble to the Act was at variance with its enacting clauses. The preamble evidently favoured the view that the Act was not intended for all classes of Hindu widows, whereas the enacting clauses are as wide and general as they can be. Their Lordships observed that the variation between the preamble and the enacting clauses was not the result of any oversight but that the legislature deliberately used the more general words in section 2 of the Act, because it was found that while the custom of prohibiting remarriage obtained in certain castes and did not obtain in others, in the matter of forfeiture by the widow of all interest in her first husband's estate there was no such divergence. They referred to, certain researches into the customs of castes in the Bombay Dekhan which indicated that there was not a single caste in which any custom to the contrary prevailed. Hence their Lordships concluded that section 2 was only declaring by statute what was already a universal practice. With due respect to their Lordships I do not think it can safely be inferred that even if the legislature knew that among the tribes or castes of the Bombay Dekhan a custom was in force that a Hindu widow should forfeit her rights in her husband's estate upon her remarriage, this would furnish an adequate ground for enacting, by a Statute applicable to the whole of British India, the rule that forfeiture of interest in her deceased husband's estate, must be a necessary consequence of the remarriage of every Hindu widow, whatever the custom of her tribe or caste may be. The Bombay Dekhan is only a small part of British India and it appears that the rule of forfeiture is by no means universal in this province at least among those; Pastes in which widows are permitted to remarry. In most of the long series of cases decided by the Allahabad High Court the plea was never raised, in cases where a custom of remarriage was admitted that remarriage entailed forfeiture of interests in her deceased husband's estate. If forfeiture of such interests was a necessary incident of the custom of remarriage it is it is conceivable that such a customary incident should not have been pleaded. In Ranjit v. Radha Rani(1) a custom of forfeiture upon remarriage was alleged but it was held to have been disproved upon the evidence. In Mangat v.Bharto(2) it was held that when a widow remarried according to custom then it was customary for her to retain her interest in her deceased husband's estate. The same custom, of retaining her interest in her deceased husband's estate, was proved inRam Dei v. Kishen Dei(3). In Narpat v. Janaka(4) it was held that forfeiture was not one of the legal incidents of the custom under which an Ahir widow is allowed to remarry. It appears therefore from an examination of the cases on this point in the United Provinces that where the custom of remarriage has been admitted or proved, then the custom of forfeiture has usually not been even pleaded as a legal incident of the custom of remarriage; when it has been pleaded it has never been proved and in some cases a contrary custom has been proved affirmatively. In my opinion therefore it is erroneous to assume that in cases where Hindu widows are allowed by custom to remarry, forfeiture of interests in their deceased husband's estate is universally recognized as a legal incident of the custom of remarriage. It cannot therefore be safely inferred that the legislature when enacting section 2 of Act XV of 1856 in very wide terms were only giving statutory sanction to a universal custom. The authority of the Bombay and Calcutta rulings is weakened by their reliance upon an erroneous assumption.

There has been some difference of opinion in the Madras High Court on the question whether section 2 would apply to a case of this sort. The most important case is Vitta Tayaramma v.Chatatcondu Swayya(1). This dealt with a case where a Hindu widow became a Muhammadan and married a Muhammadan husband, so it is not directly, in point. But the views expressed by the Judges on the applicability, of section 2 have some bearing upon the question before us. PHILLIPS, J., (at page 1080) held that section 2 was applicable to the facts of that case. KRISHNAN, J., took a contrary view. He remarked that having regard to the scope and object of the Act as stated in the preamble and seeing that it is a purely enabling Act, its provisions should not be applied to affect the property of persons who do not and could not take advantage of it. He came to the conclusion that the word "remarriage" in section 2 referred only to a remarriage under the Act and not to any remarriage whatsoever. He clearly held that section 2 would not apply to the case of a Hindu widow who is permitted by custom to remarry, and he dissented from the reasoning in the Bombay Full Bench case in the following words: "With all deference I am unable to follow this method of interpretation, nor am I satisfied that the practice of widows forfeiting their right in their first husband's property on remarriage is so universal in India as is stated. If there are castes

which allow widows to remarry and keep their estates at the same time (and I am not sure there are not any) I can see no reason, to think that the legislature in enacting Act XV of 1856 intended to interfere with the rights of such widows." I emphatically endorse these remarks. WALLIS, C.J, thought section 2 is wide enough to cover the case of any Hindu widow remarrying, whether or not her marriage would otherwise be prohibited by any custom or interpretation of Hindu law. The other two learned Judges OLDFIELD, J., and SESHAGIRI AYYAR, J., both held that section 2 would not apply to the facts of the case before them and the remarks of OLDFIELD, J., would also clearly apply to tho, case of a Hindu widow permitted by custom to remarry.

In view of this conflict of opinion it cannot be said that the Madras-High Court are committed to the view that section 2 applies to Hindu widows permitted by custom to remarry.

The Lahore High Court in Parji v. Mangta(1) held that the Act does not apply to the case of a Hindu widow who remarries according to the custom of her caste. The Patna High Court in Musammat Suraj Jote v. Mst. Attar Kumari(2) took the contrary view, following the Calcutta High Court in Matungini Gupta v. Ram Rutton Roy(3). The Judicial Commissioner's Court and Chief Court of Oudh have consistently taken the view that section 2 would not apply to a case of this sort. I may refer to Narpat v.Janaka(4) and Bhagwan Din v. Indrani(5) and Ram Lal v. Musammat Jwala(6).

In spite of the fact that certain Judges of certain other High Courts have taken a contrary view, I think the long series of Allahabad rulings, which take the view that section 2 of the Act does not apply to the case of a widow who is permitted to remarry by the custom of her caste, are correct. There is no adequate ground for upsetting the law which has been settled by judicial authority in this province.

A further question arises, whether the widow upon her remarriage would not forfeit her interest in her deceased husband's estate under the general principles of Hindu law even if she did not do so under section 2 of Act XV of 1856.

It appears to me that the general principles of strict Hindu law could not be properly applicable to a caste in which a custom of remarriage is admitted. If the members of the caste recognize the remarriage of a widow as valid, then it follows that they do not accept the theories of orthodox Hinduism which would make a legal remarriage impossible. If such theories are rejected by the caste for the purpose of permitting remarriage, it seems illogical to invoke the very same theories for the purpose of holding that if the widow does remarry, then she must forfeit her rights in her deceased husband's estate. MUKERJI, J., as dealt with this aspect of the case at length, and I need only say that I concur in the views which he has expressed. In my opinion, if there is a recognized custom permitting a widow to remarry, then there must also be a custom either of retention of interests or forfeiture of interests in her deceased husband's estate. Retention or forfeiture of interests is merely a legal incident of the custom of remarriage, and in cases where a Hindu widow's right to remarry is governed by the custom of her caste, then I think the question of retention or forfeiture of her interests in her deceased husband's estate must also be governed by custom. Unless a custom of forfeiture is proved, then the widow would retain the interests which have vested in her.

My answer to the reference is, "No unless a custom is proved whereby the widow forfeits her rights in the estate of her first husband in consequence of her remarriage."

BY THE COURT:—In our opinion section 2 of Act XV of 1856 does not apply to the case of those widows who are entitled under the custom of their caste to remarry and are not bound to take advantage of the provisions of the Act. Accordingly there is no forfeiture under the Act of the Hindu widow's estate on remarriage in such a case.

We are further of opinion that the proof of mere custom of remarriage would not be sufficient to involve forfeiture under the Hindu law, and that it would be necessary for the party claiming that the estate has been forfeited on account of remarriage to prove that there is a custom of such forfeiture in such contingency.

Let our answer to the reference be sent to the Bench concerned.

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FATEH SINGH AND OTHERS VERSUS RAGHUBIR SAHAI AND OTHERS

1938 SCC OnLine All 535 : ILR 1938 All 904 : 1938 All LJ 881 (FB) : 1938 OWN 985 (FB) (All) : AIR 1938 All 577

Allahabad High Court

Full Bench

(Before Hon'ble Mr. Justice Bennet, A.C.J & Hon'ble Mr. Justice Collister & Hon'ble Mr. Justice Mulla, JJ.)

Fateh Singh and Others … (Plaintiffs);

v.

*Raghubir Sahai and Others … (Defendants).**

Appeal No. 41 of 1936, under section 10 of the Letters Patent
Decided on August 15, 1938

Hindu law — Alienation of movable or immovable property of a widow, inherited from husband — Legal necessity required — Sale by widow of usufructuary mortgagee rights forming part of the husband's estate -A Hindu widow is not entitled to transfer property, whether movable or immovable, which formed part of the estate of her husband inherited by her, unless she does so for legal necessity; Accordingly, where usufructuary mortgagee rights in a certain land formed part of the estate inherited from her husband, and the widow sold, without legal necessity, such rights, it was held that whether usufructuary mortgagee rights are deemed to be movable property or immovable property, the sale was invalid.

Per Mulla, J.—The doctrine of nibandha in Hindu law makes it clear that the conception of "immovable property" in Hindu law is not confined to lands and houses but includes rights to receive a payment or to derive an income which is charged upon some land, as also certain other incorporeal rights which are not immediately connected with land. The rights of a usufructuary mortgagee, which are immediately and intimately connected with land, are certainly included in the conception of "immovable property" in Hindu law.

Mr. L.N Gupta, for the appellants.

Mr. Ambika Prasad, for the respondents.

The Judgment of the Court was delivered by

BENNET, A.C.J:— This is a Letters Patent appeal brought by three plaintiffs whose suit was decreed by the two courts below but has been dismissed by a learned single Judge of this Court. The plaint set out that Tilok Singh (who was actually the maternal grandfather of the plaintiffs) had received a mortgage with possession of a certain share of zamindari property. The date of this mortgage is not given, but in evidence it has been admitted by defendant 5, Dal Chand, that Tilok died some 40 or 45 years ago and the usufructuary mortgage in his favour by Durjan Singh must have been prior to that date. The plaintiffs further set out that Tilok Singh died and left two widows Mst. Bilka Kuar and. Mst. Gaura. On the 23rd of July, 1907, Mst. Bilka Kuar executed a sale deed in favour of Dal Chand, defendant 5, and Chandan, the father of defendants 1 to 4. This sale deed was of one half of the mortgagee rights which she owned jointly with the co-widow. The consideration was Rs.

250. Both widows and a daughter are now dead. The remedy asked in the plaint is a declaration that this transfer was not binding on the plaintiffs who are reversioners and that they might eject the defendants and be put in proprietary possession of the propertydetailed below. Now as the plaint was originally brought it was somewhat different and the reference was only to a deed of sub-mortgage by Mst. Bilka Kuar dated the 14th of July, 1904. In regard to that document the written statement of Kandhai Lal, defendant No. 1, was that it had been paid up and further it was claimed that it did not relate to the property in relief (c) of the plaint. Apparently this position was accepted by the plaintiffs and the plaint was amended by the introduction of the sale deed of 23rd July, 1907, as the basis of the plaint. It may be noted in passing that two other defendants Mst. Gulab Kuar and Mst. Bhagwan Kuar were merely persons to whom it was alleged that during the pendency of the suit deeds of gift had been made by the other defendants and their case need not detain us. Now the courts below found that there was no legal necessity for the sale deed of 23rd July, 1907. The courts therefore decreed the suit of the plaintiffs. The learned single Judge took a view that Mst. Bilka Kuar was entitled to recover a debt and therefore she could accept money from some other person who was willing to pay the debt and she could transfer her mortgagee interest to that person. He further stated: "It has been found by the courts below that the mortgage which was transferred to Dal Chand and Chandan has now been redeemed." Accordingly he allowed the appeal of the defendants and dismissed the suit of the plaintiffs. Now in regard to his statement that the mortgage has now been redeemed learned counsel for respondents contended that this referred to the usufructuary mortgage deed of the period of about half a century ago. It has never been the pleading in the written statement that usufructuary mortgage deed has been paid or redeemed. When Dal Chand gave evidence no doubt he did state that there was a mortgage which was satisfied, but this apparently related to paragraph 2 of the written statement of Kandhai Lal which is as follows: "The deed of mortgage, dated the 14th of July, 1904, has been paid up. The plaintiffs have brought this suit on some misunderstanding. Probably the claim has been got up on the basis of a paid up deed of mortgage by looking the name of the contesting defendants entered in the khewat." Now this paragraph refers clearly to the document of 14th July, 1904, which is described by the plaint in paragraph 10 as a submortgage by Mst. Bilka Kuar. The defence that sub-mortgage had been paid up was apparently correct. In this paragraph however there is an admission that the names of the contesting defendants are still in the khewat. It is shown therefore that the contesting defendants are still-in possession except so far as they have made deeds of gift during the pendency of the suit. I am satisfied that the learned single Judge was mistaken in thinking that the courts below had held that the usufructuary mortgage of half a century ago in favour of Tilok Singh had been redeemed. The first issue no doubt in the judgment of the trial court was "Has the mortgage deed in suit been satisfied?" and it was held that it had been satisfied, but, as the plaint shows, that mortgage deed was the deed of sub-mortgage of 1904. I am satisfied therefore that the usufructuary mortgage referred to in the plaint as made in favour of Tilok Singh is still in existence as a usufructuary mortgage and has not been redeemed.

The learned single Judge drew a distinction between movable and immovableproperty. He states: "There is however one other argument which in my opinion is sufficient to cause the suit to fail. I am not satisfied that this was an alienation which the widow was not entitled to make in accordance with Hindu law. It has been more or less presumed that the widow was transferring immovable property." He then proceeded to state that a mortgage was primarily a debt and apparently he considered that because this mortgage was a debt it was therefore movableproperty and could be alienated by the widow. Now there are several propositions here which I consider are incorrect. In Bhugwandeen Doobey v. Myna Baee(1) it has been laid down as long ago as 1867 by their Lordships of the Privy Council that no part of the husband's estate movable or immovable forms portion of his widow'sstridhan and she has no power to alienate the estate inherited from her husband to the prejudice of his heirs which at her death devolves on them. This ruling shows therefore that neither the movable nor the immovable property which forms part of the husband's estate can be alienated by a Hindu widow. I am satisfied that the distinction drawn between movable and immovable property in the judgment of the learned single Judge is not correct. In connection with his proposition that the mortgage in suit is movable property the learned single Judge referred to the ruling in Jang Bahadur v. Bhagatram Sheoprasad(2), where it was held that the interest of a mortgagee in the usufructuary mortgage is immovableproperty for the purpose of order XXI, rule 90. That ruling proceeded on the ground that the General Clauses Act stated that "Immovable property

shall include land, benefits to arise out of land…" and the Court held that under the definition in section 58 of the Transfer of Property Act a mortgage was a transfer of an interest in land. Now in the case of a usufructuary mortgage the mortgagee holds possession of the land and receives the usufruct of the land and clearly that usufruct would come under the words "benefit to arise out of land". In the case of a simple mortgage the matter is different because there is the right of the mortgagee to recover his debt which is a right to sue and there is no doubt a transfer of an interest in immovableproperty for the security of that debt. If the debt is considered in the case of a simple mortgage then no doubt the simple mortgage is not immovable property, and this has been held in a large number of rulings. In Abdul Majid v. Muhammad Faizuilah(1) a decree-holder had a decree for sale of hypothecated property and he executed a deed of assignment of the decree. It was held that this deed did not require to be registered as the decree was not immovable property. In Karim-un-nissa v. Phul Chand(2) a decree-holder of a simple money decree attached the rights under a simple mortgage of his judgment-debtor. It was held that this was not immovable property and that the attachment was correctly made under section 268 and not section 274 of the Civil Procedure Code of 1882. The judgment stated: "The thing which was sold was a debt due to the mortgagee who was not in possession of, and apparently at the date of sale had no right to the possession of, the mortgagedproperty." Now this ruling points out that the absence of a right to possession of the immovable property was a factor in the rights of the simple mortgagee being held to be movable property. The case of a usufructuary mortgage is different because the usufructuary mortgage has a right to possession of the property but he has no right to bring the property to sale. InLal Umrao Singh v. Lal Singh(1) it was held that a simple hypothecation bond is movable property for attachment and sale in execution of a decree and order XXI, rule 89 does not apply. A quotation is made on page 920 from Tarvadi Bholanath v.Bai Kashi(2), where it was laid down: "A simple mortgage creates a right to recover the debt due on it from land; a mortgage with a right of foreclosure creates a right to recover the land itself. Therefore a debt due on a simple mortgage is a debt, though it is secured on land, and the security is merely collateral." On a consideration of these rulings I hold that the rights of a simple mortgagee are movable property and the rights of a usufructuary mortgagee are immovable property and on this point I differ from the learned single Judge. As already stated, however, the question of movable or immovable property is not the criterion to apply in the present case, because a Hindi widow is not entitled to transfer property, whether movable or immovable, which formed part of the estate of her husband unless she does so for legal necessity.

Learned counsel for respondents argued that a Hindu widow in possession of her husband's estate has a right to realise debts. That may be so but the present is not a case of realising a debt. No doubt, as the learned counsel pointed out, a mortgagor has a right to redeem his mortgage and on a tender or deposit of the mortgage money the mortgagee is bound to accept that offer, but such a case is not before us and the considerations which govern that case cannot apply to the present case, which is a transfer by a Hindu widow of the rights of a usufructuary mortgagee which devolved on her after the death of her husband. Learned counsel referred to Bai Jadiv. Purshottam Narottam(3). This was a decision under the Mayukha law where the rights of a Hindu widow are wider than in this province under the Mitakshara law. In that ruling it was held that a usufructuary mortgagee right is not immovable property and on page 389, column 2, there is a passage in regard to the redemption of a usufructuary mortgage during the lifetime of the widow. That case is different from the present because the present case is not one of redemption. I do not think that the distinction between immovable property and movable property applies in the present case and in the Bombay ruling there was no mention of the ruling of their Lordships of the Privy Council which has been quoted above.

In conclusion it appears that the usufructuary mortgage in question was a part of the estate of the Hindu husband and that a Hindu widow has no right of transfer of the usufructuary mortgagee rights without legal necessity. I would therefore allow this Letters Parent appeal and set aside the decree of the learned single Judge of this Court with costs in this Court and restore the decree of the lower appellate court granting possession to the plaintiffs against the defendants.

COLLISTER, J.:— I agree that this appeal must be allowed.

There can, I think, be no doubt that, apart from considerations of Hindu law, the interest of a mortgagee in a usufructuary mortgage is immovable property, such interest comprising as it does a right to enjoy "benefits to arise out of land"; and I can find no ground for any differentiation in the conception of immovable propertywhere the rules of Hindu law are being applied to an alienation by a widow, as in the case before us. Influenced by special considerations, the learned Judge of this Court was of opinion that the transfer for value by Mst. Bilka, a Hindu widow, of her late husband's rights in a usufructuary mortgage was not a transfer of immovableproperty within its "technical meaning". His reasoning is based on the ground that a Hindu widow is entitled to recover a debt which was due to her husband and that, as a mortgage is primarily a debt, Mst. Bilka was competent to realise it in such manner as was available to her. I think this argument is fallacious quoad a usufructuary mortgage for the reason that a usufructuary mortgagee has no power to enforce his mortgage and put theproperty to sale. His function is to remain in possession of the property, enjoying its usufruct as an owner and to the exclusion of all other persons, until redemption or until the expiry of 60 years under article 148 of the Limitation Act, after which period his rights in the property become indefeasible.

In the Bombay case of Bai Jadi v. Purshottam Narottam(1) the facts were different from the facts of the case before us, but there are certainly observations in the judgment to the effect that possessory mortgagee rights of a Hindu in Bombay in the hands of his widow are tat immovable property. If that proposition was intended to apply to any Hindu widow, I respectfully dissent from it.

In my opinion Mst. Bilka was not competent, in the absence of such necessity as is recognized by Hindu law, to transfer her interest in this usufructuary mortgage, which formed part of her late husband's estate.

I also agree that Hindu law makes no distinction between a widow's right to alienate immovable property and her right to alienate movable property, so long as it formed part of the corpus of her husband's estate; but the question as to what the legal position would be if the transaction in the present case had been a simple and not a usufructuary mortgage is of course not before us.

MULLA, J.:— This is a Letters-Patent appeal by the plaintiffs in a suit for possession of a small parcel of zamindari land and for mesne profits. The property in dispute was originally held under a usufructuary mortgage by one Tilok Singh who died 40 or 45 years ago leaving him surviving two widows, Bilka Kunwar and Gaura and a daughter namely Dulari by the former. Mst. Gaura died 17 or 18 years before the institution of the suit and upon her death the whole estate of Tilok Singh comprising the property in dispute came into the possession of Mst. Bilka Kunwar as his sole heir. Mst. Bilka Kunwar died 8 or 9 years before the institution of the suit and thus the whole estate devolved upon her daughter, Dulari. The suit was instituted 7 or 8 months after Dulari's death in 1932 by her three sons who were admittedly the next reversioners of Tilok Singh. Two of them have died during the pendency of the case and are now represented by their father Rabi Lal Singh. The dispute centres round a deed of sale executed by Mst. Bilka Kunwar on the 23rd of July, 1907. By that deed she transferred one half of the mortgagee rights in theproperty in dispute, which she had inherited from her husband, jointly to two persons named Chandan Lal and Dalchand. Dalchand is one of the contesting defendants, the others being the heirs and representatives of Chandan Lal. There are two more defendants in the suit who have been impleaded on the ground that they are donees from the original vendees, Chandan Lal and Dalchand. A doubt appears to have arisen during the trial of the suit that the property in dispute had been redeemed but that doubt has been, resolved and the argument has proceeded on the assumption that the defendants are still in possession of the property in dispute as usufructuary mortgagees having acquired that right under the deed of sale executed by Mst. Bilka Kunwar.

The plaintiffs claimed that they were entitled to eject the defendants and to recover possession of the property in dispute because the defendants' title rested on the sale deed executed by Mst. Bilka Kunwar which was invalid inasmuch as it was not supported by any legal necessity. The suit was contested in the first court mainly on the ground that there was legal necessity for the sale deed in question but one of the defendants who was impleaded for the first time in the lower appellate court also raised the plea that the question of legal necessity did not arise at all because the sale deed involved only a transfer of the rights of a usufructuary

mortgagee which did not constitute immovable property and hence the power of Mst. Bilka Kunwar to make the transfer was not subject to the limitations imposed by the Hindu law. This latter plea do es not appear to have been seriously pressed in the lower appellate court and the argument was confined to the question of legal necessity. On that question both the courts below found upon the evidence that the sale deed in question was not supported by any legal necessity and hence the suit was decreed. In the second appeal before a learned Judge of this Court the defendants pressed the plea that the rights of a usufructuary mortgagee did not constitute immovable property as contemplated by the Hindu law and hence it was not necessary that the sale deed in question which transferred merely those rights to the defendants should have been supported by any legal necessity. It was also contended that the transaction really amounted to the recovery of a loan by transfer of the security for it and such a transaction was fully within the competence of Mst. Bilka Kunwar and the restrictions imposed by the Hindu law upon a widow's power of transfer did not apply to it. These arguments found favour with the learned single Judge of this Court and he consequently dismissed the suit; hence the present appeal.

The argument on behalf of the appellant is that the finding of the learned single Judge of this Court is vitiated by an erroneous conception of the powers of a Hindu widow in dealing with the property which she inherits from her husband and by a misappreciation of the true nature of the property in dispute on the assumption that the conception of immovable property is embodied in the statutory law was something different from that contemplated by the Hindu law. In order of appreciate the force of this contention it is necessary to set out the relevant portion of the judgment of the learned single Judge which runs as follows:

"I am not satisfied that this was an alienation which the widow was not entitled to make in accordance with the Hindu law. It has been more or less presumed that the widow was transferring immovable property. In this Court a reference has been made to the case of Jang Bahadur v. Bhagatram Sheoprasad(1) in order to establish the proposition that mortgagee rights are rights in immovable property. That judgment is based upon the technical meaning applied to the term by the Transfer of Property Act and the General Clauses Act. Where the term 'immovable property' is used in a statute it must of course include the interests of a mortgagee in immovable property, but there is no such technical use of the term when the rules of Hindu law are to be applied. A mortgage is primarily a debt. It is true that it is a secured debt and that certain interests in immovable property are involved if the debt is not paid, but as I have already said, in its primary aspect the mortgage is a debt and the mortgagee has a right to enforce the recovery of money. A Hindu widow is entitled to recover the debts due to her husband. In the present case Mst. Bilka Kunwar did not take the money from the mortgagors, but if she could recover the debt I do not see why she could not accept the money from some other person who was willing to pay her and transfer her mortgagee interests in the property to that person."

Upon a careful consideration of the matter in all its legal aspects, I am definitely of the opinion that the appellant's contention is sound in law and ought to prevail. It is quite clear from the quotation which I have made from the judgment of the learned Judge that the whole structure of his argument is primarily based on the assumption that the limitations imposed by the Hindu law upon the powers of a widow in dealing with her husband's estate apply only to immovable property. No elaborate argument is needed to show that this assumption is wholly erroneous. The Hindu law makes no distinction between movable and immovable property in the hands of a Hindu widow so long as the property is inherited by her from her husband. Strictly speaking the Hindu law permits a Hindu widow only to enjoy the income of her husband's estate in a frugal manner. She is enjoined to lead a life of ascetic privation and to preserve her husband's estate, whether movable or immovable, as far as possible in its entirety for the benefit of the reversioners. It is true that in the course of us interpretation by the British courts which could not help being influenced by the gradual change in social conditions the Hindu law has lost a great deal of its purity and rigour and it is now well recognized on the highest authority that a Hindu widow possesses absolute power of disposal over all accumulations and income of her inherited estate, but it has been consistently had that the restrictions placed upon her power of transfer apply equally whether the property she has inherited is movable or immovable. The matter was concluded by the decision of their Lordships of the Privy Council as far back as 1867 in the case of Bhugwandeen Doobey v.

Myna Baee(1). In that case their Lordships upon an exhaustive consideration of the Hindu law texts and other authorities arrived at the following conclusion:

"Their Lordships, therefore, have come to the conclusion that, according to the law of the Benares School, notwithstanding the ambiguous passage in the Mitakshara, no part of her husband's estate, whether movable or immovable, to which a Hindu woman succeeds by inheritance, forms part of her stridhan, or particular property; and that the text of katyayana which is general in its terms, and of which the authority is undoubted, must be taken to determine — first, that her power of disposition over both is limited to certain purposes; and, secondly that on her death both pass to the next heir of her husband."

In the same case their Lordships observed in the course of their judgment as follows:

"The reasons for the restrictions which the Hindu law imposes on the widow's dominion over her inheritance from her husband, whether founded on her natural dependence on others, her duty to lead an ascetic life, or on the impolicy of allowing the wealth of one family to pass to another, are as applicable to personal property invested so as to yield an income as they are to land. The more ancient texts importing the restriction are general. It lies on those who assert that movable property is not subject to the restriction to establish that exception to the generality of the rule."

The authority of this case has, of course, since been followed in several cases in various High Courts in India, e.g, Gadadhar Bhat v. Chandrabhagabai(1) and Durga Nath Pramanik v. Chintamoni Dassi(2). It must, therefore, be held that the power of a Hindu widow to alienate movable property is as limited as it is in the case of immovable property. This finding is enough to dispose, of the appeal and to entitle the plaintiffs to a decree, but in view of the fact that a question was specifically raised in the course of argument on behalf of the respondents that the rights of a usufructuary mortgagee do not constitute immovable property, and this question being one of general importance, it is necessary to examine the contention in order to see if it is well founded. It is conceded that for the purposes of statutory law such tights must be deemed to constitute immovable property. So far as this High Court is concerned, there is the clear authority of Jang Bahadur v. Bhagatram Sheoprasad(3), where it was held that a mortgagee's interest in a usufructuary mortgage is immovable property within the meaning of rule 90, order XXI of the Civil Procedure Code. It appears further from that case that the same view has been taken by the Bombay and the Calcutta High Courts though a dissentient note has been struck by the Madras High Court in various cases, the latest of which is Chullile Peetikayil Nammad v. Othenam Nambiar(4). So far as this High Court is concerned, it may be taken to be well settled that if a question arises as to whether the rights of a usufructuary mortgagee constitute immovable property within the meaning of the staturory law, the answer must be in the affirmative. It is contended, however, that what may be immovable property within the meaning of the statutory law need not necessarily be immovableproperty as contemplated by the Hindu law and this contention has found favour with the learned single Judge of this Court. The argument necessarily implies that the conception of immovable property as derived from the statutory law is something quite different from the same conception in the Hindu law or to put it in other words is repugnant to the letter or spirit of the Hindu law. I do not however, find any justification for this assumption. There is no warrant for the supposition that the Hindu law classed only land and houses as immovable property and did not include, within the meaning of that term, my right or interest immediately connected with land. The Hindu law has nowhere defined immovable property, but it is clear that it regarded many incorporeal rights as falling within that class of property. The doctrine of nibandha being classed as immovable property by the Hindu law is well known and well recognized by judicial decisions. According to that doctrine the royal grant of an annuity or a fixed pension has been classed as immovable propertywithin the contemplation of the Hindu law, as in the Full Bench case of the Collector of Thana v. Hart Sitaram(1) It is thus clear that where a right to receive a payment or to derive an income was charged upon some land, it fell within the purview of immovable property as contemplated by the Hindu law. We find further that even incorporeal rights which were not immediately connected with land were regarded by the Hindu law as immovable property for instance a hereditary office or a right to officiate as a priest at funeral ceremonies. It may also be noted that in the case ofKrishnaji Pandurang v. Gajanan Balvant(2) CHANDAVARKAR, J., held that an allowance granted in permanence, whether secured

on land or not, was according to the Hindu law nibandha and must therefore be held to be immovable property. It is thus clear that the conception of immovable property in Hindu law was not confined to land or houses but was wide enough to include various incorporeal rights whether they had any immediate relation to land or not. The conception being so wide in us scope, I see no reason to hold that the rights of a usufructuary mortgagee which are recognized as immovableproperty by the statutory law and which are immediately and most intimately connected with land do not fall within its purview. The usufructuary mortgagee is in actual possession of the land and is entitled to enjoy its usufruct to the fullest extent. What is still more important is that he has the right of exclusive enjoyment of theproperty. He is entitled to exclude all others, including the owner himself, from the possession or enjoyment of the property and if he is wrongfully deprived of his possession he has the right to recover it. Williams in his Law of Real Property in dealing with the incident of ownership observes as follows (24th Edition, page 2):

"This right to maintain or recover possession of a thing as against all others may, we think, be said to be the essential part of ownership. As regards its other incidents, ownership may be absolute or else limited or restricted. Thus absolute ownership would seem to include the right of free as well as exclusive enjoyment; by which we mean the right of using, altering or destroying the thing owned at the owner's pleasure, so only that he do not violate any other person's right to security of person and property. But those who have rights of exclusive though restricted enjoyment are nevertheless commonly termed owners."

The rights given by the law to the usufructuary mortgagee, though they fall short of absolute ownership, are yet a very important part of it and they are so intimately connected with land that in my opinion they cannot but be deemed to constitute immovable property within the meaning of that term in the statutory law.

I see nothing repugnant either to the letter or the spirit of the Hindu law in holding that such rights constitute immovable property. I would therefore hold that the transfer of such rights by a Hindu widow is a transfer of immovable property within the contemplation of the Hindu law.

The learned counsel for the respondent, however, relied on an authority of the Bombay High Court in the case of Bai Jadi v. Purshottam Narottam(1). In that case a Hindu widow had made a sub-mortgage of her rights as a usufructuary mortgagee in certain property which she had inherited from her husband and a question arose whether such rights constituted immovable property. In dealing with this questionMACLEOD, C.J, observed as follows:

"But no authority has been cited for the proposition that, a usufructuary mortgage is immovable property so that if the mortgage is redeemed during the widow's lifetime and the widow spent the money, as she would be entitled to do, the reversioner could claim against the party redeeming to be again-put in possession of the property until redeemed a second time. Clearly the mortgage rights which were vested in Bai Manek represented movable property and could be sold in execution of the decree against Bai Manek, and no question of legal necessity would arise. The mere fact that Bai Manek was in possession as mortgagee would not cause those mortgage, rights to be treated in law as immovable property, as all that the widow was entitled to was to retain possession of the property as security for the debt until she was redeemed."

With the greatest respect for the learned Judge I venture to think that this is not a wholly true appreciation of the position of the usufructuary mortgagee. As I have pointed out above, the rights of a usufructuary mortgagee taken as a whole form a very large and important part of the bundle of rights which constitute ownership. It is not in my opinion a wholly correct description of such rights to say that all that a usufructuary mortgagee is entitled to is to retain possession of the property as security for the debt until he is redeemed. He is entitled in fact to the fullest enjoyment of the property and has the right to exclude all others' including the owner from its possession and enjoyment. He may not be the absolute owner of theproperty, but, for all practical purposes, he may well be deemed to be the owner thereof while he is in possession. If he is not redeemed within the period prescribed-by the law, his rights mature into absolute ownership. I cannot persuade myself to hold that the rights which he thus possesses and which are so intimately connected with immovableproperty can be properly de discribed as movable property. The fact that theproperty in his possession is open to redemption by the

owner is to my mind quite irrelevant for the purposes of determining the nature of the property. Under section 58 of the Transfer of Property Act what is conveyed to the usufructuary mortgagee is the transfer of an interest in specific immovable property. I fail to see how it can be suggested that the transfer of an interest in specific immovableproperty is really the transfer of some movable property. I further fail to understand how the nature of the property which is transferred by a mortgagor can under any alteration in the hands of the mortgagee. If the mortgagor transfers what in the eye of the law is included within the meaning of immovable property the subject of the transfer must retain its character even in the hands of the mortgagee. Again with great respect I cannot agree to the proposition laid down by the learned Chief justice that the rights of a usufructuary mortgagee in the hands of a Hindu widow must obviously be deemed to be movable property because they can be seized in execution of a decree against her, based on her personal security, and no question of legal necessity would arise in that case. I think on the other hand that even if a Hindu widow incurs a debt for legal necessity, but without creating a charge upon her husband's property, the creditor, who obtains a decree against her on the basis of such a debt can only bind the rights and interest of the widow in anyproperty forming part of her husband's estate which he might seize in execution. I am supported in this view by the decision of this Court in Kallu v. Faiyaz Ali Khan(1). I am therefore unable to accept the authority of the case relied upon by the learned counsel for the respondents for holding that the rights of a usufructuary mortgagee are only movable property. It is unnecessary to pursue this question any further because the decision of the present case must necessarily be against the respondents in view of the finding that the restrictions placed upon the powers of a Hindu widow apply equally to movable and immovable property forming part of her husband's estate.

Lastly it was argued on behalf of the respondents that the transaction with which we are concerned in the present case was entirely within the competence of Mst. Bilka Kunwar because it amounted only to the recovery of a loan. In the first place I cannot possibly accept the suggestion that the transaction in question was not a transfer of property but only the recovery of a loan. Under the law she had no right to recover the loan but only to remain in possession of the property and to enjoy its usufruct until the mortgagor came to redeem it. In the second place even if it is conceded that a Hindu widow is entitled to recover a debt payable to her husband's estate, it does not necessarily follow therefrom that she is entitled to transfer anyproperty for that purpose without any legal necessity. The power given to her by the law to manage her husband's estate and to recover any debts payable to it does not set aside the limitation placed upon her power of transfer. Ordinarily the recovery of a debt cannot involve the transfer of any property, but even if in any case a widow transfers any part of her husband's estate for the ostensible object of recovering a debt, I think the validity of that transfer shall always be open to question on the ground that it was not supported by legal necessity. The fact that the property in the hands of Mst. Bilka Kunwar could always be redeemed by the mortgagor is to my mind entirely irrelevant to the question in issue.

For these reasons I hold that the sale deed executed by Mst. Bilka Kunwar on the 23rd July, 1904, by which she transferred the mortgagee rights in the property in dispute which formed part of her husband's estate, was invalid because it was not supported by legal necessity and could not, therefore, convey any title to the defendants which could enure after her death. I would therefore allow this Letters Patent appeal and set aside the decree of the learned single Judge of this Court with costs in this Court and decree the plaintiff's suit for possession of the property in dispute.

BY THE COURT:— The Letters Patent appeal it allowed with costs in this Court and the judgment of the lower appellate court is restored granting the plaintiffs a decree for possession.

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SURESH DARVADE VERSUS ARJUN RAM PANDEY

2010 SCC OnLine Chh 39 : AIR 2010 Chh 40 : 2010 AIHC (NOC 1110) 343

(Before Hon'ble Mr. Justice Prashant Kumar Mishra, J.)

Suresh Darvade

v.

Arjun Ram Pandey

Second Appeal No. 438 of 2009

Decided on February 19, 2010

JUDGMENT

Section 26 of Hindu Succession Act--the plaintiff ceased to be a Hindu, whether he could take shelter of the provisions of the Hindu Succession Act to base his title on the suit property....This Section does not disqualify a convert. It only disqualifies the descendants of the converts who are born to the convert after such conversion from inheriting the property of any of their Hindu relatives. The disqualification does not affect the convert himself or herself. . Thus provision contained in Section 26 of Hindu Succession Act does not disqualify the convert himself from succeeding to the property of Hindu father.

Heard on admission.

2. The respondent/plaintiff preferred a suit for declaration of title and possession of plaint Schedule-A property on the plea that one Jhadu Ram was his father and the original defendant No. 1 Gendi Bai is his mother. Jhadu Ram was granted lease (patta) of the suit land and after his death, it was recorded in the name of Gendi Bai (step-mother of the plaintiff). According to the plaintiff, after the death of Gendi Bai, he would succeed to the property, however, the original defendant No. 2.appellant has encroached over the property and is in illegal possession, therefore, his title may be declared and possession may be delivered to him.

3. The defendant came up with a plea that the plaintiff is not the son of Gendi Bai but he is son of Budhyarin Bai and that the suit property was a self acquiredproperty of Gendi Bai, being her stridhan and it was never recorded in the name of Jhadu Ram. The defendant claims that he has purchased the property from Gendi Bai and that since the plaintiff has embraced Islam religion, he is disentitled to succeed in property and he cannot be the owner of the property belonging to Gendi Bai.

4. The trial Court decided all material issues against the defendant and in favour of the plaintiff to hold that the plaintiff is the owner of the suit property, the suitproperty belonged to Jhadu Ram and was not self acquired property or stridhanproperty of Gendi Bai, the defendant has failed to prove the execution of sale deed or valid and lawful alienation of the property by Gendi Bai in his favour, the possession of defendant No. 2.appellant is illegal and that the plaintiff is entitled to recover the possession of the suit land from defendant No. 2. The trial Court, while answering issue No. 10 has categorically recorded the finding that the plaintiffs act of embracing Islam religion would not disentitle him to succeed to the property of his father.

5. The first appellate Court has confirmed all the findings recorded by the trial Court on all material issues and has thus concurred with the judgment and decree passed by the trial Court.

6. Learned counsel for the appellant has vehemently argued that the findings recorded by the Courts below that the property belonged to Jhadu Ram is perverse. He submits that since the plaintiff ceased to be a Hindu, he could not take shelter of the provisions of the Hindu Succession Act to base his title on the suit property, therefore, the Courts below ought to have dismissed the suit.

7. On consideration of the arguments raised by the counsel for the appellant and on perusal of the records, this Court is not impressed with the arguments advanced by the learned counsel for the appellant. The document (Ex. P/3) is a grant made in favour of Jhadu Ram leasing the property in his favour. The document has been issued by the office of Collector under the signature of Additional Collector of the concerned district. Thus, the finding that the property belonged to the plaintiffs father Jhadu Ram is not perverse.

8. Once it is found that the property belongs to Jhadu Ram, the plaintiff being his son would be entitled to succeed his property and mere fact that he has embraced Islam religion afterwards would not disentitle him to succeed the property of this father. This Court may profitably quote, AIR 1976 Calcutta 272 para 8 as below :

"8. Mr. Panda submits that the appellate Court was wrong to hold that a convert from Hinduism is not a disqualified heir. Mr. Panda refers to us Section 2 of the Act which provides that "this Act applies to any person, who is a Hindu by religion in any of its forms or developments and to any person who is a Buddhist, Jaina or Sikh by religion and to any other person who is not a Muslim, Christian, Parsi or Jew by religion…….. " Such being the provisions Mr. Panda submits that a Christian is not entitled to inherit the properties of the Hindu. We are unable to accept the contention of Mr. Panda. Section 2 simply provides the class of persons whose properties will devolve according to Hindu Succession Act. It is only the property of those persons mentioned in Section 2 that will be governed according to the provisions of the Act. This Section has nothing to do with the heirs. This Section does not lay down as to who are the disqualified heirs. Sections 24, 25, 26 and 28 lay down the provisions how a person is disqualified. Section 24 provides "certain widows remarrying may not inherit as widows". Section 25 disqualifies a murderer from inheriting the property of the person murdered. Section 28 provides that no person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity, or save as provided in this Act on any other ground whatsoever. The most important section is Section 26. Section 26 reads as follows :—

"Where, before or after the commencement of this Act, a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu-relatives, unless such children or descendants are Hindus at the time when the succession opens."

This Section therefore does not disqualify a convert. It only disqualifies the descendants of the converts who are born to the convert after such conversion from inheriting the property of any of their Hindu relatives. Section 28 of the present Act discards almost all the grounds which imposed exclusion from inheritance and lays down that no person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity. It also rules out disqualification on any ground whatsoever excepting those expressly recognized by any provisions of the Act. The exceptions are very few and confined to the case of remarriage of certain widows. Another disqualification stated in the Act relates to a murderer who is excluded on principles of justice and public policy (Section 25). Change of religion and loss of caste have long ceased to be grounds of forfeiture of property and the only disqualification to inheritance on the ground that a person has ceased to be a Hindu is confined to the heirs of such convert (Section 26). The disqualification does not affect the convert himself or herself. This being the position, we have no hesitation to hold that the respondent who is admittedly a brother of the deceased is entitled to succeed if there be no other preferential heir."

9. Thus provision contained in Section 26 of Hindu Succession Act is the only provision dealing with the right of succession of children born to a convert after the conversion, however this provision does not disqualify the convert himself from succeeding to the property of Hindu father. Thus, the argument to the contrary raised by the learned counsel for the appellant has no substance and it is accordingly rejected.

10. From what has been discussed above, it is apparent that the plaintiff has been able to prove the case for declaration of title and recovery of possession from the present appellant.

11. The Hon'ble Supreme Court in the case of State Bank of India v. S.N Goyal,(2008) 8 SCC 92 : (AIR 2009 SC 2594) has laid down the principle as to what is a substantial question of law. Relevant paragraph of the judgment is extracted herein below :

"13. Second appeals would lie in cases which involve substantial questions of law. The word "substantial" prefixed to "question of law" does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties. "Substantial questions of law" means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the parties. In the context of Section 100 CPC, any question of law which affects the final decision in a case is a substantial question of law as between the parties. A question of law which arises incidentally or collaterally, having no bearing on the final outcome, will not be a substantial question of law. Where there is a clear and settled enunciation on a question of law, by this Court or by the High Court concerned, it cannot be said that the case involves a substantial question of law. It is said that a substantial question of law arises when a question of law, which is not finally settled by this Court (or by the High Court concerned so far as the State is concerned), arises for consideration in the case. But this statement has to be understood in the correct perspective. Where there is a clear enunciation of law and the lower Court has followed or rightly applied such clear enunciation of law, obviously the case will not be considered as giving rise to a substantial question of law, even if the question of law may be one of general importance. On the other hand, if there is a clear enunciation of law by this Court (or by the High Court concerned), but the lower Court had ignored or misinterpreted or misapplied the same, and correct application of the law and declared or enunciated by this Court (or the High Court concerned) would have led to a different decision, the appeal would involve a substantial question of law as between the parties. Even where there is an enunciation of law by this Court (or the High Court concerned) and the same has been followed by the lower Court, if the appellant is able to persuade the High Court that the enunciated legal position needs reconsideration, alteration, modification or clarification or that there is a need to resolve an apparent conflict between two view points, it can be said that a substantial question of law arises for consideration. There cannot, therefore, be a straitjacket definition as to when a substantial question of law arises in a case. Be that as it may."

12. In the present case, the appellant has not been able to raise any such issue which can be said to be substantial question of law within meaning of the term as has been laid down by the Hon'ble Supreme Court in the above referred judgment.

13. In the result, the present second appeal under Section 100 of Code of Civil Procedure fails to raise any substantial question of law for determination, hence, it deserves to be and it is accordingly dismissed.

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HITENDRA SINGH AND OTHERS VERSUS MAHARAJADHIRAJ SIR RAMESWAR SINGH BAHADUR AND OTHERS

1925 SCC OnLine Pat 63 : AIR 1925 Pat 625

Patna High Court

(Before Hon'ble Mr. Justice Miller Dawson, C.J
(On Difference Between Das, J. And Foster, J.))

Hitendra Singh and others … Plaintiffs Appellants;

v.

Maharajadhiraj Sir Rameswar Singh Bahadur and others … Defendants Respondents.

Appeal No. 206 of 1920

Decided on February 16, 1925

Hindu Law –Stridhan--alienation by lease by a Hindu widow followed by a suit by the reversioners after her death to recover the property; --Husband executed a deed of gift in favour of his wife and put her in possession of the property. -that upon the death of the bahuasin, plaintiffs succeeded to the property as her heirs - that gift in the present case, being a gift by the husband to the wife ??? to marriage, must be regarded as the stridhan, of the wife whether, in her hands, the property was inalienable. -- — whether the plaintiffs must have the right to claim theproperty it had been alienated--. In my opinion, however, on the assumption that the right of alienation did not exist the suit is maintainable and is not barred by limitation.

The Judgment of the Court was delivered by

DAS, J.:— This is an appeal against a decision of the learned District Judge of Darbhanga. The appellants are the junior members of the Darbhanga Raj family and they sued the respondent, the Maharajadhiraj of Darbhanga in substance for recovery of possession of a property described in these proceedings as 7-annas 8-ganda 3-kattah share of taluka Laheri. The property in dispute belonged to Darga Dutt Singh, the father of plaintiffs 1-4. On the 17th April, 1876, Durga Dutt Singh executed a document described as a heba-bil-ewaz in favour of his wife Mt. Anuragin Bahuisin (who will henceforth be referred to as the bahuasin) by which he transferred the disputed property to her after receiving from her the sum of Rs. 41,532-6-8. Various questions have been raised in this suit and in the arguments before us; but the main question turns upon the construction of the heba-bil-ewaz, dated the 17th April, 1876. On the 15th December, 1890, Babu Durga Dutt Singh and his wife the bahuasin mortgaged the disputed property to the then Maharaja of Darbhanga to secure the repayment of a certain sum of money which was then due by Babu Durga Dutt Singh to the Maharaja of Darbhanga. On the 5th April, 1897, the Maharaja of Darbhanga sued upon his mortgage and on the 3rd June, 1897, he obtained an ex parte decree against Babu Durga Dutt Singh and his wife. The Maharaja of Darbhanga then took out execution and on the 21st May, 1902, the present Maharaja of Darbhanga, the defendant in this action and the respondent before us, purchased the disputed property at the Court sale held in pursuance of the decree of the 3rd June, 1897, for three lakhs of rupees. On the 10th June, 1902, the judgment-debtors applied for setting aside the sale under S. 311 and Section 244 of the CPC, 1882. The bahuasin died on the 1st February, before the disposal of the application of the 10th June, 1902; and on the 29th March, 1904, the present plaintiffs were substituted in the record of the proceedings as the heirs of their mother the bahuasin on the application of Babu Durga Dutt

Singh. On the 2nd January, 1904, the application was refused and the sale was confirmed. There was an appeal to the Calcutta High Court which was dismissed.

2. The plaintiffs claim to have entered upon possession of the disputed propertyon the death of their mother the bahuasin and on the 23rd February, 1906, they instituted a suit, being suit No. 19 of 1906, for confirmation of their possession. They made an application in that suit for an injunction restraining the Maharaja of Darbhanga from taking possession of the disputed property until the determination of the suit. On the 30th June, 1906, the Court refused to grant an injunction. On the 16th March, 1907, the suit was withdrawn with liberty to bring a fresh suit. Delivery of possession to the Maharaja of Darbhanga followed on the 14th December, 1906. The present suit was instituted on the 24th July, 1918, and it was dismissed on the 23rd July, 1920, by the learned District Judge of Darbhanga on two grounds: first, on the ground that it was barred by limitation; ani, secondly, on the ground that the plaint disclosed no cause of action. In view of the decision to which the learned District Judge arrived, he did not think it necessary to try the other issues which were raised in the case. The plaintiffs appealed to this Court and on the 13th June, 1923, this Court, without expressing any opinion as to the correctness of the decision of the learned District Judge, remanded the case to him with instructions to him to try all the issues in the case. This Court drew the attention of the learned District Judge to what the Judicial Committee of the Privy Council has repeatedly pointed out, namely, that the subordinate Court? should try all the issues so as to make it unnecessary either for this Court or for the Judicial Committee of the Privy Council to remand the case afterwards should it become necessary to do so. The case then went back to the learned District Judge who took evidence and recorded his findings on the different issues raised between the parties. Although on the main question of fact his decision is in favour of the plaintiffs, he has decided the questions of law in favour of the defendants and has dismissed the plaintiffs' suit. Before dealing wish the arguments which have been advanced before us, it will be convenient to state shortly the case of the plaintiffs and the reply thereto, and the questions which fall to be considered in this case.

3. The plaintiffs allege that upon the payment of Rs. 41,532-6-8 by the bahuasin to Durga Dutt Singh anti the execution of the heba-bil-ewaz, dated the 17th April, 1376:

   "there was a complete change and transfer of ownership and possession with regard to the 7-annas 8 gandas 3-kattahs of taluka Laheri",

   and that the bahuasin obtained possession of the disputed property from the date of the execution of the heba-bil-ewaz and that she was registered as the owner thereof in the land registration department. In regard to the mortgage of the 15th December, 1890, they say that Rs. 1,88,962-9-2 was due by Babu Durga Dutt Singh to the then Maharaja of Darbhanga on account of revenue and cesses payable by Babu Durga Dutt Singh in respect of the bahuana properties. They assert that the bahuasin was in no respect liable for those debts and that Babu Durga Dutt Singh

   "taking advantage of his position of authority and influence over his wife preferred to mortgage the disputed property in the said mortgage bond, and she was induced to become a party thereto upon a misrepresentation that the debts of the husband were binding on the wife and the said Maharaja with the knowledge that the property in suit belonged to the bahuasin and with the further knowledge that it had been wrongly represented to her that the debts of the husband were binding on the wife, accepted the mortgage in his favour."

4. It appears, however, that plaintiff No. 2 actually signed the mortgage bond on behalf of his mother and that plaintiffs 1 and 3 were the attesting witnesses. In order to meet this difficulty the plaintiffs say that:

   "they were not at all aware of the contents of the bond and as they were fully under the control of their father they had only to act according to his dictation and on the pressure of the men of the Maharaja."

5. The plaintiffs further say that the bahuasin was a pardanashin lady and had no independent advice in the matter of the execution of the mortgage bond and that she did not execute it

"knowing and understanding its contents or the importance thereof, or realising the consequences of her act."

6. In regard to the ex parte decree obtained against Durga Dutt and the bahuasin, the plaintiffs allege that summons was not served on the bahuasin according to law and that:

"as a matter of fact she was purposely kept from all knowledge of the said suits or of the decrees obtained therein and that in the circumstances of the case she was neither in law nor in equity bound by the proceedings taken in the above suits, the decrees passed therein or by subsequent proceedings in execution of which also she had absolutely no knowledge."

7. In regard to the execution proceedings, they say that they were taken without the knowledge of the bahuasin and that the Maharaja purchased the property

"for an inadequate price of 3 lakhs of rupees though its actual price then was not less than 6 lakhs of rupees."

8. They allege that as the heirs of the bahuasin they succeeded to the disputedproperty and came into possession thereof; but that they were dispossessed on the 16th December, 1906, and they say that their cause of action arose on the 16th December, 1906,

"the date of their wrongful dispossession."

9. It will be noticed that two important questions of fact are pleaded: first, that there was a complete defence to the mortgage action and that the decree obtained against the bahuasin was a fraudulent decree which does not affect the rights of the plaintiffs as the heirs of the bahuasin; and, secondly, that the execution proceedings were fraudulent and that the property was purchased by the defendant for the very inadequate price of three lakhs of rupees and that all the proceedings from start to finish ought to be set aside. But it is obvious that these questions were not available to the plaintiffs. The bahuasin applied for setting aside the ex parte decree and failed. That question could not be raised by the bahuasin except on the ground that the decree against her was obtained by fraud. So far as the execution sale is concerned she again applied for setting it aside under S. 311 and Section 244 of the CPC. Pending the disposal of that application the bahuasin died and the plaintiffs were substituted in the record of that application as the heirs of the bahuasin. That application again failed and it is not open to the plaintiffs to reagitate the same question in a regularly constituted suit between the parties. It is quite true that although the bahuasin might have failed first in her application for setting aside the ex parte decree, secondly, in her application for setting aside the sale, she might still have maintained a suit for setting aside all the proceedings as a fraud upon her from start to finish. But to such a suit, Article 95 of the Limitation Act affords a complete reply. It is not open to doubt the 5 the bahuasin did some time or other become aware of the fraud practised on her. Article 95 of the Limitation Act provides:

"that a suit to set aside a decree obtained by fraud or for other relief on the ground of fraud must be instituted within three years' from the time when the fraud became known to the party wronged."

10. It seems to me therefore that it is not open to us to consider the main questions of fact raised by the plaintiffs in this case; and if there were no other questions which could legitimately be raised by the plaintiffs on the plaint as presented by them there is no option but to dismiss the suit.

11. But a very important question was raised by the plaintiffs in the Court below, the adjudication of which does not depend on any question of fact. It was insisted on behalf of the plaintiffs that both under the Hindu Law as also under the heba-bil-ewaz of the 17th April, 1876, the bahuasin took a heritable but inalienable interest, and that consequently the plaintiffs are not embarrassed by the decree or the execution proceedings against the bahuasin and that it is not necessary for them to ask the Court to set aside the proceedings in connection with the mortgage suit as a condition precedent to this action. The question is a pure question of law, and arises on the Mithila School of Hindu Law by which the parties

are governed and on the construction of the heba-bil-ewaz. It was directly raised by the plaintiffs in the Court below and the learned District Judge has given his decision on the point. The plaintiffs assert that they are entitled to raise this point on their allegations in the plain; that there was a conveyance of the property by Durga Datt Singh in favour of the bahuasin and that upon the death of the bahuisin they became entitled to succeed to the property as her heirs. It is quite true that they do not allege in the plaint that in the hands of the bahuasin the property was alienable, but they contend that, if they can satisfy the Court on Hindu law and a the construction of theheba-bil-ewaz of the 17th April, 1876, that in her hands the property was inalienable, the Courts cannot refuse to consider the point merely because they have not put their case in that form in the plaint. In my opinion, it would be wrong on our part not to allow a question of law to be argued before us which fairly arises on the allegations made in the plaint, though it is not stated in that form in the plaint.

12. It is not necessary for me in the view which I take to refer to those allegations in the written statement which expressly deny that there was any undue influence exerted over the bahuasin either by Babu Durga Dutt or by the Maharaja of Darbhanga or to those which deny that there was any fraud either in connection with the ex parte decree obtained in the mortgage suit or in the course of the execution proceedings which followed the decree. The main question of fact raised by the defendant in this case is that the heba-bil-ewaz, dated the 17th April, 1876, was afarzi document not intended to be acted upon. The defendant asserts that the heba-bil-ewaz was "merely a nominal and colourable transaction without consideration" and that Babu Durga Dutt Singh was very much indebted and he took the opportunity of and taking advantage of the payment by him out of the joint family funds of the decretal dues of Rai Banwari Lal Sahu he (the said Babu Durga Dutt Singh) brought into existence the heba-bil-ewaz in favour of his wife, the said Mussammat Anuragin Bahuasin as a subterfuge and means for protection of theproperty from his creditors, that the said heba-bil-ewaz does not evidence a real orbona fide transaction, that no consideration passed thereunder and neither the saidbahuasin paid the money recited therein nor had she means of her own to make such payment," and he alleges that the property was throughout in the possession of Durga Datt Singh. The reference in the written statement to Rai Banwari Lal Sahu should be explained. The heba-bil-ewaz shows that there was a sum of Rs. 41,532-6-8 due by Babu Durga Dutt Singh to Banwari Lal Sahu on a decree obtained by Banwari Lal Sahu against him, thab the disputed property and another propertywere advertised for sale to recover the sum of Rs. 41,532-6-8, and that Babu Durga Durga Dutt Singh failed to procure the money in order to pay off Banwari Lal Sahu and that the bahuasin gave him the money to enable him to save the property. The suggestion of the defendant is that, taking advantage of the proceedings in connection with the suit of Banwari Lal Sahu against him, Babu Durga Dutt Singh put this property in the name of his wife so as to defeat his creditors. This is the main question of fact raised by the defendant; and on this issue the decision of the learned District Judge is in favour of the plaintiffs. The other question raised by the defendant is that the suit is not maintainable and that it is barred by limitation. It is obvious that if these questions be decided in favour of the defendant, the plaintiffs' suit must fail, and it will be necessary for us to discuss these questions before proceeding to deal with the more serious questions raised before us.

13. I will first deal with the question of the maintainability of the suit and whether the plaintiffs' suit is barred by limitation. Now, I quite agree that it is not open to the plaintiffs to maintain the suit on any of the grounds which were available to thebahuasin. I have dealt with the point, and I do not desire to repeat myself. But the plaintiffs contend that the property was inalienable in the hands of the bahuasinand that, as her heirs, they are entitled to recover possession of the property from anyone into whose hand the property may have passed by an act of the bahuasin. Three questions fall to be considered: first, whether there are sufficient allegations in the plaint to entitle the plaintiffs to raise such a case; secondly, whether it is open to them to ask the Court to consider such a case; and thirdly, whether the consideration of such a case is not barred by lapse of time.

14. I am of opinion that all the material facts are stated which entitle the plaintiffs to contend that the property was inalienable in the hands of the bahuasin. They allege that Durga Dutt executed a deed of gift in favour of his wife and put her in possession of the property. They also allege that upon the death of the bahuasin, they succeeded to the property as her heirs. On these fact— "the material facts" in the words of the Code —they contend that they are entitled to ask the Court to hold that the property was inalienable in the hands of the bahuasin. Now, whether theproperty was or was not inalienable is not a question of fact; it is an inference of law, and it is not necessary to set out an inference of law in the pleading. There is no question of surprise in this case; for the point was stated to us before we remanded the case for trial of all the issues raised in the case. The question was argued at great length before the District Judge; and, in my opinion, it would be wrong on our part to refuse to hear the plaintiffs on this point on a needlessly technical view of the plaint.

15. The second question must also be answered in favour of the plaintiffs. If theproperty was in fact inalienable, then the plaintiffs must have the right to claim theproperty it had been alienated, unless the bahuasin could herself set up the inalienability of the property as a defence to the mortgage action. But it is well established that "the grantor cannot dispute with his grantee his right to alienate the land to him." That being so, the bahuasin could not claim adversely to her own deed, and her failure to set up the inalienability of the property in the mortgage action cannot operate as constructive res judicata in this case. It was contended that the mortgage decree binds the heirs and that the property having passed away in execution sale, the present suit is not maintainable. I am unable to assent to this proposition. It is true that the plaintiffs are heirs; but the property being inalienable, they are wholly unaffected by the mortgage decree. To hold otherwise is to say that property which is inalienable may become alienable by the act of alienation. In my opinion, the plaintiffs are entitled to maintain this suit and to show that the property was inalienable in the hands of their mother.

16. On the question of limitation, it is material to remember that, on the plaintiffs' case, they entered upon possession of the property on the death of their mother and that they were dispossessed on the 16th December, 1906. It is the common case that on the death of the bahuasin, the plaintiffs were substituted in the record of the proceeding under S. 311 of the Code which was then pending in the place of the bahuasin. It is admitted by the defendant that he obtained delivery of possession on the 16th December, 1906. That being so, the suit is governed by Article 142 of the Limitation Act and is within time.

17. But it was contended that the plaintiffs cannot sue for possession until they had cleared the way for such a suit by securing the annulment of the mortgage decree and the sale thereunder; and that, in that view, the suit is barred by the provision of Article 95 of the Limitation Act. Now I quite agree that where a peraon his prima facie bound by a decree, he cannot, by suing ostensibly for possession, ignore the decree and evade the operation of law; and where such a decree is an impediment to the plaintiffs' way in obtaining relief inconsistent with it, he must bring his suit within the period prescribed by law for setting aside a decree. But the argument assumes that the plaintiffs are bound by the decree obtained against the bahuasin. If I may say so with respect, the confusion in the argument is due to the fact that the plaintiffs' claim as the heirs of the bahuasin. Ordinarily a decree obtained against a person binds the heirs; and, if the decree was obtained by fraud, the heirs must sue within the period prescribed by Article 95 of the Limitation Act. But the argument overlooks two important points: first, that plaintiffs are not bound by the alienation, and therefore by the mortgage decree; and secondly, it was not open to the bahuasin at any time to claim adversely to her own deed. The bahuasin could not claim to have the decree set aside on the ground that she was not competent to mortgage the property. That being so, the plaintiffs could not bring a suit to have the decree set aside on that ground. But although they were not entitled to bring a suit to have the decree set aside, they were entitled to bring a suit for possession, if, being in possession, they were dispossessed from it but to such a suit Article 142 Clearly applies. The whole question is: Are the plaintiffs entitled to recover possession without having the mortgage decree ind the sale thereunder set aside? In my opinion, since they were not bound by the decree and the sale thereunder, they could treat

those proceedings as a nullity without the intervention of any Court, and they showed their election to do so by commencing an action to recover possession of the property. In my opinion, the suit is governed by Article 142 of the Limitation Act and is consequently within time.

18. I now come to the question of benami. Now, in dealing with this question, it is to be remembered that the case is not one that Babu Durga Dutt Singh purchased the property in the name of his wife. The property stood in his name and undoubtedly belonged to him, and he conveyed it to his wife by a document which is described as a heba-bil-ewaz. Cases are to be found in the books which lay down that where a person purchases a property in the name of his relative, the important point to be considered is, who paid the purchase money. But here the purchase money was undoubtedly paid by Babu Durga Dutt Singh and he transferred it to his wife on the 17th April, 1876. The case of the defendant is that the transfer was wholly fictitious; but before deciding this question in favour of the defendant, we must ask ourselves the question, What was the motive for this fictitious transfer? The case of the defendant on this point is contained in the 14th paragraph of hi? written statement which runs as follows:

That the alleged deed of gift to Mt. Anuragin Bahuasin was merely a nominal and colourable transaction without consideration, that Babu Durga Dutt Singh was very much indebted and he took the opportunity of and taking advantage of the payment by him out of the joint family funds of the decretal dues of Rai Banwari Lal Sahu he (the said Babu Durga Dutt Singh) brought into existence thehiba-bil-ewaz in favour of his wife, the said Mt. Anuragin Bahuasin, as a subterfuge and means for protection of the property from his creditors, that the said heba-bil-ewaz does not evidence a real or bona fide transaction, that no consideration passed thereunder and neither the said bahuasin paid the money recited therein nor had she means of her own to make such payment, and this defendant submits that upon execution of the said deed or at any time thereafter the possession of the share in question of taluka Laheri aforesaid did not pass to the alleged donee but on the other hand the said share of the propertyremained as before in the possession of the said Babu Durga Dutt Singh until possession thereof was delivered to this defendant under the process of the Court after this defendant's purchase thereof and after disallowance by the Courts of the plaintiffs' and their father's objection to the sale as set forth above. This defendant further submits that the said deed is otherwise invalid and inoperative and that there was no transfer of any beneficial interest thereunder.

19. The suggestion of the defendant accordingly is that the object of Durga Dutt in entering into the transaction of the 17th April, 1876, was to defeat his creditors. In view of the case made, it is important for us to consider whether at the date of the execution of the heba-bil ewaz Babu Durga Dutt Singh was in such embarrassed condition as would induce him to enter into a fictitious transaction for the protection of his property.

20. In dealing with this question it must be remembered that Babu Durga Dutt was in possession of bahuana properties which even now yield an income of a lakh and a half of rupees. In 1873 Durga Dutt and his brother Girdari sold certain valuable properties belonging so them for six lakhs of rupees by which th?y paid of all their debts then existing. At the date of the heba-bil-ewaz Durga Dutt owed Rs. 41,532-6-8 to Rai Banwari Lal Sahu Bahadur on a decree which had been obtained by the latter against the former. The heba-bil-ewaz shows that he raised this sum from his wife and satisfied the decree of Rai Binwari Lal Sahu. The positive evidence in the case is that at the date of the transaction in question there were no other debts due by Babu Durga Dutt Singh. The case put to Amarendra Singh, one of the plaintiffs, by the defendant, was that Durgp, Dutt was indebted to various persons including Ram Narain Thakur, Mussammat Fulbati Kumari, Tulsi Sahu, Mr. Henry Gyll, Jbumak Furbey, Subans Sahu and Jailal Sahu. But no attempt has been made by the defendant to establish the case put to Amarendra Singh. In my opinion the evidence establishes that by the transaction of the 17th April, 1876, Durga Dutt satisfied his debt and that at the date of the transaction there were no other debts due by him. That being so, the positive case made by the defendant on this point fails. The defendant sought to supplement the weakness of his evidence on this point by attempting to prove an admission on the part of Babu. Durga Datt Singh.

The evidence adduced on behalf of the defendant on this-point is to the effect that when it was proposed that Babu Durga Dutt should in some way secure the debt which was duet by him to the Maharaji of Dirbhanga in 1890, and Darga Dutt offered to execute a mortgage in respect of taluka Laberi, a question arose whether the heba-bil-ewaz, which had been executed by him in favour of his wife was a genuine-transaction or a fictitious transaction and that Babu Durga Dutt admitted to-the Maharaja of Darbhanga in the presence of various persons that he had entered into that transaction to save his-properties as he was heavily indebted at that time. The evidence is furnished by Bhikhai Lal Missir, and Lalji Singh, both called on behalf of the defendant. In his evidence in examination-in-chief Bhikhai narrated the incident which took place in the Maharaja's durbar in 1890. His account is as follows:

Durga Dutt came to the Maharaja and offered to execute a document to secure the debs which was due by him to the Maharaja. Upon that the Maharaja asked him; What kind of document he would execute? Durga Dutt said that he would execute a mortgage document. The Maharaja thereupon asked him what properties he would mortgage. Durga Dutt answered that he would mortgage Laheri. Thereupon Balbhadar Missir, who was a mushahib in the durbar, pointed out that property stood in the name of the bahuasin. Durga Dutt thereupon said, 'The property is really mine but I have kept it in her name and that if asked we both would execute the document'.

21. In cross-examination the witness stated that Durga Dutt admitted that there-were debts due by him and so he entered into a fictitious transaction in regard to theproperty. This is in substance the evidence of Lalji Singh. The learned District Judge has not accepted this-evidence, and I entirely agree with his judgment on this point. It is improbable that if Durga Dutt had entered into a fictitious transaction in order to save this property from his creditors, he should have made a solemn admission before the full durbar; and it is unlikely that these witnesses should remember the details of a conversation, which took place thirty-three years ago. The story is inherently improbable since there is no evidence to establish that at the date of the heba-bil-ewaze Durga Dutt had any debts to pay other then that which was satisfied by the execution of the heba-bil-ewaz.

22. The suggestion of Mr. Hasan Imam, for the respondent, is that although Durga Dutt was not indebted to anyone at the date of the heba-bil-ewaz, he knew that, being a man of extravagant habits, he would sooner or later be involved in debts and that the heba-bil-ewaz was executed, not with a view to defeat any any existing creditors, but with a view to save the property from future creditors. It is quite true that the affairs of Babu Durga Dutt became involved later on in his life, but it is impossible to indulge in a speculation of the kind suggested by Mr. Hasan Imam especially as the positive case made by the defendant has failed.

23. It is well established that an apparent transaction must be assumed to be real until the contrary is shown. The onus is accordingly on the defendant to show that the transaction of 1876 was a fictitious transaction. I have already shown that the definite case made by the defendant as to the motive which induced Durga Dutt to put the property in the name of his wife has failed. The only other questions are: first, whether the bahuasin in fact paid Rs. 41,532-6-8 to Durga Duto as alleged in theheba-bil-ewaz; secondly, whether Durga Dutt continued to be in possession of theproperty although he had executed a document in favour of his wife; and, thirdly, whether the surrounding circumstances throw any light on the question. It is not possible to get any direct evidence at this distance of time as to a transaction which took place in 1876. It is true that there is some evidence on each side bearing directly on the character of the transaction; but this evidence has not been believed by the learned District Judge. It is therefore useless for me to go through that oral evidence as I see no reason for differing from the conclusion of the learned Judge on this point. In regard to the first question, namely, whether consideration was paid by the bahuasin, the view of the learned District Judge is on the whole in favour of the defendant. But in arriving at this conclusion the learned District Judge assumed that the onus was entirely on the plaintiffs. The learned District Judge was impressed by the fact that undoubtedly Banwari Lal Sahu had obtained a decree for Rs. 41,532 against-Babu Durga Dutt and had attached taluka Laheri in the execution proceedings in

connection with that decree and that undoubtedly the decree was satisfied and the property released from attachment. The inquiry being thus limited, the learned District Judge rightly thought that the only question for determination was whether payment was made out of the husband's or the lady's money. He considered the evidence of the three witnesses examined on behalf of the plaintiffs on the question of the payment of the consideration by the lady. He conceded that the witnesses on this point were all competent witnesses, but he thought that their evidence was not wholly acceptable. Conceding that the money may have come from the lady he held that "there was no sufficient evidence to show if it was her own money or her husband's" and the conclusion at which he arrived may be stated in his own words: "that being the case I am of opinion that it has not been proved that the monej was her own money. Therefore I find that plaintiffs have failed to prove that the lady had paid the money out of her private funds."

24. The conclusion of the learned District Judge is somewhat halting. It is not quite clear whether he rejected the case of the plaintiffs that the money was actually paid by the bahuasin (whether it belonged to herself or to her husband) or whether he rejected the case of the plaintiffs that the money which was in fact paid by the bahuasin belonged to her and not to her husband. If I had to come to a conclusion on this-point, on the actual evidence of the three witnesses to which the learned District-Judge refers, I would unhesitatingly agree with the conclusion at which the District Judge has arrived. They are-speaking of an incident which took place in 1876 and, in my opinion, it is impossible for this Court to rely on that evidence.

25. But as I have said before, the onus is on the defendant and not on the plaintiffs and, in my opinion, the defendant has not shown that the money was not infact paid by the bahuasin in regard to the transaction of 1876. Ib is quite true that the account hooka which would show the payment of the money by the bahuasin to Durga Dutt have not been produced by the plaintiffs; and I am not prepared to assent to the argument that the onus being on the defendant it was not necessary for the plaintiffs to produce the best evidence on the point. But there is one circumstance in connection with this point which should not be ignored by us; and it is this, that it is somewhat difficult for the plaintiffs to produce the account books of 1876. The account books actually produced in the case are in such decayed condition that I cannot altogether reject the plaintiffs' story that the account books other than those produced cannot be traced.

26. There being no reliable direct evidence on this point, we are bound to consider the surrounding circumstances. These surrounding circumstances are, first, thattaluka, Laheri was attached in execution of a decree obtained by Banwari Lal Sahu against Durga Dutt, and, secondly that the property was released from attachment after payment by Durga Dutt of the decretal amount due to Banwari Lal Sahu. Theheba-bil-ewaz recites that Babu Durga Dutt tried to procure the money from the market but failed, and that as a last resort he took the money from his wife. I can find no sufficient reason for holding that the recitals in the heba-bil ewaz are deliberately false. A lady of the rank and position of the bahuasin might well have Rs. 41,000 in her hand, though it may be that, in point of law, the money belonged, not to herself, but to her husband; and it is not improbable that she should make over the money to hen, husband to save her husband's property from sale. The conclusion at which I arrive on this point is that it has not been shown by the defendant that the money was not actually paid by the bahuasin to her husband, and that there is no reason why we should not rely upon the recitals in the document.

27. On the question of actual possession, the evidence adduced on behalf of the plaintiffs is, in my opinion, conclusive. The bahuasin was recorded in the Land Registration Department as the owner of the property and the public demands were admittedly paid in her name. Mr. Hasan Imam contends that if the original transaction was fictitious all public transactions must of necessity be in the name of the fictitious owner entirely agree with this argument; but it is for the defendant to show that the original transaction was fictitious. It is not disputed by Mr. Hasan Imam that since September 1882 all the accounts stand in the name of the bahuasin; but he contends that there is no evidence to show that the income of the propertywas appropriated by the bahuasin between 1876 and 1882. In 1881 the bahuasininstituted an

account suit against her agent Turant Lal; and in that suit Turant Lal raised the defence that the bahuasin was a farzidar on behalf of her husband. The defence succeeded, and it is Mr. Hasan Imam case that since 1882 false account books were prepared by Durga Dutt in order to make it appear that the bahuasinwas the owner of the property.

[His Lordship on discussion of evidence held that jamabandis and deoriaccount books supported the case of plaintiff and rejecting the evidence of Mr. Onraet held that the evidence of Mr. King did not touch the point.]

28. It is necessary now to notice some of the arguments which hive been advanced by Mr. Hasan Imam on behalf of the defendant. Mr. Hasan Imam strongly relies upon the decision in suit No. 6 of 1881 which was a suit by the bahuasin, against Turant Lal for account in regard to his management of taluka Laheri. Turant Lal admittedly accepted the appointment from the bahuasin; and when the suit for account was brought against him he raised the plea that the bahuasin was abenamidar for her husband. How this plea was allowed to be raised in view of the admitted fact that he was appointed by the bahuasin as her agent is a matter of considerable surprise to me; but allowed to be raised it was, and the learned Judge who tried that case solemnly examined the evidence to find out whether the plea of Turant Lal was sustainable, and he came to the conclusion that the bahuasin was in fact the benamidar of her husband.

29. In my opinion the judgment in Suit No. 6 of 1881 is inadmissible in evidence as against the plaintiffs. Sections 40-43 of the Evidence Act deal with the subject of relevancy of judgments, orders or decrees of Court. Judgments qua judgments or adjudications upon question in issue and proofs of the particular points they decide are only admissible either as res judicata under S. 40 or as being in rem under S. 41, or as relating to matters of a public nature under Section 42 of the Evidence Act. The judgments, orders and decrees, other than those admissible by Ss. 40, 41 and 42, may be relevant under S. 43, if their existence is a fact in issue or is relevant under other provisions of the Act. It is obvious that the judgment in question is not relevant either under S. 40 or under S. 41 or under Section 42 of the Evidence Act. The question which we have to decide is whether it is relevant under S. 43. As has been pointed out by the learned authors of Woodroffe and Ameer Ali on the Evidence Act, the cases contemplated by S. 43 are such as the section itself illustrates, namely, where the fact of any particular judgment having been given is a matter to be proved in the case. Under that section a judgment may be admissible as relevant under some other provisions of the Act.

30. The question was debated in the leading case of Gujju Lal v. Fateh Lal(1), deeided by the Full Bench of the Calcutta High Court. That was a suit between A andB in which the question was whether C or D was the heir of H. If C was the heir of Hthen A was entitled to succeed; otherwise not. The same question had been raised in a former suit brought by X against A and was decided against A; and the question arose whether the former judgment in the suit brought by X and A was admissible in evidence in the suit between A and B. It was held by the Full Bench of the Calcutta High Court (Mitter, J., dissenting) that a former judgment which was not a judgmentin rem nor one relating to matters of a public nature was not admissible in a subsequent suit either as res judicata or as a proof of the particular point which it decided Unless between the same parties or those claiming under them. In the view of the learned authors of Woodroffe and Ameer Ali on the Evidence Act, the decision of the Full Bench of the Calcutta High Court in Gujju Lal v. Fateh Lal(1) has not been touched by the decisions of the Judicial Committee, and it is somewhat remarkable that case has been followed by the Bombay High Court, by the Madras High Court and by the Allahabad High Court.

31. I propose to refer to three cases upon which the plaintiffs relied, and which seem to me to be directly in point. In Kashi Nath Pal v. Jagat Kishore Acharya Chowdhry(2) it was held by Mookherji and Roo, JJ., that although a judgment notinter parties, may be used in evidence in certain circumstances, as a fact in issue, or as a relevant fact or possibly as a transaction, the recitals in the judgment cannot be used as evidence in a litigation between the parties. In Devendra Nath Haidar v.Bisheshwar Haidar(3) the

plaintiff sued for recovery of his share in the land in suit. The Subordinate Judge in appeal admitted a judgment in a previous suit brought by another person against the defendants, and mainly relying on a certain passage therein, as proving an admission by the defendant, decided in favour of the plaintiff. It was held by Richardson and Mullick, JJ., that the judgment was inadmissible in evidence for the purpose of proving the alleged admission and that the error committed by the Subordinate Judge in using the judgment for a purpose for which it could not be legitimately used vitiated the decree. In Abdul Latif Kazi v. Abdul Haq Kazi(4), which was a case of benami, it was held by Mookherji and Rankin, JJ., that the fact that a judgment was admitted in evidence in order to prove that there was a litigation which terminated in a certain way, did not make all the recitals in that judgment part of the evidence of the subsequent action. It is not necessary for me to deal with the numerous cases on the point; it is sufficient for me to say that I entirely agree with the view expressed by the learned authors of Woodroffe on Evidence that a judgment or decree is not admissible in evidence under Section 43 of the Evidence Act unless as a fact in issue or as a relevant fact under other sections of the Act. Thus if A has obtained a decree for the possession of land against B, and C, B's son, murders A in consequence, the existence of the judgment is relevant as showing motive for the crime. So again, in a suits for malicious prosecution, the judgment in the criminal proceeding is evidence to establish the fact of acquittal, the fact, namely, that the criminal proceedings terminated in favour of the plaintiff. Again a reference to the finding of a judgment may explain the character of the party's possession and the nature of the enjoyment had is the property in suit, and so the finding of a judgment may be referred to in all other cases where;he record is matter of inducement or merely introductory to other evidence. Other instances may be cite where a judgment is admissible in evidence in a subsequent litigation; but it must be shown that the existence of the judgment is a fact in issue, or that it is relevant under the other sections of the Evidence Act. This has not been shown in this case; and I must hold that the judgment in Turant Lal's case is not relevant in this case.

32. The next circumstance upon which Mr. Hasan Imam relies is the institution of a suit by Tara Dutt and Sashi Sekhar, sons of Amarandra Singh plaintiff No. 2, in which they alleged that the transaction of 1876 was a benami transaction, that theproperty belonged to the joint family and that, being babuana property, it was inalienable. The evidence of Amarendra in this suit is that he knew nothing about that suit. The evidence is worthless, and I have no doubt whatever that the plaintiffs were well aware of that suit. But then the question arises, What weight should we attach to the incident? I have already stayed that the Maharaja of Darbhanga sued upon the mortgage executed by the bahuasin and her husband and obtained an ex parte decree on the 3rd June, 1897. The property was sold on the 21st May 1902. There was then an application for setting aside the sale under Sections 311 and 244 of the CPC. That application failed and the sale was confirmed. On the 23rd February, 1906, a suit, being Suit No. 19 of 1906, was instituted by the present plaintiffs for confirmation of their possession. In that suit they alleged that the transaction of 1876 was a perfectly genuine one, and they set out various circumstances in support of their case that t;he sale of the 21st May 1902 did not affect their interest. They also applied for an injunction restraining the defendant from taking possession of the property until the determination of their suit. That application failed, and the plaintiffs thereupon presented an appeal to the Calcutta High Court against the order of the learned Subordinate Judge, lated the. 30th June, 1906, refusing to grant a temporary injunction. On the 15th August, 1906, the High Court dismissed the appeal. Thereupon Tara Dutt and Sashi Sekhar filed a suit on the 4th of September 1902, in which they claimed, that, the property belonged to the joint family and that, being babuana, property, it was inalienable. They also applied for an injunction restraining the defendant from taking possession of the property until determination of the suit. This application was dismissed on the 10th December, 1906, and the defendant recovered possession of the property on the 14th December, 1906.

33. In my opinion, no weight ought to attach to the circumstance connected with Suit No. 410 of 1906. It is obvious that the family was making frantic efforts to save the property. First, the plaintiffs filed a suit on the allegation that the-propertybelonged to their mother and the sale did not affect their interest. They

failed in inducing the Court to-give them a temporary injunction restraining the Maharaja of Darbhanga from taking possession of the property. Thereupon they caused Tara Dutt and Sashi Sekhar to-institute a suit on different allegations altogether with a view to induce the Court to issue an injunction. I am therefore not prepared to attach any weight to the admission made by the plaintiffs in Suit No. 410 of 1906. It may be mentioned that Suit No. 19 of 1906 and Suit No. 410 of 1906 were both withdrawn soon after the Maharaja of Darbhanga, got possession of the property. Mr. Hasan Imam also relies upon the judgment in Suit No. 29 of 1900 between thebahuasin and the present defendant. The Maharaja, in execution of a decree against Dirga Dutt, had attached certain properties as being in the possession of Durga Dutt. The bahuasin preferred a claim to-those properties alleging that at the date of the attachment those properties ware-in her possession and not in the possession of her husband. The Court rejected her claim, whereupon a suit was instituted by her for declaration of her title to the properties which were the subject-matter of her claim. Now it is important to remember that the property which is in dispute in this suit was not involved in the litigation of 1900; but a question arose as to the means at the disposal of the bahuasin to enable her to acquire those properties. Thebahuasin alleged that at the time of her marriage her father-in-law made a gift to her of five gold mohurs and certain kamat lands in twelve mauzas and a mauza named Sonepatha. She also alleged that she was in possession of mauza, Laheri, and the Court had to consider whether mauza Laheri in fact belonged to her. It is obvious that the question as to her title to mauza Laheri aroses very incidentally and was not a matter in issue in that case. The learned Judge in dealing with the case said a) follows:

"The second source of plaintiff's income is said to be the mauza Laheri. Thisproperty is said to have been purchased by her in 1284 from her husband. But it appears that for she debts of her husband alone, amounting to one lakh and eighty-eight thousand rupees and odd, his property was mortgaged on the 15th December, 1890, by a deed executed by the plaintiff and her husband in favour of defendant 1's predecessor-in-title. This is quite clear that because the plaintiff became the apparent owner by the execution in her favour of a deed of sale by her husband, the mortgage-deed was taken from her husband as well as from her. Of course, in the body of the deed, the plural number is used both in respect of the debt and the ownership of the property; but that is merely a matter of form. The list given in that deed clearly shows that the debts for which the mortgagee-deed was executed were of the husband alone. If the mortgagedproperty had really been sold to her by her husband, why should she mortgage her property for her husband's debt, or why should she allow her husband to allege himself as co-owner of the property? I make these observations simply with a view to show that the alleged second source of income is also a myth and a nonentity."

34. Any attempt to come to a conclusion on this point on the judgment in Suit No. 29 of 1900 (Exhibit F-5) would operate as a gross injustice in this case; but it is not open to me to criticise the judgment of the learned Subordinate Judge in that case. It is sufficient for me to state that for the reasons which I have already given this judgment is not admissible in evidence against the plaintiffs.

35. I thick I have dealt with a 1 the arguments bearing on this point; it is not necessary to deal with the numerous cases on the question of benami. These cases are quoted in the judgment of Mookherji, J., in Promode Kumar v. Madan Mohan Shah(5). I would respectfully appropriate the following passage appearing in that judgment as part of my judgment: It is important to bear in mind in this class of cases that, as pointed oui by Lord Phillimore in Seth Moniklal v. Raja Bijoy Singh(6), the decision of the Court should rest not upon suspicion but upon legal grounds established by legal testimony. This recalls the earlier pronouncements to the same effect by Lord West-bury in Sreman Chunder v. Gopaul Chunder(7) and by Sir Lawrence Jenkins in Minakumari v. Bijay Singh(8). But we are not unmindful that, in the words of Lord Hobhouse in Uman Prashad v. Gandharpa, Singh(9) and of Lord Shaw in Muhammad Mahbub v. Bharatindu(10) as benami transactions are very familiar in Indian practice, even a slight quantity of evidence to show that it was a sham transaction may suffice for the purpose. The person who impugns its apparent character must not rely, however, solely on probabilities, as Lord Buckmaster

observed in Irshad Ali v. Kariman(11). He must show something definite to establish that it is a sham transaction, on the principle that the burden of proof lies upon the person who claims contrary to the tenor of a deed and alleges that the apparent is not the real state of things [Azimut Ali v. Hurdwaree(12), Faez Buksh v. Fakeeroodeen(13),Suleiman v. Mehndi Begum(14), Nirmal v. Mahomed(15) and Moti Lal v. Kundan Lal(16)]. The most important lest to be applied in these cases is, as observed by Mr. Ameer Ali in Nrityamoni v. Lakhan Chandra(17), the source whence the consideration came. Sir George Farwell formulated the same test in different language, when he observed in Bilas Koer v. Desraj(18) that where it is asserted shat an assignment in the name of one person is really for the benefit of another person, the principle applies that the trust of the legal estate results to the man who pays the purchase money. To the same effect is the decision of the Judicial Committee in Parbati v.Baikuntha(19), which recalls the earlier pronouncement by Lord Campbell in Dhurm Das v. Shama Soondri(20), and by Knight Bruce, L.J, in Gopeekrist v.Gungapersaud(21), Where, however, from the lapse of time direct evidence of a conclusive or reliable character is not forthcoming, as to the payment of consideration, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts. Sir Arthur Wilson emphasised this when he observed in Dalib Singh v. Chaudhrian Nawai Kunwar(22), that if evidence-on neither side is wholly convincing as-to the fundamental criterion, namely, the source of the purchase money, if the evidence given and withheld is open to-adverse criticism, the Court must rely on the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions and 6 heir subsequent conduct, including their dealings with or enjoyment of the disputed property [see Upendra v. Bhupendra(23)], We must further look to the substance of the transaction as evidenced in the deeds of the parties, not permitting the real question to be obscured by what Knight Bruce, L.J, calls, in Hunooman v.Babooee(24), the form of expression, the literal sense, nor by what Lord Maonaghten describes in Lal Achal Ram v. Raja Karim(25), as exhibitions of the art of the conveyancer in the shape of recitals of obviously untrue statements introduced to impart some additional solemnity to an instrument." Applying these tests to the present case, I have no doubt whatever that the defendant has failed to establish that the transaction of 1876 was a fictitious tram action. The actual oral evidence produced is not convincing, and there is no option but to found our conclusion mainly on the surrounding circumstances. I have no doubt whatever that thebahuasin has been in possession of the property ever since the heba-bil-ewaz of 1876. I can see no motive which would lead Durga Dutt to put the property in the name of his wife; and even if I were to hold that no consideration was in fact paid by the bahuasin, my conclusion on this point would be the same. In Ismail Mussajee Mooikerdam v. Hafiz Boo(26) the defendant relied upon a document which, on the face of it, purported to be a deed of sale in her favour. The plaintiff contended that the transaction was a benami one and that it did not operate to confer any title on the defendant. It was found as a fact that no consideration was in fact paid by the defendant; but notwithstanding this, the Judicial Committee came to the conclusion that the transaction was one of gift. The decision destroys one part of the argument of Mr. Hasan Imam where he contended that if we found on the evidence that no consideration was paid, we must hold that the transaction was a fictitious one, there being no reason for putting a false recital in the document if the document was intended to have operation. I have anxiously considered all the evidence in this case and I entirely agree with the conclusion at which the learned District Judge has arrived on this point. I hold that the transaction of the 17th April, 1876 was a genuine transaction and operated as a transfer of the property to the bahuasin.

36. Before coming to the points which have been decided by the learned District Judge in favour of the respondent it will be convenient to dispose of a short question which was answered by the learned District Judge in favour of the appellants. Mr. Hasan Imam contends that section 244 of the Code of 1882 operates as a bar to this suit. In order to deal with the question it is necessary to remember that the sale took place on the 21st May 1902, and that the bahuasin and her husband applied for setting aside the sale on the 10th June, 1902. The bahuasin died in February 1904. Thereupon the present plaintiffs were subsituted in the record of the application in the place of the bahuasin on the application of Durga Dutt.

The substitution was effected on the 31st May 1904, and the application was dismissed on the 2nd June, 1904. The contention of Mr. Hasan Imam is that the plaintiffs on being substituted, should have raised the question whether the sale of the property affected their interests; and Mr. Hasan Imam relied upon various cases which are all (with one exception) cases of money decrees.

37. Now, in my opinion, it is impossible to regard the application of the 10th June, 1902, as an application under section 244 of the. Code. No doubt the applicants described the application as one under S. 311 and S. 244 of the Code; but it is a not very material how an application is headed if we know what questions are substantially raised) by the application. It must be remembered that an order under S. 244 of the Code of 1882 operated as a decree, whereas an order under S. 311 did not operate as a decree. It used to-be the constant endeavour of the litigants to bring their applications for setting aside a sale within the terms of S. 244 in order to get a second appeal to the High Court. It is for this reason that applications for setting aside a sale used to be invariably made both under Ss. 311 and 244, just as they are cow made under Order XXI, rule 90, and S. 47 of the present Code. It may be not ceded that an application for setting aside as sale could be brought within the terms of S. 244 if there were sufficient allegations to support such a case. For instance, an application for setting aside a sale on the ground of fraud could be made under the provisions of S. 244 of the Code. It is therefore necessary to examine the allegations made by Durga Dutt and the bahuasin in their application, dated the 10th June, 1902, in order to determine whether their application was one under S. 311 or one under S. 311 and S. 244 of the Code. The application is Exhibit M-3. Now it will he noticed that the allegations are all allegations necessary to enable a party to succeed in an application under S. 311 of the Code. There is not a single allegation made in the petition which would enable the Court to try the case under S. 244 of the Code I am of opinion, therefore, that the application of the 10th June, 1902, though described as one under S. 311 and S. 244 of the Code of 1882, could only be investigated under the provision of S. 311 of the Code. That being so, S. 244 cannot operate as a bar to the present suit.

38. But there is a more serious objection to the argument. It will be remembered that the decree was a mortgage decree, and there is abundant authority for the view that where a decree directs the sale of specific property the Court executing the decree has no power to go behind the decree and say. "I will not sell the propertybecause the interest of the judgment-debtor has come to an end." The exact point has been decided in cases far too numerous to mention. In Liladhar v.Chaturbhuj(27) there was a decree for sale of certain mortgaged properties against Mussammat Jhuno. Mussammat Jhuno died on the 29th October, 1895, and on the 30th June, 1896 an application was made for execution of the decree which was dated the 28th June. The plaintiffs who were entitled on their case to succeed to the property on the death of Mussammat Jhuno were made parties to the execution proceedings as the legal representatives of Mussammat Jhuno. They raised several objections in regard to the application for execution, the first of which was to the effect that the decree was a decree for the sale of the life interest of Mussammat Jhuno and that the estate having determined on her death the decree was no longer capable of execution. They also contended that Mussammat Jhuno was not competent to effect a mortgage of the property to enure beyond her life-time, and that there was no justifying necessity for such a mortgage. The Court executing the decree overruled the objections and directed the sale of the mortgaged properties. Thereupon a suit was instituted by the plaintiffs and they sought a declaration that the decree of the 28th June, 1893, which was obtained by the defendants against Mussam mat Jhuno became void and inoperative at the death and that the propertymentioned in the plaint which was in the possession of the plaintiffs and which the defendants caused to be advertised for sale was not liable to be sold in the events which had happened. It was contended on behalf of the defendants that S. 244 operated as a bar to the suit. The learned Judges deciding the case conceded that if the matter in controversy between the parties in the suit could be decided under S. 244 then there could be no doubt that the suit was not maintainable. But they came to the conclusion that the Court executing the decree could not consider the question of the validity of the decree. In delivering the judgment, the learned Judges said as follows, "A Court executing a decree is

bound to give effect to it as it finds it and it is not in the province of that Court to consider whether the decree was or was not rightly passed. The decree in this case was a decree for the sale of the property; the plaintiffs, who were parties to the execution proceedings in the character of legal representatives of Mussammat Jhdno Kunwar, could, only (raise objections relating to the execution, discharge, or satisfaction of the decree, or to the stay of execution thereof, starting with the assumption that the decree was a valid one. That a judgment-debtor cannot dispute the validity of a decree, is a proposition for which we have abundant authority. We may refer to the recent case of Maluji v. Fakir Chand(28). It is clear that a person claiming title through the original judgment-debtor cannot dispute the validity of she decree, and where a decree directs the sale of particular property, a person who does not claim through the mortgagor cannot in execution contend that the mortgagor was not competent to make the mortgage and that the decree was one which ought not to have been passed. Such questions would, in our opinion, be outside the province of the Court executing the decree; for instance, in the present; case, if we assume that the present plaintiffs could properly raise the objection upon which they mainly rely, the Court executing the decree would have to determine, after taking evidence, whether the mortgage was effected by Jhuno Kunwar, that is, whether the mortgage bond was executed by her, whether there was consideration for the mortgage, and whether there was valid necessity for it. Such an inquiry is certainly not contemplated by Section 244 of the CPC." With reference to the cases which were cited before the learned Judges relating to decrees for money where there was no direction in the decree for sale of specific property, the learned Judges said as follows "The case of a decree for money in which after the death of the debtor, property is attached as the assets of the debtor, and in which the legal representative of the deceased debtor objects to the attachment on the ground that the property attached is no part of the assets of the deceased debtor,-is different from the case of a decree which orders sale of specific property; a case of the former class is contemplated by the ruling of the Full Bench in Seth Ghand Mal v.Durga Dei(29)" and then the learned Judges proceeded to say as follows, "But when a decree specifically orders the sale of particular property no question of assets can arise, and the Court executing the decree is bound to execute it as it stands. Any question relating to the validity of that decree must, in cur opinion, be decided in a separate suit." This is the view which has been accepted by both the Madras High Court and by the Calcutta, High Court [seeKumaretta Servaigaran v. Sabapathy Chettiar(30) and Khetrapal Singh Roy v. Shyama Prosad Barman(31)]. Mr. Hasan Imam relies upon Rajbansi Roy v. Mahabir Roy(32)where the learned Judges appear to have held that when a judgment-debtor does not challenge the validity of a mortgage decree but contends that in execution thereof certain property should not be attached and sold in consequence of circumstances arising subsequent to the decree, such contention ought to be dealt with under S. 244 of the Code, and not by a separate suit. With all respect, I am unable to agree with that decision and prefer to follow the decision of the Allahabad High Court in the case to which I have already referred. I have no doubt whatever that the decision of the District Judge on this point is right, and I must hold that S. 244 of the Code does not operate as a bar to this suit.

39. I now come to the real point in controversy between the parties, namely, What was the effect of the transaction of 1876 on the power of the bahuasin to mortgage the property? The plaintiffs contend that the gift in favour of the bahuasin was asaudyaica gilt and the bahuasin by virtue of that gift took a heritable but inalienable interest in the property and that accordingly it was not in the power of the bahuasinto enter into a mortgage transaction with reference to the property so as to bind the interest of the plaintiffs who claim through the bahuasin and not through their father. Mr. Hasan Imam on behalf of the defendant contends, first, that the transaction of 1876: was a transaction of sale and not a transaction of gift and that accordingly the bahuasin took an absolute interest in the property; that if the transaction was one of gift the bahuasin took an absolute interest in the propertyunder the Hindu Law and that in any event the consent of her husband as evidenced by the fact that he joined in the mortgage validated the mortgage if it were otherwise invalid; and that, thirdly whatever may be the position under the Hindu law, thebahuasin took an absoluts heritable and transferable interest under the terms of theheba-

bil-ewaz. The questions raised in the arguments before us are not easy of solution, and it is necessary to proceed with care.

40. The first question which must be considered is whether the transaction of 1876 was one of sale or one of gift. The document is described as a heba-bil-ewaz; and Mr. Hasan Imam contends that the parties having elected to use a term which is well known in Muhammadan Law must in this instance be deemed to be governed by the Muhammadan Liwin regard to the effect of the transaction. As authorities in support of his proposition Mr. Hasan Imam relied upon Abdul Aziz Khan v.Appayasami Naicker(33) and Ram Narain Singh v. Ghota Nagpur Banking Association(34). These cases establish that the rights of the parties to a contract are to be judged of by that law by which they may justly be presumed to have bound themselves. In the case of Abdul Aziz Khan v. Appayasami Naicker(33), the question arose whether a purchaser at an execution sale of an impartible zamindari could be allowed to put forward the case that he had purchased an absolute interest in it. In order to understand the decision it is well to point out that it was understood in India up to the decision of the Judicial Committee in Sartaz Kuari v. Deoraj Kuari(35)that a holder of an impartible zamindari had only a limited interest and that, except for special justifiable causes, he had no power of alienation beyond his life-time. While this was the view of the law, the plaintiffs purchased the right, title and interest of the holder of an impartible zamindari at a sale held in execution of a decree against such holder. Subsequently this interpretation of the law was reversed, as I have said, by the Judicial Committee in Sartaj Kuari's case(35) and in the Pithapur case Rama Krishna Rao v. Court of Wards(36) which decided that the bolder of an impartible estate had an absolute and alienable interest in it unless a custom against alienation was proved. The plaintiff who was the purchaser of the right, title and interest of the holder of the impartible estate brought a suit against the successor by survivorship for possession of the subject of sale on the ground that the plaintiff had purchased an absolute interest in it. It was held that the reversal of the previously accented interpretation of the law did not displace its application to the contract contained in the certificate of sale of 1876, the put ties to which were bound by the law as then understood and that only the life interest of the then holder passed by the sale. In Ram Narain Singh v. Chota Nagpur Banking Association(34) the question arose as to the meaning of the expression istemrari mukarrari in a lease granted by the Raja of Ramgarh. The learned Judges pointed out that at the time when the leases were granted the idea was universally held that the holder of an impartible, zamindari like the Ramgarh raj could not encumber the corpus of the estate so as to bind the co-parceners except for justifiable special causes, and that it was not till the decision in Sartaj Kuari's case(35) that the contrary view was authoritatively formulated. Mookherji, J., referred to the words of Willes, J., in Lloyd v. Guibert(37) and said that the rights of the parties to a contract are to be judged of by that law by which they may justly be presumed to have bound themselves. But it will be noticed that the law by which they were held to be bound was their personal law, a law which was applicable to them, and that there was no difficulty in applying that law to them although the previously accepted interpretation of that personal law was subsequently reversed by an authoritative decision of the Judicial Committee. No authority has been cited to us to the effect that a Hindu may, by adopting a term well known to Muhammadan Law, make himself bound by the Mahammadan Law. Indeed it is impossible, in my opinion, to maintain that view. It is not necessary to discuss the various cases which have been cited to us by Mr. Hasan Imam to the effect that a heba-bil-ewaz is looked upon in Muhammadan Law as a sale; but I may usefully refer to the following observations of Mahmood, J., in Rahim Baksh v. Muhammad Hasan(38), "Heba-bil-ewaz is a transaction made up of mutual or reciprocal gift between two persons each of whom is alternately the, donor of one gift and the donee of the other."

41. After all it is not very material to consider how the parties describe a transaction, if we know what the transaction is; for it is the substance of the transaction, and not the form of it, to which we must have regard. I must accordingly consider the terms of the document itself to see whether the transaction was one of sale or one of gift. In considering the terms it is only necessary to remember, as Mr. Hasan Imam has admitted before us, that the income of the property at the time of the transaction in question was

anything between Rs. 30,000 and Rs. 40,000 per year. The document itself has been printed, but I have adopted the translation of Mr. Hasan Imam which has been accepted by the plaintiff. The document runs as follows:

"The decree of Raj Banwari Lal Sihu against me for Rs. 41,532-6-8/16 cr./16 ms. is under execution in the Court of the District Judge at Muzaffarpur and the shares of me, the executant in taluka Laheri, pargana Jabdi, T.N 1522 and in mauza Pandual, pargina Hati, T.N 54167 have as per inventory filed by the said decree-holder, been advertised for sale on the 17th April, 1876. Although I, the executant, tried to procure money from creditors, etc. for payment of the decretal amount to the said decree-holder, I could not get it and I see no means to safeguard my milkiat properties from sale as mentioned in the inventory. As the sale will entail loss of the said milkiat properties on sale, belonging to me, the executant, my share of 7834 ga. situate in taluka Laheri asli with dakhli, pargana. Jabdi, T.N 1522 appertaining to Registration Office, District Darbbanga, and sub-district Madhubani, and thana Lockhe, with trees fruit-bearing and non-fruit-bearing, and ahar, pokhar and reservoir and tank and kachcha and pakka, wells, and sair, and salt sail and houses occupied by tenants, and all my zamindari rights which up to now have been in my possession without the co-partnership of anyone, to my wife Mt. Anuragin Bahuasin, having taken Rs. 41,5326-8/16 cr./16 ms. in each, I have made, of my free-will and accord, heba-hil-ewaz and having with the said amount paid up the amount of the decree of the aforesaid decree-holder, and got the property released from sale, have put the aforesaid Mussmmat in possession of the subject of the heba. The aforesaid Mussammat should by becoming possessed of the subject of the heba spend the produce of the property with sons generation after generation, (ha farzandan naslan bad naslan). I, the declarant, or my heirs and representatives (quam moqaimain), shall have no right or concern in demanding the subject of the hebaor the consideration money from the aforesaid Mussammat or her heirs and representatives. Should I, the executant, my heirs and representatives, make any claim or put forward any demand in respect of the gift properties or the consideration thereof, the same will be deemed null and void. I have, therefore, given, in writing, these few wards in the shape of a heba bil-ewaz so that it may be of use when required."

42. No doubt the payment of a consideration of Rs. 41,532 is mentioned; but the question is whether the transaction was substantially one of gift or one of sale. If Mahmood, J., is right in his view that a heba-bil-ewaz is a transaction made up of mutual or reciprocal gifts between two persons, then it would appear that there was a gift by the bahuasin of Rs. 41,532 to her husband and a gift of taluka Laheri by her husband to her. The income of the property was anything between Rs. 30,000 ind Rs. 40,000 a year; and, in my opinion, it is impossible to regard the transaction as a sale when all that was paid by the bahuasin was Rs. 41,532. I have no difficulty whatever in understanding the transaction. Durga Dutt was in reed of Rs. 41,532 to save the property from sale. He had tried to procure the money from the market and had failed. The bahuasin had Rs. 41,532. In order to save the property she handed it over to her husband. The husband in return made a gift of the propertyto his wife. In my opinion the transaction was substantially one of gift, although Durga Dutt received Rs. 41,532 as a gift from his wife.

43. Mr. Hasan Imam has drawn our attention to certain statements alleged to have been made by the bahuasin, suggesting an inference that the transaction in her favour was one of sale. In Suit No. 6 of 1881, which was the suit instituted by her against Turant Lal Chowdhury, she is alleged to have put forward the claim that she was the purchaser of the property in question. The plaint filed by her in that case is however not in the record. But Mr. Hasan Imam relies upon the recitals in the judgment itself; bub as I have said before, the recitals in the judgment are not admissible in evidence against the plaintiffs in this suit. The next admission upon which Mr. Hasan Imam relies is that alleged to have been made by her in Suit No. 29 of 1900. That was a suit by her at against the Maharaja of Darbhanga under the provisions of S. 283 of the Code of 1882 to establish her right to certain propertywhich did not include the property now is suit. The Maharaja had obtained a decree against Babu Durga Dutt and in execution of that decree had attached certain properties alleged to belong to him. The bahuasin laid a claim to those properties

and was defeated in the claim case. Thereupon a title suit was instituted by her. Neither the plaint filed in that suit nor her deposition is in the record. It appears that the question arose as to the source of the bahuasin's income which enabled her to acquire the properties in dispute in that suit; and in dealing with this point the learned Subordinate Judge says as follows:

"The second source of plaintiff's income is said to be the mauza Laheri. Thisproperty is said to have been purchased by her in 1284 from her husband."

44. As I have said before the recital in the judgment is not admissible in evidence against the plaintiffs, and assuming that the admission as alleged was made by thebahuasin, I cannot attach any importance to it, since, on the construction of the document itself, we are in a position to say what the transaction was. I come to the conclusion that the transaction of 1876 in favour of the bahuasin was one of gift.

45. The next question is, What is the effect of that gift? The plaintiffs contend that by virtue of the Mithila law, by which the parties are admittedly governed, thebahuasin took a heritable but inalienable interest in the property and that the terms of the gift did not confer on her a larger interest. I will first consider the case under the Hindu law. The question must be determine in accordance with the doctrine to be found in theVivada Chintamani. Bachaspati Misra, the author of Vivada Chintamani, adopts the enumeration of women's peculiar property which is to be found in Manu andKatyayana, but says that the "six kinds of property" which is to found in Manu"means that there cannot be a less number." In fact Bachaspati Misra gives other kinds of stridhan which are not to be found in Manu. It is not necessary for our present purpose to go through Baohaspati Misra's list, which appears to be exhaustive. The plaintiffs contend that the gift in this case is what is known as a gift subsequent and constituted the saudayica of the bahuasin. The original text upon which the claim is founded is that of Vishnu which is referred to by Baohaspati Misra and which runs as follows in the translation of Vivada Chintamani by Mr. Tagore:

The property of a female is what her father, mother, son, or brother has given her; what she recieved before the nuptial lire; or at the bridal procession; or when her husband took a second wife; what her husband agrees should be regarded as her perquisites; what she received from his or her kinsmen as a gift subseqent to the marriage."

46. The gloss of Baohaspati Misra on the text of Vishnu as translated by Mr. Tagore is as fallows:

"What is received by a woman after marriage from the kinsmen of her lord or those of her parents is called a gift subsequent."—(Mr. Tagore's edition, page 259).

47. Mr. Hasan Imam contends that a gift from a husband is not within the text, for the husband cannot be referred to as "the kinsman of her lord"; but there is no doubt whatever that the translation of Mr. Tagore is not very accurate. The words used in the original are bhartri kul which mean the kul or the family of her husband and includes the husband. The correct translation of the passage is as follows:

That which is received by a woman from the family of her husband subsequent to marraige is called anvadheya or gift subsequent; so also that which is similarly received from the, family of her father."

48. A reference to Vivada Ratnaker, Chappter 12, verse 10, which is also of authority in Mithila, will show that this translation is correct. The passage is translated as follows by Mr. Shastri:

"Whatever is received by a woman after marriage from the husband's family or from her own family is called gift subsequent."

49. I am of opinion, therefore, that gift in the present case, being a gift by the husband to the wife ??? to marriage, must be regarded as the sstridhan, of the wife. According to Bachaspati (see Mr. Tagore's edition, page 259):

"Saudayica is the name by which the different kinds of the peculiar propertyof women are known."

50. That being so, the gift in the present case was a saudayica gift of the husband to the wife.

51. This was not seriously disputed before us; but it was contended that such a gift is niebher heritable nor inalienable. That such a gift is heritable admits of no doubt whatever. Bachaspati Misra refers to the text of Manu on this point which is as follows:

"On the death of the mother let all the uterine brothers (and if unmarried) the uterine sisters divide the maternal estate in equal shares. It is fit even to the daughters of those daughters something should be given from the estate of their maternal grandmother on the ground of natural affection."

52. The words "uterine brothers" obviously do not mean the brothers of the donee, as is shown by the text of Brihaspati to which Bachaspati Misra next refers in these words:

"Brihaspati confirms this," namely, the text of Manu, by declaring that "a woman's property gees to her children, and the daughter is a sharer with them, provided she be unaffirmed; but if she be married, she shall not receive the maternal wealth. Something should be given to her that her feeling may not be wounded."

53. Baohaspati Misra makes the position perfectly dear by interpreting the words "to her children" in the text of Brihaspati as meaning "to her son." The other text to which he refers on this point is that of Gautama which lays down that a woman's separate property goes to her daughters unmarried and unprovided for.

In this case at the date of the transaction, namely, the 17th April, 1876, the bahuasinhad a daughter Aparajita and five sons who are the plaintiffs in this action. Aparajita was married in 1869 and was cited as defendant third party in the action. It is nobody's case that Aparajita was unmarried and unprovided for at the time when the succession opened out. That being so, the plaintiffs, as the sons of the bahuasin, were entitled to succeed to the property after her death as her heirs and not as the heirs of her husband.

54. I now come to the question whether, in her hands, the property was inalienable. I propose to consider the point first on the Hindu Law itself apart from the terms of the heba-bil-ewaz. Bachaspati Misra refers to the following text ofNarada:

"Property given to her by her husband through pure affection, she may enjoy at her pleasure after his death or give away, with the exception of lands or houses".

and draws the following conclusion from that text:

"Consequently a woman can dispose of moveable property which has been given to her by her husband, but she can never dispose of immovableproperty. The same rule holds good in the case of saudayica or the gifts of affectionate kindred" [see Tagore's edition, page 261].

55. It would appear from this passage that it was the view of Bachaspati Misra, who is of paramount authority in Mithila, that a woman can under no circumstances dispose of immovable property given to her by her husband. Bachaspati Misra then refers to the text of Katayayana which provides that a woman, on the death of her husband, may enjoy his estate according to her pleasure; but that in his lifetime she should carefully preserve it. He concedes that the text admits of two meanings:

"The one is that, on the death of the husband his property devolves on his wife and becomes her own in default of other heirs; the other is that theproperty she enjoys with the consent of her husband in the life-time is to be regarded as her peculiar property."

56. It will be noticed that the text of Katyayana is open to two interpretations, and this has given rise to a difference of opinion amongst the commentators. The word used in Katyayana is 'daya.' Now the dictionary meaning of 'daya' is both 'heritages' and 'gift' and this is the sense in which Bachaspati Misra anderstands the term 'daya' as used in Katyayana. On the other hand, the author of Smriti Chandrika, which is of paramount authority in Madras, interprets the term 'daya' as meaning a 'donation'.

57. According to Bachaspati Misra the words, "let a woman on the death of her husband enjoy her husband's property at her discretion" refer to a heritage, that is to say, to the property which devolves on the widow in

default of other heirs, and the words, "while he lives she should carefully preserve it," refer to a donation, that is to say, to what is received by the wife in the lifetime of her husband; and the conclusion at which Bachaspati Misra arrives is as follows:

"As a woman cannot make a present of or at pleasure dispose of immovableproperty given to her by her husband in his life-time, so she cannot dispose of any immovable property which she inherits on his death."

and he says that the same opinion is maintained in Ratnakara and the Prakashakara which are of authority in Mithila. In my opinion, a reference to the scheme set out by Bachaspati Misra makes it abundantly clear that a wife receiving a gift from her husband is incapable of alienating it except under circumstances which would enable a widow taking the property of her husband by inheritance to alienate it. He is at some pains to show that a wife taking a gift from her husband is exactly in the same position as a widow succeeding to theproperty of her husband by inheritance. If that be so, it follows that in the absence of legal necessity or the consent of those persons who are entitled to succeed to the property on her death, there is no power of alienation in a woman taking a property by gift from her husband.

58. The next question is whether the consent of her husband has the effect of validating the transaction, and, if so, whether there was "consent" in this case, within the meaning of that term as used in the Hindu texts. It is contended on behalf of the plaintiffs that Bachaspati Misra is perfectly clear on this point and reference is made to the following passage in Vivada Chintamani as translated by Mr. Setlur:

"Just as is the case of immovable property given by the husband the widow has no power of gift, etc., even with the permission of the husband, so also in the case of immovable property of the husband which is descended to the widow. The Prakashakara and the Ratnakara are to the same effect" (Part II, page 257).

If Mr. Setlur's translation be correct, then the point is concluded by the authority of Bachaspati Misra; but the original passage in Vivada Chintamani has been translated by Mr. Tagore, by Mr. Ghose and by Golap Chandra Sarkar. The translation of Mr. Tagore is as follows:

"As a woman cannot make a present of or at pleasure dispose of immovable property, given to her by her husband in his life-time, so she cannot dispose of any immovable property which she inherits on his death. The same opinion is maintained in the Ratnakara and the Prakashakara"—(Mr. Tagore's translation, page 263).

59. Mr. Ghose adopts the translation of Mr. Tagore. Mr. Shastri translates the text as follows:

"Just as in immovable property given by the husband there is incompetency of women in making gift and the like by reason of this text, so also in the husband's immovable property devolving by inheritance on the wife".

60. The text referred to in Shastri is the text of Katyayana referred to above.

61. It would appear then that Mr. Setlur stands alone in his translation that there is prohibition on the wife to dispose of immovable property taken by her under a gift from her husband even with the consent of the husband. The critical words in the original are 'etat bachanat'. It is contended on behalf of the plaintiffs that there are two readings of this passage and that in one of these readings the word 'etat' is omitted. The contention is that if the word 'etat' be omitted, the word 'bachanat' is capable of being rendered as "by the command or order," and the disputed passage is capable of being rendered as follows:

As by virtue of the order or permission (of the husband) a woman cannot make a present of or at pleasure dispose of immovable property, given to her by her husband in his life-time, so she cannot dispose of any immovable propertywhich she inherits on his death,"

but that if the word 'etat' be taken into consideration, the passage would mean that as by virtue of the text a woman cannot make a present of, etc. It is contended that the word 'bachanat' may mean either a text

or order, command, permission, etc., but it appears that in the text as quoted in Shastri the word 'etat' is omitted and still he renders the word 'bachanat' as text.

62. In view of the authority of Tagore and Shastri, I am unable to come to the conclusion that there is a direct prohibition in Vivada Chintamani on the power of a woman to deal with immovable property even with the consent of her husband.

63. But I am of opinion that Mr. Setlur has rendered the spirit of Bachaspati Misra. The whole idea running through the mind of Bachaspati Misra is that the propertytaken by a woman by a gift from her husband must be protected during her life-time and that she is in the same position in regard to that property as a widow taking theproperty of her husband by inheritance after his death. Now a widow can alienate such property only for legal necessity or with the consent of those who are entitled to succeed to the property on her death. So also it would seem that in the view of Bachaspati Misra, a woman taking the property by gift from her husband can only alienate the property in case of necessity or with the consent of those who are entitled to succeed to the property on her death.

64. It has been urged before us that if there is no express text on this point inVivala Chintamani we must decide the point on the interpretation of the texts ofMitikshara with such assistance as may be afforded by other commentaries (though not recognised as authoritiea in Mithila) and by modern text books. It is conceded that there is no express text on this point in the Mitakshara; but it is contended that both in the Mayukha and Smriti Chandrika it is expressly provided that the prohibition on the right of a woman to alienate property taken by her as a gift from her husband is not absolute, but that she may alienate such property with the consent of her husband; and a decision of the Bombay High Court in Bhau Bin Abaji v. Raghunath Krishna(39), has been cited before us:

I will consider the case first under the Mitikshara; for the Mitikshara is of authority in Mithila except in regard to those matters where there is a difference of opinion between Vignenasvara and the Mithila commentators. Now it is can-ceded that there is no text in the Mitakshara dealing with the question whether a woman taking a property by gift from her husband can alienate such propertywith the consent of her husband.

65. But Mitra Misra, who is of very high authority in the Benares School is of opinion that:

"in the disposal of women's property, females have not independence without the permission of their husbands" (see Sircar's edition of Viramitrodya, page 224).

66. At first sight the text of Mitra Misra would appear to be conclusive in this case but on further investigation it will be noticed that the opinion of Mitra Misra is based on a text of Manu which has been interpreted in a different sense in the Mithilaschool. The text of Manu Chapter 9, upon which reliance is placed in all the schools, verse 199 has been translated as follows in the Sacred Books of the East:

"Women should never make a hoard from (the property of) their families which is common to many, nor from their own (husband's particular) propertywithout permission". (Volume 25, page 372).

67. It is obvious that there is wide scope for different interpretations, since the critical words "husband's particular" are missing in the text, and are left to be inferred from the context. Now Mitra Misra (and, as I shall presently show, the authors of Smriti Chandrika and Mayukha) declined to read these words in the text with the result that he rendered the text as follows:

"Women shall not make any disbursement out of family property which is common to many, or even out of their own property, without the permission of their husbands."

68. The conclusion at which Mitra Misra arrived followed directly from the text ofManu as he read it, which he accepted as of undoubted authority. Now this text ofManu is not referred to in Vivzda Chintamani; but Chandreswar, who is of equal authority in Mithila, refers to it only to show that he has read the text differently. The passage occur in chapter 7, paragraph 2, and is rendered as follows by Sircar:

"Manu says, 'woman shall not make abstraction from family (property) common on to many, nor even from her husband's own property, without permission'."

69. And then follows the commentary of Chandreswar in these words:

"Here by the word 'family' is intended family property by reason of contextual association; hence, out of joint property, abstractions', i.e, secret appropriation of property, should not be made by women without the permission of the owners. Likewise 'from even husband's own property', i.e, from husband's property, held not in common with other members of the family, secret appropriation should not be made, without the permission of the owner of the property. This is the meaning."

70. It is obvious that there is a difference, and a serious difference, between Mitra Misra and Chandreswar on the critical text of Manu, and that the view of Mitra Misra, based as it is on his interpretation of the text of Manu, can be of no authority in Mithili.

71. The view of Mitra Misra as to the text was shared by Nilkantha, the author of the Mayukha. In the Mayukha (chapter 4, S. 10, page 93 of Mr. Mandlilt's edition) the text of Manu is rendered as follows:

"Hence, says Manu (Chapter 9, verse 199): 'A woman should never make any expenditure out of the family (property) belonging to several or even (oui of) her own wealth without the assent of her husband'."

72. This passage is prominently referred to in the judgment of Jenkins, C.J, in Bhau Bin Abaji Gurav v. Baghuiath Krishna Gurav(39), in support of the proposition that a woman's power of disposal over her stridhan is during coverture subject to her husband's consent.

73. The author of the Smriti Chandrika also adopts the interpretation placed upon the text of Manu by Mitra Misra and Nilkantha. That text is rendered as follows in Smriti Chmdrika:

"Manu therefore says: Women should never make expenditure from the wealth of the family common to many, inclusive of themselves, or even from their separate property without the permission of their respective lords"

74. And the comment of the author on the text is as follows:

"The meaning is that women who are naturally wanting in independence cannot of their own choice, make disbursements, use, or the like, of theproperty belonging in common to themselves and their husbands, or ofproperty belonging to them exclusively." (Chapter 9, Ss. 14 and 15, Setlur's Collection of Hindu Law Books on Inheritance, Part 1, page 259.)

75. Now I quite agree that) in dealing with this point, wo may take such assistance as may be afforded by other commentaries, though not recognised as authorities in Mithila; but I think that I have shown with sufficient clearness that the view presented in the Yiramitrodya, the Mayukha and the Smriti Chandi'ika on this point cannot be regarded as of authority in Mithila, The foundation of the rules enunciated in those schools is the text of Manu, and, when that text is interpreted in a different light in the Mithila school, it follows that the rule based on a particular interpretation of the text, not accepted in Mithila, cannot have any operation in Mithila.

76. And a careful examination of Vivada Chintamani will lead to the conclusion that there is no question of the control of the husband in property given by him to his wife, Bachaspati Misras refer to the text of Katyayana, only to put it aside. He then quotes the text of Narada and draws the conclusion, binding in Mithila that a wife can never dispose of immovable property given to her by her husband (Mr. Tagore's edition, page 261). Later in the chapter he says that: The immoveableproperty which a woman gets after the death of her husband, cannot be disposed of at her pleasure "and that" the meaning of this is consonant with that of the husband's donation (which can only be enjoyed but not serpent)"; and lastly he points out that:

"as a woman cannot make a present of or at pelasure dispose of immovableproperty, given to her by her husband in his life-time, so she cannot dispose of any immoveable property which she inherits on his death."

77. It will be noticed that, in the scheme of Bachaspati Misra, the gift and the heritage stand on the same footing and that he deduces the rule that the widow cannot dispose of any immovable property which she inherits on the death of her husband as a logical consequence of the rule that the wife cannot make a present, or at pleasure dispose of immovable property.

78. Now if the gift and the heritage stand on the same footing then it follows that the subject-matter of the gift, if immovable property, cannot be dealt with by the wife, except for purposes which may be denominated "necessary purposes." The consent of the husband, who has parted with his proprietary interest in theproperty, will not validate the transaction, though the consent of the next heirs may raise a presumption of the existence of necessity. In this case the transaction did not rest on any necessity, nor is it pretended that it did. Babu Durga Dutt, it is true, owed a sum of money to the Maharaja; but he had valuable properties of his own which could be offered as a security for the debt. It is urged that Durga Dutt and his sons were under the impression that bahuana properties were inalienable; but the Maharaja was not of that opinion, and the impression of Babu Durga Dutt and his sons cannot decide the question of necessity to the prejudice of the bahuasin. It is for the party founding title on an alienation by a limited owner to show necessity in respect of the alienation; and the Maharaja obviously cannot establish necessity, since he never assented to the doctrine that babuana properties were inalienable. I have no doubt whatever that under the Mithila Law immovable property taken as a gift by a wife from her husband is heritable but inalienable except for purposes which may be denominated necessary purposes, and that in this case there was no legal necessity to support the transaction.

79. Assuming that I am wrong in my view that the consent of the husband will not validate the alienation, I have still to enquire into the question whether there was in this case "the consent" of her-husband to the mortgage. Now the case cannot be pub on a higher footing than this, that, while the husband is living, his consent will raise the presumption that there was necessity to support the transaction. But presumption is a rule of evidence, not a rule of law; and we have all the facts to enable us to decide the point on evidence. Those facts are not in dispute; and I am unable to assent to the proposition that the act of the husband in consenting to transaction for his benefit is to be regarded as a consent which will validate the transaction. The control exercisable by the husband in regard to the dealings of the wife withproperty given to her by him is in no sense proprietary. It may be incident to his status as the guardian of his wife; but if his control is to be put on that footing, he is bound to exercise it/or the protection of his wife and the preservation of theproperty. It cannot be suggested that it is in the power of a guardian to give validity to a transaction by the ward by consenting to it, when the transaction is wholly for the benefit of the guardian; and in this case, the Maharaja must be regarded as a party to the breach of trust, since he knew that the debt was of Durga Dutt Singh, and in no way binding on the bahuasin.

80. It was next contended on behalf of the respondent that the Hindu Law allows the husband, under certain circumstances, to deal with the property of his wife for his benefit, and that the transaction ought to be supported on this ground. The texts of Devala Yanjnavilkya and Katyyaana have been adopted by all the schools as the law on the subject; but we are concerned with the interpretation put on these texts in the Mithila school. Devala givas a complete enumeration of the peculiar propertyof woman. According to him, it consists of:

"food and vesture, ornaments, perquisites and wealth received by a, woman from a kinsman (Vivada Chintamani, Tagore's edition, page 263).

81. According to him, the husband has no right to it except in extreme distress. He provides, however:

"If he (the husband) give it away on a false consideration, or consume it, he must make good the value to the woman with interest; but he may use theproperty of his wife to relieve a distressed son."

82. Bachaspati Misra's gloss on this text is important, and I give it in full as Mr. Hasan Imam strongly relies on it in support of his case. The gloss is as follows;

"The property of a woman should not be improperly given away or consumed without her consent, but it may be used for the relief of a distressed son. It is declared by the same writer that the-husband has power to use it with os? without the consent of his wife. If the husband having obtained her consent used the property amicably, he shall be required to pay the principal when he be-comes rich. If the wife give her peculiar property through affection, when her husband is ill, or in danger, or has been confined by a creditor, he may give her the-value of it when he pleases. The meaning of the above is that if the wife, observing her husband's illness and the like, give her wealth, it may be repaid by him at his pleasure."

83. Mr. Hasan Imam contends that the text gives the husband the power "to use the property amicably having obtained her consent;" but it is obvious that the rule is confined to such properties as are enumerated by Deavla which, ??? to him, constitute "the several kinds of peculiar property of woman." They are (1) food and vesture, (2) ornaments, (3) perquisites, that is, wealth given to a damsel on demanding her in marriage, and (4) wealth received from a kinsman. We are not concerned in this suit with the first three classes of stridhan, for property given by a husband to a wife does not fall within these classes. Does it fall within the words "wealth received from kinsman?" The word in the original for kinsman is 'bandhu' which were is also used in Yajnavalkya and which is rendered in the Mitakshara asmatribandhus and pitribandhus, that is to say, persons related to mother and father (see Colebrook, 2-xi-6, Gharpure's edition of the Mitakshara, page 273, and Banarji'sStridhan, page 299). It is obvious that the husband is not comprehended within the term, and that the text of Devala cannot be cited as authority for the proposition that the husband may deal with the property given by him to his wife with her consent.

84. In the next place it seems to me that neither in form nor in substance was the transaction one in which the husband, "having obtained her consent used theproperty amicably." Now what was the transaction? In point of form the mortgage was by Durga Dutt and the bahuasin on the footing that the property be longed to them, and that the debt, to secure which the mortgage was executed, was binding on both. If, however, the substance is to be regarded then obviously the Maharaja secured the execution of the mortgage by both of them for his own safety, because there was a hebanamah in favour of the bahaasin, and it might be urged if he took the mortgage from the bahuisin that the heba did not operate to convey any title to the bahuasin. The transaction was not a transaction of the husband with the consent of the wife, but a transaation of the husband and wife on the footing that the title was in both of them, so that the Maharaja would have a claim good on the mortgage, if the title was in either.

85. Lastly, I am of opinion that it has not been established that the bahuasin consented to her husband mortgaging the property for her personal benefit. Now I am quite aware that the plaintiffs cannot, in this action, raise the question whether there was not undue influence exerted on the bahuasin in regard to the execution of the mortgage by her. On the hypothesis that the property was alienable by her, no question of undue influence can now arise, since the bahuasin had the right and the opportunity to establish a case of undue influence in the mortgage action against her. But if I am right in holding that the property was not alienable by her, then the question of "consent" becomes material in discussing whether there is an answer to the plaintiff's suit. The plaintiffs say that the property was inalienable and that accordingly they became entitled to recover the property on the death of the bahuasin. To that, the defendant relies that under the Hindu Law, Durga Dutt had complete power to mortgage the property with the consent of the bahuasin. Thereupon the plaintiffs ??? "Prove that the bahuasin consented to her husband mortgaging the property for his personal benefit." Now this question was not in issue in the mortgage action, either directly or constructively, for it was a simple suit to enforce a mortgage executed by Durga Dutt and the bahuasin, on the footing that the property belonged to both of them. The only defence that could be put

forward by the bahuasin in that litigation would be that there was undue influence exerted on her in the matter of the execution of the bond. That issue cannot be raised by the plaintiffs in this Court. But at the same time it must be remembered that the question as to the inalienability of the property could not be put in issue in that litigation; for, as I have said before, the bahuasin could not claim adversely to her own deed. The plaintiffs raise the question of inalienability in this action, and, in answer to the defendant's case that, though the bahuasin could not mortgage theproperty, her husband could mortgage it with the consent of the bahuasin, they are entitled to ask the defendant to prove that the bahuasin did consent to her husband mortgaging the property for his personal benefit.

86. It is therefore, necessary to examine the circumstances connected with the execution of the mortgage bond in dealing with the point, it is to be remembered that the bahuasin was an illiterate perdanashin woman living with her husband at the date of the transaction. The evidence of Amarendra Singh, one of the plaintiffs in this action is as follows:

"The Maharaja had several decrees against Durga Dutt which were under execution. Mr. Duff, a sub-manager of the Durbhanga raj, brought an account of the money due to the raj and informed Durga Dutt that;he Maharaja wanted a mortgage document to secure the debt. After some conversation Mr. Duff left but came back again after a few days and said that the Maharaja wanted the Laheriproperty to be mortgaged. Durga Dutt said: The property is not mine. I have given a heba of it to my wife."

Mr. Duff went away, but came back again and said, "Maharaja has ordered me to get the mortgage deed executed by both of you as the property is in the name of your wife." Durga Dutt thereupon directed the maternal uncle of the witness to ask the bahuasin, and said "whatever decrees there are on me, she also ought to pay." The person so directed went to the bahuasin, and related everything to her. The bahuasin said: 'I know nothing. What is proper may be done.' Durga Dutt on hearing this, informed Mr. Duff that the deed would be executed by both of them. The witness denied that the bahuasin bad any independent legal advice.

87. This is substantially the evidence of Amarendra Singh; and whatever difficulty there may be in accepting the whole of that evidence, this at least is clear that the lady did not have any independent advice and that she executed the document because she was asked to do so by her husband for this part of the evidence of Amarendra Singh remains unchallenged and contradicted.

88. The defendant's version of what took place in connection with the transaction is as follows:

"Durga Dutt Singh accompanied by his son, Amarendra Singh, came and saw the Maharaja and said: 'I owe you money but; I am unable to pay it now. So I want to execute a mortgage bond for the whole amount.' The Maharaja asked him what property he wanted to mortgage. He said that he would mortgage Laheri. Balbhadra Misir, a senior musahib of the Maharaja, thereupon said that Darga Dutt had already executed a farzi deed in respect of that property in favour of his wife. To this Durga Dutt said: 'This is true. But the property is mine, but I have actually executed the farzi deed. This should not stand in the way as I and my wife would jointly execute the mortgage.' The Maharaja thought over the matter and said that he was agreeable if there was a joint executicn of the doaumont by Darga Ditt and his wife."

89. It is not necessary for me to say which of the two versions is true. It is sufficient or me to point out that, whether the suggestion that a mortgage bond should be executed to cover the debt proceeded from the Maharaja or from Durga Dutt, the parties are agreed that the whole of the negotiation was conducted by Durga Dutt without any reference to his wife, and that her consent was assumed rather than taken, and that, if her consent was at all taken, it was taken as a-matter of form, and that no opportunity was given to her to consult her interest in the matter. It is, in my opinion, not open to doubt that her consent was obtained by pressure through her husband, and without independent advice.

90. In these circumstances the question arises whether a Court of Equity will give effect to the argument advanced on behalf of the Maharaja that the bahuasin consented to her husband mortgaging her property for his personal benefit. InTurnbull and Company v. Duval(40) Lord Lindley said as follows:

"Whether the security would be upheld if the only ground for impeaching it was that Mrs. Duval had no independent advice has not really to be determined. Their Lordships are not prepared to say it could not. Bui there is an additional and even stronger ground for impeaching it. It is in their Lordship's opinion quite clear that Mrs. Duval was pressed by her husband to sign, and did sign, the document, which was very different from what she supposed it to be, and a document of the true nature of which she had no conception. It is impossible to hold that Campbell or Turnbull and Company, are unaffected by such pressure and ignorance." In Bank of Montreal v. Stuart(41) the evidence was summed up in these words by Lord Macnaghten: The evidence is clear that in all these transactions Mrs. Stuart, who was a confirmed invalid, acted in passive obedience to her husband's directions. She had no will of her own. Nor had she any means of forming an independent judgment even if she had desired to do so. Upon this evidence, the House of Lords had no hesitation in refusing to support the transaction by which Mrs. Stuart gave her own properties as securities for advances made by the Bank to her husband. Other cases may be cited; but it is not necessary to pursue the subject. In my opinion, "consent" has not been proved as a fact, If, however, it is to be inferred from the circumstances that she was a party to the mortgage bond, I have no difficulty in coming to the conclusion that a Court of Equity will disregard that consent, having regard to the fact that the bahuasin, an illiterate pardanashin lady, acted in passive obedience to her husband's direction, not having a will of her own, nor having any means of forming an independent judgment, even if she had desired to do so.

91. I now come to the text of Yijnavalkya, which, in my opinion, creates no difficulty whatever. The text is as follows:

"A husband is not liable to make good the property of his wife, taken by him in a famine, or for the performance of a duty or during illness or while under restraint"

92. The conditions which would enable Durga Dutt to deal with the property of his wife were not present and the Maharaja was aware that those conditions were not present.

93. The only other text on this point is that of Katyay and who declares that.

"money taken by a man from his wife, for performing some imperative duty, when he his no means of doing so, shall not be repaid."

94. The text has no application, and it is not necessary to pursue the point.

95. In my opinion, the subject-matter of the gift was under the Hindu Law heritable, but inalienable except under circumstances which were not present, and if the terms of the gift did not confer on the bahuasin the right to alienate theproperty, the plaintiffs as the heirs of the bahusasin, are entitled to succeed in the action. This brings me to the question whether the bahuasin took an alienable interest under the terms of the gift.

96. Now in construing the heba-bil-ewaz executed by Durga Dutt in favour of his wife, we are bound to proceed on the assumption that a Hindu knows that, as a general rule, women do not take absolute estates of inheritance which they are enabled to alienate. This was laid down by the judicial Committee in Moulvie Mohamed Shumsool Hooda v. Shewukram alias Roy Doorga Pershad(42) and repeated by their Lordships in Radha Prasad Mullick v. Ranee Mani Dassee(43). This does not mean that, where there are words of sufficient amplitude conveying in the terms of the gift itself the fullest rights of ownership, including the power to alienate, the Court will refuse to construe the deed of gift so as to deny to the donee the right to alienate. But I think, that in construing a deed of gift executed by a Hindu husband in favour of his wife, the Court would be right in leaning towards a on striction which is in consonance with

the ordinary notions and wishes of the Hindus with respect to devolution of property and in harmony with the law by which the parties are governed. The ordinary notions and wishes of Hindus are well known and have peen recognised by the Judicial Committee in the cases to which I have referred. In regard to the law by which the parties are governed, I have already expressed my opinion that the Mithila law reoognises that immoveable property taken as a gift by a wife from her husband is inalienable except for purposes which may; be denominated "necessary purposes."

97. The question then is, to quote the language of Lord Buckmaster in T.B Ramachandra Rao v. A.N.S Ramachandra Rao(44), has the donor made use of words of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership, including the power to alienate? It is not necessary that there should be an express declaration to that effect; but it must follow, as a matter of construction, that something more has been granted than what the law would give, that in fact the fullest rights of ownership, including the power to alienate, have been conveyed.

98. I have set out the document earlier in this judgment and it is not necessary to set it out again. It is conceded that there is no express declaration to the effect that the bahuasin would have the power to alienate; but it is contended that there are various expressions in the grant itself which suggest the inference that the fullest rights of ownership were conveyed to the bahuasin.

99. It was argued that the donor, having described himself as a malik and having conferred all his zamindari rights upon, his wife, has said as plainly as he could that she should have the power to exercise the fullest rights of ownership. The argument is an attractive one; but it is necessary to consider the passage upon which the argument is founded. That passage is as follows:

"Having taken Rs. 41,532, I have made heba-bil-ewaz to my wife of my share of 7-annas 8¾-gandas situate in taluka Laheri……with trees, fruit-bearing and non-fruit-bearing and ahar and pokur and reservoirs and tank and kaohoha and pakka wells and sair and salt sair and houses occupied by tenants and all my zamindari rights which up to now have been in my possession without the co-partnership of anyone in possession."

100. Mr. Hasan Imam's argument is that the words, 'zamindari rights' mean rights over the zamindari and that, as the rights of the donor over the zamindari were absolute, nothing short of an absolute estate were by these words granted to the bahuasin. With great respect, I am unable to assent to the argument. Here general words—"zamindari rights"—follow an enumeration of specific things,—"trees, fruit-bearing and non-fruit bearing and ahar and pokar, and reservoirs and tanka and kachoha and pakka wells and sair and salt sair and houses occupied by tenants"—which undoubtedly have some common characteristic which constitutes them as genus, and the general words can fee properly regarded as in the nature of a sweeping clause designed to guard against accidental omissions. That being sd, the rule of ejusdem generis will apply, and the general words will be restricted to things of the same nature as those which have been already mentioned. The expression "zamindiri rights," is my opinion, means rights to specific properties of the same nature as those specified, and act rights of a zauindar in the properties specified. If there was any doubt as to this interpretation, the words which precede and the words which follow remove that doubt. The document says:

"I am making a heba-bil-ewaz."

101. Now in respect of what properties? The grantor enumerates the specific properties and ends with the sweeping clause, "all my zamindari rights," and he puts the matter beyond doubt by adding the words, "which up to now have been in my possession without the co-partnership of anyone." Now I can understand a heba bil ewaz of specific properties; but I do not understand a heba-bil-ewaz of an abstract right, the right of a proprietor to alienate the properties. Nor is it possible to speak of an abstract right as being in the possession of the donor without the co-partnership of any one. In my opinion, the foil description of what was intended to be conveyed shows conclusively that the expression "zamindari

rights" means right or title to properties constituting the zamindari, those properties being of the same nature as those already specified.

102. It was next contended that a gift by a husband to his wife, generation after generation (ba farzandan, naslan bad naslan) carries with it the right to, alienate. Now I entirely agree that these words, in the absence of anything showing a contrary intention, pass a general ??? of inheritance according to Hindu Law. This is the primary signification of these words, which denote heritability and connote an estate of unlimited duration. I also agree that the right of alienation, speaking broadly, is a necessary part of the ownership of an estate of inheritance. Hence there is a secondary signification of those words, which denote an absolute estate and connote alienability. A grant of an estate to a person 'be farzandan, naslan bad naslan' is a grant of an estate of inheritance. An estate of inheritance is a heritable estate. A heritable estate is an absolute and alienable estate. Therefore an estate granted to a person 'be farzandan naslan bad naslan' is an absolute and alienable estate. If I am right in this view, then the words 'be farzandan, naslan bad nislan' are apt for conferring an estate of inheritance and therefore an absolute and alienable estate, not an estate of inheritance and an absolute and alienable estate.

103. Now it is quite true that, both in this country and in England, the right of free disposition is generally inherent in an estate of inheritance; but the holder of such an estate might be prevented by personal incapacity from exercising the right of alienation; and a restraint on alienation might be imposed by family custom or local law for instance, an infant, though holding an estate of inheritance, is not permitted to exercise the right of alienation. So, in England, wives married before 1883, could not dispose of any property to which their title accrued before that year. So also, where the personal enjoyment of the property is essential to the performance of certain public duties, no alienation of such property can be mode. So also, as I have already said, a restraint on alienation might be imposed by family custom or local law. If I am right in this view, then an estate of inheritance would not carry with it the right of alienation, when such an estate is conveyed to a person suffering under a personal incapacity or subject to a family or local custom prohibiting alienation. If this be so, then clearly a right of alienation is not necessarily inherent in an estate of inheritance, and a grant of property to a person 'be farzandan, naslan bad naslan' would not necessarily give that person the right to alienate the property, though these words would conter on him an estate of inheritance.

For instance, a grant of property to a ghatwal 'be farzandan naslan bad naslan' to enable him to perform certain public duties would not confer on him the right to alienate the property. I arrive at the conclusion that these words— be farzandan, naslan had naslan—are generally sufficient to confer an estate of inheritance; that a right of alienation is generally inherent in an estate of inheritance: but that, as the incidents of every estate in land may be affected by the personal incapacity of the holder for the time being or, by the existence of the personal law by which the holder may be governed, it may be shown in any particular instance that the grant of an estate of inheritance did not carry with it the right of alienation.

104. Now the personal law by which the bahuasin was governed prohibited her from alienating the immovable property which she took as a gift from her husband. Bachaspati Misra has laid down in distinct terms that though a woman can dispose of moveable property which has been given to her by her husband, she can never dispose of immovable property. In my opinion, the ordinary incident of an estate of inheritance was so affected by the personal law by which the bahuasin was governed that in this case the grant of such an estate as evidenced by the words 'be farzandan naslan hid naslan' did not carry with it the right of alienation.

105. I will now consider some of the cases on the subject; but I may begin by giving the opinion of Mr. Mayne on the point:

Gifts by a husband to his wife of immovable property, says Mr. Mayne in his Hindu Law, "even though accompanied by express words of inheritance, are not alienable unless distinctly declared to be so. It is

a quality of such gifts that though they descend to wife's heirs, she cannot alienate them." (8th edition, paragraph 397, page 542).

106. I am informed that this passage is omitted in the latest edition of the book: but the latest edition is not by Mr. Mayne. The only criticism that can legitimately be directed against this passage is that there is a suggestion in it that there is no power of alienation unless that power is expressly conferred. This would not be correct; nor do I think that Mr. Mayne has so stated the proposition. But the passage is valuable as indicating that an estate of inheritance granted by a husband to his wife does not carry with it the right of alienation.

107. In Bhujanga Rau v. Ramayamma(45) the Madras High Court held that "whereproperty is given to a Hindu lady by her husband, and the gift is expressed only in such terms as create a heritable estate, it must be taken that it was the intention of the donor that she should acquire such an interest as the personal law of the parties recognises to be created by the transaction." The gift in that case was by a Hindu to his wife 'putra poutra paryantan', which expression his the same significance as that conveyed by the expression 'ba farzandan naslan bad naslan.' This decision was followed in Nunnu Meah v. Krishnaswami(46), but was disapproved of inMuthuvenkatanarayanan Chetti v. Athipanduranga Naidu(47). In the latter case, however, the question did not fall to be considered, as a power of alienation was expressly conferred on the wife. It was also disapproved of in Ramachandra Rao v.Ramachandra Rao(48) where Sheshagiri Ayyar, J., considered that it was inconsistent with the conclusions of the Judicial Committee in Surajmani v. Rabi Nath Ojha(49). In delivering his judgment that learned Judge referred to the terms of Section 8 of the Transfer of Property Act and held that, unless a different intention is expressed or necessarily implied, a transfer of property by a husband to his wife passes forthwith to the wife all the interest which the husband is capable of pa-sing in the propertyor in the legal incidents thereof; and the learned Judge said: "This is what was laid down in Surajmani v. Babi Nath Ojha(49)."

108. Now if that is what was laid down in Sarajmani's case(49), then it is obvious that Bhujanga Rau v. Ramayamma(45) can no longer be followed. The decision of the High Court in Ramachandra Rao v. Ramachandra Rao(48) was, however, reversed by the Judicial Committee on-another point [see T.B Ramachandra Rao v. A.N.S Ramachandra Rao(44) but their Lordships thought it their duty to state in clear terms what was actually decided by them in Suraj mail's case(49), as there was some misapprehension as to the effect of that decision. "In the case referred to," said their Lordships, when originally heard before the High Court [Surajmani v. Rabi Nath(50)], it had been stated that under the Hindu law in the case of a gift of immoveable property to a Hindu widow, she had no power be alienate unless such power was expressly conferred. The decision of this Board did no more than establish that proposition was not accurate, and that it was possible by the use of words of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership, including, of course, the power to alienate, which the High Court had thought required to be added by express declaration. In that case, it is true that there is some comparison drawn between the gift to a widow and a gift to person not under disability but that was not the foundation of the decision which depends entirely upon the wide meaning attributed to the words in which the gift to the widow was clothed. More recent decisions of this Board in Sasiman Chowdhurain v. Shib Narayan Chawdhury(51) and Bhaidas Shivadas v. Bai Gulab(52) do nothing but repeat;his same proposition in other words." 1 think that it is perfectly clear that their Lordships did not decide in Surajmani's case(49) that, to quote the words of Sheshagiri Ayyar, J., "unless there is an expressed or implied qualification to the contrary the donor must be deemed to have conveyed all that he was possessed of in the property granted."

109. The decisions of the Indian Courts on this point afford an interesting studyMoulvie Mohamed Shumsool Hooda v. Shewukram alias Roy Doorga Pershad(42) was decided by the Judicial Committee in 1874. The rule of construction formulated in that decision gradually came to be treated as a rule of law, and a tendency appeared in the decisions to treat gifts by Hindu husbands to their wives as conveying only a limited estate unless a power of alienation was conferred by express declaration. This tendency found its

fullest expression in Surajmani's case(49) which was decided by the Allahabad High Court in 1903. An appeal was taken to the Judicial Committee which decided in 1907 that the expression 'malik iva khud ikhtiyar' imported full proprietary rights and that, in order to cut down the full proprietary rights that the words imported, something must be found in the context to qualify it. Now this was all that was decided by the Judicial Committee in Surajmani's case(49); bub it was thought thar the decision came to this, that a gift by a Hindu husband to his wife should be construed as conveying an absolute estate, unless there was something in the contest to quality it. But, as the Judicial Committee has now plainly intimated to the Indian Courts, it decided nothing of the kind. Their Lordships found an expression in the grant, malik wa khud ikhtiyar, which they construed as importing full proprietary rights. The decision therefore rested on the view that the grantor had used words of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership. It is obvious that there is no conflict between the decision inSurajmani's case(49) and the decision in Bhujanqa Bau v. Ramayamma(45). In my opinion, the latter case was correctly decided, and there is no reason why we should not follow it.

110. I should like to say a word about Section 8 of the Transfer of Property Act on which Sheshagiri Ayyar, J., strongly relied in Ramachandra Rao v. Ramachandra Rao(48). That section provides that unless a different intention is expressly or necessarily implied, a transfer of property passes-forthwith to the transferee all the interest, which the transferor is then capable of passing in the property, and in the legal incidents thereof. But S. 8, which is in the second chapter of the Act, must be read subject to the provision of S. 2 which provides that nothing in the second chap-; ter of the Act shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist law. Now, it is a rule of Hindu law as it is understood in Mithila, that a gift by a Hindu to his wife does not carry with it the right to alienate. In my opinion, therefore, we cannot have recourse to S. 8 in construing the gift in this case.

111. In the Tagore case Ganedra Mohan v. Upendra Mohan(53), Sir Barnes Peacock said as follows: "It is certainly true, as stated by the learned Judge, that a gift to a man and his sons and grandsons, or to a man and his son and son's son would, in the absence of anything showing a contrary intention, pass a general state of inheritance according to Hindu Law. I believe the words usually used an Bengal areputra-poutradikrame and in the upper province naslan bad naslan, the literal meaning of the former being 'sons and grandsons, etc., in due succession', and of the latter, 'in regular descent or succession.' If I may say so with the utmost respect, this is a very accurate statement of what those expressions import. The opinion of Sir Barnes Peacock was accepted by the Judicial Committee as the basis of their decision in Ramlal Mookerjee v. Secretary of State(54). A Hindu died leaving a widow, a daughter's daughter and a brother. By his Will, he left his properties to his daughter's daughter in these terms:

"If no daughter or daughter's son of mine should be living at the time of the death of my wife, then my grand-daughter (daughter's daughter) shall become the proprietress of my property and shall remain in undisputed possession thereof putra poutradikrame."

112. The question raised in the appeal turned upon the construction of the terms of the gift to the daughter's daughter. Their Lordships quoted with approval the passage from the judgment of Sir Barnes Peacock in the Tagore case(53) and proceeded to say as follows: "The correctness of these observations was not questioned in the judgment on appeal. It was not denied at the Bar that these words, though undoubtedly importing the male sex in their primary signification, would in the case of a gift to a male, be read as words of general ??? would include female as well as male heirs, where, by the law, his estate would descend to females." Stopping here for a moment, it is to be noted that the force of these words may be profoundly affected by the law by which the grantee may be governed, and that this is what their Lordships expressly decided. This is exactly what was decided by the Madras High Court in Bhujanga Rau v. Ramayamma(45). Their Lordships continued as follows: "Their Lordships feel no greater difficulty in applying them to the female heirs of a female, where, by law, the estate would descend to such heirs, and see no sufficient reason for narrowing the construction of words which have been often recognised in India as apt for conferring an estate of inheritance." If there was nothing else in the judgment of their

Lordships, it could not be contended that there is anything in the decision to encourage the argument that these words are regarded as apt for conferring an absolute estate. Mr. Hasan Imam, however, strongly relies upon the next passage in the judgment which is as follows:— "They are of opinion that clause 7, if it stood alone, would confer an absolute estate on Haridasi (the grand-daughter) upon the death of the widow."

113. Now, in my opinion, the decision of the Judicial Committee cannot be regarded as an authority for the proposition that the words, putra-poutradikrame ornaslan bad naslan, import, of their own force, an absolute estate. Their Lordships have already said that the force of these words may be qualified by the personal law of the grantee. Now, what is the actual decision? The exact signification of these words has already been considered; and their Lordships have said very definitely that these words are recognised "as apt, for conferring an estate of inheritance." But then, in the passage which followed, their Lordships said that the terms of the gift conferred an absolute estate on Haridasi and so they did, unless there was something in the personal law by which Haridasi was governed (which there was not) which prevented her from alienating the property which she got from her grandfather. As I have said before, an estate of inheritance is, prima facie, an absolute estate; and Haridasi took an absolute estate, unless she suffered from a personal incapacity or was subject to a personal law which imposed a restriction on her right to alienate the property. Obviously there was no personal incapacity which afifeoted her in any way; and the personal law by which she was governed imposed no restriction on her right to alienate. [See Dyabhaga, 4-1-23, Setlur, Part 2, page 32].

114. The case of Lalit Mohan Singh Roy v. Chukkulal Roy(55) does not carry us any further. A. Hindu testator who had no children devised his estate to his nephew in these terms.

"If no children are born to me, then the eldest son born of the vromb of my third sister Srimabi Kshiroda, my nephew. Sriman Lalit Mohan Roy…becoming on my death my sthalbhishikta and becoming owner (malik) of all my estate and properties, etc. shall, remaining my sthalbkishikta, obtaining the management of the Iswar Sheba… keeping the estate intact, enjoy with son, grandson and so on in succession, the proceeds of my estate." The question raised in the appeal was whether Lalit Mohan took an absolute heritable and alienable estate, or whether there was an attempt by the testator to the up the estate for ever, in which case the gift would fail, subject to a life estate in favour of Lalit Mohan. Their Lordships said as follows "The words 'become owner (malik) of all my estate and properties' would, unless the context indicated a different meaning, be sufficient for that purpose even without the words 'enjoy with son, grandson and so on in succession' which latter words are frequently used in Hindu Wills and have acquired the force of technical words conveying a heritable and alienable estate." Their Lordships further said:

"Their Lordships do not find any express prohibition in this Will against alienation of the estate, the beneficial enjoyment of which is given to the devisees, as there is of the estates appropriated to religious and charitable purposes. If there were such a, clause added to a gift of a heritable estate, it would be repugnant and void."

115. I have no doubt whatever that their Lordships were dealing with the particular case before them, and not laying down a rule applicable to all cases. As I have said before, a heritable estate is prima facie alienable, and a clause prohibiting alienation added to a gift of a heritable estate would be prima facie void. In the case before their Lordships, the grantee took a heritable estate and therefore all alienable estate, because he was not affected by any personal incapacity nor subject to a personal law which imposed a restriction on his power of alienation. But supposing a gift was made to a parson, naslan bad naslan on condition of rendering services of a public nature? If the wide interpretation sought to be placed on the decision of the Judicial Committee were to be accepted as correct, then obviously the grantee would have the right to alienate the lands. But exactly the opposite was held by the Judicial Committee in Nilmoni Singh Deo v. Bakmnath Singh(56). Although the paint is not made clear in the decision of their Lordships, there is

no doubt that the grant was 'naslan bad naslan'. I may usefully refer to the argument of Counsel on this point. The argument was put as follows: "Again it was to be noticed that it did not follow that, because the Government might disallow the succession of an unlit person, the jagir could not be hereditary. Ib was hereditary, and because it was hereditary, it was alienable. Grants held 'naslan bad naslan', 'buntan pad buntan', as the jagir was, were transferable by gifts, sale, or otherwise, by the terms of Regulations 37 of 1793 and 12 of 1805. "Their Lordships found that the jagir was hereditary, but came to the conclusion that it was inalienable. I take the basis of the decision to be that where the personal enjoyment of the property is essential to the performance of certain public duties, no alienation of such property can be made, although the grant may be heriditary. This is one instance where the words 'naslan bad naslan' did not convey an alienable estate, though they did convey an heritable estate. Other instances may be cited; for instance in Raj Ramgarh, there is a well-understood custom that jagirs are resumable on failure of heirs in the male line, though the grant may be to a person and his putra-poutradic [see Ram Narayan Singh v. ??? Saran Lal(57)]. The Calcutta ??? Court, relying upon the decision of ??? Committee inRamlal Mookherjee v. Secretary of State(54) and in Lalit Mohun Singh Roy v. Chukkun Lal Roy(55) had come to the conclusion that those words imported an estate of inheritance. The decision of the High Court was, however, reversed by the Judicial Committee. So also the force of the words, 'putra-poutradic' may give way to a family custom. This was held by the Judicial Committee in Ekradeshiwar Singh v. Janeshwari Bahuasin(58). The grant in that case was to a lady and in these terms: "You and your sons and grandsons, etc., (putra-poutradic), shall cultivate or get cultivated the mauza aforesaid, and enjoy the usufruct thereof yourself."

116. Their Lordships held that these words a? used in the eanad must be regarded as words of limitation, consistent with the custom, and not as words of general inheritance.

117. I have laboured this point at unnecessary length because it was contended at the Bar that the decision of their Lordships in the two cases to which I have referred concludes the matter, and that the words, 'naslan bad naslan' or words having the same signification, wherever used, must be regarded as conferring an estate of inheritance with power of alienation. In those cases, these words undoubtedly did confer estates of inheritance with power of alienation; but I am unable to read those decisions as establishing a fixed and unalterable rule applicable in every case, although the grantee may be prevented by personal incapacity from exercising the right of alienation, and although the personal law governing the grantee may impose a restriction. In Ehradeswar Singh v. Janeshioari Bahuasin(58), their Lordships held that those words must be read as consistent with the custom and not as words of general inheritance. I am of opinion that, in this case, those words must be read as consistent with the personal law by which the bahuasin was governed. That law imposed a restriction on her right to alienate the lands; and ??? the words, be farzandan, ??? as consistent with the ??? Law, I must hold that these ??? though they conveyed to her an ??? did not confer on ??? to alienate the property.

118. It was lastly contended that it ought to be held, on a construction of the covenant for title, that an alienable interest was conveyed to the bahuasin. The covenant is in these terms:

"I, the declarant, or my heirs and representatives (quam moquaiman) shall have no right or concern in demanding: the subject of the heba or the consideration money from the aforesaid Mussammat or her heirs and representatives Should I, the executant, my heirs and representatives, make any claim or put forward any demand in respect of the gift-properties or the consideration thereof, the same will be deemed null and void."

119. It was contended that by the use of the words "heirs and representatives," the-grantor clearly intimated that he had conferred the fullest proprietary rights on the grantee including the right to alienate-the property. In my opinion the argument is without substance. I have expressed my opinion that in the actual dis-positive words used by the grantor there is nothing to indicate that an alienable interest was conveyed to the grantee. That being so, can a covenant of this nature be construed as in my way enlarging the grant?

In my opinion, the covenant secured the grantee in the possession of that which; was previously granted, and gave an additional remedy, namely, an action for damages, if the grantee was deprived of that which was previously professed to be granted, but did not enlarge that which was previously granted [see Leech v. Schweder(59) and Davis v. To on Properties Investment Corporation, Limited(60). In Nottidge v. Dering(61) Cozens-Hardy, M.R, said as follows: "Covenants for title are really ancillary to the-assurance of theproperty, and ought not, in the absence of clear words, to be extended so as to confer a larger estate than is expressly assured." This is a sufficient answer to the argument; but I think the argument must fail on broader grounds. The estate which was expressly granted to the bahuasin was an estate of inheritance, that is to say, an estate of unlimited duration. Now whether a power of alienation is incident to such an estate must depend, in my view, upon the personal law of the person who happens, for the time being, to be the holder of the estate. If the holder happened to be a person who is not subject to a law prohibiting him from alienating the land, clearly he could exercise the power of alienation; and the covenant would operate so as to prevent the grantor, his heirs and representatives from "demanding the subject of the heba" from the alienee. This is how I construe the covenant in question.

120. Mr. Hasan Imam referred to Ram Narain Singh v. Peary Bhugat(62) in support of his argument on this point. That was a case of a gift of immovable property by a husband to his wife. The grantor stated in distinct terms that he was conveying all his rights to his wife without exception and that neither he nor his heirs shall at any time have any claim either to the property or to the price or value of it. The Calcutta High Court held that, looking at the fact shat the husband divested himself of all his rights, and that he prohibited his descendants from claiming the property or its price, the gift was a gift "out and out." I do not see how the decision throws any light on the subject. The decision proceeded on the terms of the dispositive words used in the gift, and no other conclusion could be reached on the terms of the grant.

121. I have anxiously considered the terms of the hebanamah, and I am of opinion that the grantor has not, to quote, the words of Lord Buckmaster, "made use of words of sufficient amplitude conveying in the terms of the gift itself the fullest rights of ownership, including the power to alienate." It must be remembered that the language used by Hindus in instruments relaying to grants of immoveableproperty is very often merely descriptive of the course of legal succession. A grant of immoveable property by a Hindu husband to his wife is heritable under theMithila Law. The words used by Durga Dutt do no more than describe the course of succession under the law by which he was governed. Such a grant is inalienable except under circumstances which are not present here. Durga Dutt was presumably aware of the restriction placed by law on the right of the wife to alienate immovableproperty received by her as a gift from her husband. It is not disputed that Durga Dutt could, by use of apt words, convey the fullest rights of proprietorship in theproperty to his wife. The question is, Has he done so? I have come to the conclusion that, reading the whole hebanamah consistently with the law by which the parties were governed there is no indication in the terms of the gift that the fullest rights of proprietorship, including the right to alienate the property, were conferred on thebahuasin. That being so, the plaintiffs are entitled to succeed in the action.

122. My learned brother and I wish to acknowledge the assistance we have received in this case from Counsel and Vakils on both sides. We in this Court are accustomed to get every assistance from the leading Counsel engaged in the case; and that assistance was ungrudgingly given. But we would especially like to express our appreciation of the industry and learning shown by Mr. Lachmi Kanta, Jha, himself a Maithil Brahmin, in his wide survey of the Hindu Law texts.

123. I would allow the appeal, set aside the judgment and the decree of the Court below, and give the plaintiffs a decree for possession with mesne profits which must now be assessed in the usual way. The plaintiffs are also entitled to their costs both in this Court and in the Court below.

124. As my learned brother and I differ in opinion on two paints, bath being points of law, namely:

First, whether the present suit is maintainable by the plaintiffs, and whether it is barred by limitation; and.

Secondly, whether, on the interpretation of the heba bil-ewaz the fullest rights of ownership, including the power to alienate the property were conveyed by Babu Durga Dutt Singh to his wife, this appeal must be heard, in accordance with S. 98 of the Code, on these points only, by one or more of the other Judges of this Court. The papers must be laid before the Chief Justice for the necessary orders.

125. FOSTER, J.:— The following pedigree and statements appended thereto which I gather from the plaint will explain some of the facts of this case: (vide Page 660 Col. 1.)

I.— No. 3 received from the Maharaja settlement of babuana properties inpargana Jabdi and purchased (inter alia) 16-annas taluka Laheri.

II.—Nos. 4 and 5 partitioned Laheri, No. 5 getting as his separated share a 7-annas 8-gandas 3-kauris share.

III.— No. 5 made a gift of this Laheri share to No. 6 (1876).

IV.—Nos. 5 and 6 executed a mortgage of the Laheri property in favour of No. 5's creditor to satisfy No. 5's debts (1890).

126. The plaintiffs, the eldest of whom was born about the year 160, belong to a junior branch of the Darbhanga raj family and are Mithila Brahmins. Their father Durga Dutt Singh, after partition of babuana and other properties (which includedtaluka Laheri) in 1876 conveyed to his wife Mussammat Anuragin Kuer, whom I shall call the bahuasin, his share in taluka Laheri by way of heba-bil-ewaz. Whether this transaction was benami or genuine is an issue in this case. Plaintiffs say there was a complete change and transfer of ownership and possession; defendants say it was merely nominal. In 1890 Dusga Dutt Singh, being in debt to the Maharaja to the extent of about Rs. 1,89,000, at the Maharaja's instance, executed along with his wife a mortgage of the Laheri property aforementioned in favour of his creditor. The Maharaja had always been paying the land revenue of the babuana properties, and so a debt had accumulated. Whether this mortgage could affect the present plaintiffs' interest as heirs of the property is the main question in this case. That the plaintiffs claim as heirs of their mother is stated in the plaint. In 1897 this mortgage was decreed, the Maharaja being plaintiff and Durga Dutt Singh and his wife defendants. In 1902 the whole interest in the Laheri property was sold in execution of the mortgage decree and purchased by the Maharaja who is now defendant. In February 1904 the bahuasin died, at a time when an application to set aside the sale made by her and her husband was pending; and her sons were at Durga Dutt's instance substituted as her heirs who had inherited the Laheri property. Two months or so later this application was ejected and the sale confirmed on the 2nd June, 1904. In February 1906, the plaintiffs instituted Suit No. 19 of 1903, for a declaration of their title and confirmation of possession in Laheri, on the ground that the mortgage band was got by fraud without the knowledge of their mother the owner, and that the mortgage decree was fraudulent. Darga Dutt Singh was pro forma defendant in this case; he died in July, 1907. In June, 1907 the plaintiffs withdrew the suit with permission to bring a fresh suit. On the 24th July, 1918, the plaintiffs instituted the present suit. The cause of action in the previous plaint had been stated as having arisen in February 1906 when the frauds therein stated had been discovered. The cause of action in the present plaint is dated 16th December, 1906, the delivery of possession to the Maharaja as auetion-purchaser. The declarations sought in the plaint are that the property belonged to the plaintiffs' mother, and that Durga Dutt Singh had no right to execute the mortgage bond; so the rights of the bahuasin and the plaintiffs were not affected by the mortgage suit, the decree, the sale and the delivery of possession. The plaintiffs pray for recovery of possession and mesne profits. It is important to note that there is no prayer for setting aside the mortgage decree—seemingly because of limitation—and the word, "fraud" does not occur in the statement of reliefs sought. It is also important to note that the plaintiffs sue not as reversionary heirs of their father, but as heirs of their mother, the position which in fact they had occupied in the execution proceedings. The present suit having been dismissed the plaintiffs are appealing and there is a cross-objection: all the important issues are thus re-opened.

127. It is obvious that the mortgage decree obtained against Durga Dutt Singh and his wife must stand in this case as a fundamental fact. So long as the decree stands it must bind the heirs. The decree and the execution directed the sale of the whole interest—not of a life estate or any restricted interest in the Laheri property, and the decree has been accordingly enforced in the sale. But the plaintiffs' case, which does not deny these facts, is that the decree and the sale could pass only thebahuasin's estate. It is urged that she had a heritable but not an alienable estate, and she had no power to mortgage the whole estate so as to disinherit her heirs. The contention purports to be based upon the Mithila Law.

128. Before proceeding to consider the main issue, I wish for convenience sake to take up the issue raised by the Maharaja defendant whether the heba-bil-eivaz of 1876 was benami. I have had the advantage of reading my learned brother's judgment on this point and I need not repeat his arguments, with every one of which I am in agreement. I find that the heba-bil-ewaz was not a benami transaction and that the issue has been correctly decided by the learned District Judge.

129. It yet remains to see what was the legal result of this heba-bil-ewaz of 1876. It appears to me that if Durga Dutt Singh wanted to grant an estate with restrictions on alienation, he need merely have executed a heba or a simple gift. By making a transfer in the form of a hebabil-eivaz, which ordinarily carries the incidents of a sale, he must be taken to have intended the usual legal consequences of such a common form of transfer. I admit that in this argument I am paying more attention to form than substance; but so, I think, did Babu Durga Dutt, whose intentions I am attempting to discover. He a Mithila Brahmin of wealth, having some knowledge himself and no doubt numerous advisers within reach, must have known the difference between a heba and a heba-bil-ewaz. Why did he choose the latter expression instead of 'heba' or the corresponding term in Hindi Daupatra especially if he intended that his wife should take property as a Mithila Hindu wife. Are we justified in thinking that so much of the document was a pure mistake? After a careful examination of all the expressions of the document, I can find none which clearly indicate a limited estate. It is noticeable that the document mentions that theproperty transferred is to pass into the possession of the Mussammat and the produce thereof is to be enjoyed generation after generation:

"And I, the executant, and my heirs and representatives neither have nor shall have any demand or dispute with respect to the gift properties or consideration thereof as against the said Mussammat her heirs and representatives."

130. The adjectival word "gift" is in the original 'mahuba' a term which is used to describe properties transferred by either Aheba or (as in this case) a heba-bil-ewaz. Now, the noticeable points are firstly that no mention is made of any specified heir such as a daughter or son, though such existed: the expressions of the document in this respect are such as might be used in a transfer to an utter stranger: secondly, as the learned Judgere remarks:

"The Use of the words 'warisan wa qaem moqamian' in respect of both the donor and the donee shows that the donor contemplated that the donee may have qaem moqamian', i.e, representatives other than her heirs"

131. In the third plaoe the passage quoted recalls the case of Ram Narain v.Pearay Bhagat(62), and certainly supports the contention that this was an absolute transfer. No doubt the facts are not set out in this reported case, and at first sight the only question appears to have been whether the wife, the donee, took an estate of inheritance or for her life-time. But the issue must have been also as to whether the gift conveyed an absolute state ("a gift out and out"). For that is the conclusion arrived at, and the two Calcutta cases quoted dealt with what purported to be absolute alienations by a wife (devisee in one case, donee in the other). The issues governing those cases were whether she, the wife or widow, took an absolute and therefore freely alienable estate. The cases are Kunj Behari Dhur v. Prem Chand Dutt(63) and Srimati Pabitra Dasi v. Dimudar Jana(64).

132. As I read the Privy Council decisions they lay down uniformly the rule that: (the Courts should examine the documents of transfer with an eye to the ordinary Hindu's inclinations; he does not usually intend to make a wife absolute owner by a deed of transfer. In the earlier interpretations of this rule of the Privy Council the Court went almost so far at to import a strong presumption that the grantee was to receive a limited estate, and it was held that something express is necessary to exclude what is tacitly implied. Expression facit cessare taciturn. But I conceive that the rule adopted in modern times is that if by a construction of the document the grant of an absolute estate can reasonably be extracted, there is no need to insist on an express and distinct grant of an absolute estate Expressio eorum quae insunt nihil operatur. Express words are not essential; the fact that the donor is a Mithila wife is not fundamental; it is to be seen whether the words are of sufficient amplitude to convey an absolute estate [Ramchandra v. Ramchandra(44)].

133. It appears from the pedigree and the statements given above quoted from the plaint that mauza Laheri was (in spite of the recital in the heba-bil ewaz) ancestral property held in co-parcenership by Durga Dutt and his sons. The gift of 1876 was made in the life-time of some of the sons, but in the circumstances it must, I think, be held that the transfer, though effected by the father, was made by him as agent of the joint family who ratified and affirmed the transaction.

134. After a prolonged consideration of the document, I am disposed to think that this was the transfer of an absolute estate.

135. The heba-bil-ewaz was evidently, we see from its recital, rather an act of gratitude that a sale for value. In spite of its form, it seems to me to be reasonable to regard this transfer of the Laheri property as in substance a gift (dattam) within the meaning of the Hindu texts— unless of course it be an absolute grant.

136. The learned Yakil for the appellants urges that on the Mithila text whatever immoveable property the husband grants to the wife, unless distinctly stated to be alienable, even though accompanied by express words of inheritance, cannot be alienated even with the consent of the husband. As he forcibly put it in his argument, so far as such property is concerned, the husband is "as a dead man." The proposition is of course surprising, and it is unfortunate that it was not put forward in the plaint; for in a case like this evidence of local usage in Mithila tracts would have been of great value. My learned brother's discussion of the texts has entirely unsettled my original impression that the Mithila law had no divergence from the law of the other schools in regard to the alienation by a wife with her husband's consent of immoveable property granted to her by him in his life-time. At the same time I am still impressed with some difficulties which do not amount to substantial doubts. As I have said, we have no evidence of local usage, a matter which is important when there is no authoritative text expressly and positively supporting the alleged Mithilarule. The rule is gathered by inference and is nowhere explicitly stated.

137. The ruling of the Madras Court, Bhujanga Rau v. Ramayyama(45), has been declared to be inconsistent with later Privy Council decisions and to be no longer law by the Editor of the 9th edition of Mr. Mayne's Hindu Law (paragraph 397); but this statement is a marked departure from the 8th edition. The case refers to alienations by the widow, not by a wife with her husband's consent. The form of alternative proposition in the Mitakshara school would, I conceive, be different from the form of alternative proposition in the Mithila school though bath might be expressed loosely as "if not an absolute estate, inalienable." But it would have to be understood that in the Mitakshara law the word "inalienable" in such a context would mean "inalienable without the husband's consent" and in Mithila law "inalienable without legal necessity." That is how I understand the Smriti Chandrika (Chapter IX, S. 1, verses 13 and 14, and S. 2, verse 4, et passim) in regard to the Mitakshara law as applied in Madras. But on the whole I arrive at the conclusion that the rule that the wife must preserve the corpus of the property while her husband lives, spending only the income subject to his permission, and after his death must preserve it for her heirs, is fairly de-ducible from the Mithila texts; and I defer in this matter to my learned brother's arguments.

138. Reverting to the question whether the;gift was absolute, as I understandBhujanga Rau's case(45) it laid down that gifts by a husband to his wife of immovableproperty, even though accompanied by express words of inheritance, are not alienable by her unless distinctly stated to be so, though they descend to the wife's heirs. I think this is put forward as a rule of Mitakshara law and I take the meaning to be that such a gift even though it creates an estate of inheritance does not free the wife in respect of alienation from her husband's tutelage, or after his death from the limitations of a widow's estate, unless the matter is made distinctly clear. I am not convinced that such a demand for a distinct statement in the document could be applied in Mithila law, where the husband's tutelage can never exist in such circumstances and the grantor would (on one of the alternative constructions) be rendering his property absolutely inalienable. In Mithila law the alternative is ordinarily between absolute alienability, and absolute inalienability where there are no special limitations reserving control by some one. So I am not disposed to import the rule of Bhujanga Rau's case(45), as I construe it, into the present case. A husband, karta and father under Mithila law would be taking a very serious step in making such a gift to his wife as is suggested on the plaintiff's side: he would be surrendering his authority and control, and tying up the property for an indefinite period. In my opinion the hiba-bil-ewaz of 1876 was an absolute transfer, and I find that the intention deducible from is expressions was an absolute transfer. The finding is pertinent at this point because it shows why I think that the special rules ofMithila law as to absolute inalienability remain outside the facts of the present case.

139. I come now to the questions that have arisen in connection with the execution of the mortgage bond. In the first suit it was the plaintiff's case that the mortgage was fraudulently executed and that the bahuasin never gave her consent at all. The discovery of this fraud was stated to have occurred in February 1906 (though the documentary and oral evidence show that three of the plaintiffs had a close connection with the document evidencing the transaction). The only evidence to suggest undue influence —which is all that is now asserted—is the statement that Babu Durga Dutt Singh, when he was being pressed by the Maharaja, sent a message to the bahuasin through her own relative Raghunandan Jha (a very important fact in itself) that she ought to meet the decrees against her husband. On this point as to undue influence I entirely agree with the learned District Judge who finds that there was no undue influence and that the lady had her uncle's independent advice. The matter is not in fact within the legal scope of the present case.

140. The position of the plaintiffs is anomalous. From the facts set out in paragraphs 1 to 3 of the plaint (the details of which I have quoted at the commencement of this judgment), I gather that taluka Laheri was ancestralproperty. In paragraph 17 of the plaint, the relief (e) is stated:

> That should the Court for any reason hold that the said deed of gift was only a colourable transaction, the Court may be pleased to hold that the said mortgage bond, the decree passed thereon in the absence of the plaintiffs Nos. 1 to 4 and the proceeding in execution thereof, affected, if at all, only the right, title and interest of the said Babu Durga Dutt Singh ani not that of the said plaintiffs; and the slid plaintiffs are entitled to recover possession of their legitimate share in the disputed property and with this declaration the Court may be pleased to pass in favour of the said plaintiffs a decree for possession of their legitimate share and for mesne profits with regard to that share from the date of this suit until the date of recovery of possession."

141. Now the property being co-parcenary and having bean, on the facts which are assumed in this relief and asserted in the plaint, mortgaged by the father for his previous debts which were neither immoral nor illegal, and the whole propertyhaving been sold in enforcement of the mortgage decree, it is difficult to see what the plaintiffs expect to get under this prayer; but, as I have found that theproperty was sold in execution of a mortgage executed by their mother who was the absolute owner thereof, and as that mortgage was decreed against her, and the whole property was sold in execution, this relief need not be considered.

142. The next fact to note is that the mother was not a co-parcener or a manager or anything but absolute owner, and the sons, the present plaintiffs, were not co-parceners or reversionary heirs, but direct heirs who would have succeeded to theproperty, after the death of their mother, by simple inheritance: they derive title from their mother and are her heirs and legal representatives, they are therefore claiming under their mother. The mortgage decree still stands good, therefore the sale thereunder. In the previous suit, which was on a different cause of action from that of the present suit, as I have mentioned already, there was an express prayer for a declaration that the mortgage bond and the decree were vitiated by fraud and there was an express prayer for setting aside that decree. That suit was withdrawn and has never again been instituted. The opportunity passed away, and was lost. The present suit is quite different. I do not see how the question of undue influence can be raised in the present suit so as to have the effect of annulling the mortgage decree and the sale thereunder. As I have said before, the plaintiffs have no title independent of their mother.

143. I agree with the learned District Judge that the plaintiffs could not sue for possession until they had cleared the way for such a suit by securing the annulment of the mortgage decree and the sale thereunder. The point is raised in the written statement paragraph 3, in the issues Nos. 2 and 4, and has found a place in the arguments in this Court. The policy of restraining multiplicity of suits is not merely a matter for parties to invoke in their own interest, but it is a matter of public concern, and therefore, I have no hesitation in giving it importance. The contention of the plaintiffs is that they can ignore the decree and sale, as they put it, "we are not bound by them." In my opinion, the property Laheri has passed away in the execution sale and it is now too late to set that sale aside, and so the suit is maintainable. No doubt there are cases where a person's interests are not affected by Court sales; the commonest example is where the decree and sale were without jurisdiction, as when the property of a stranger to the suit is sold in execution, thatproperty being outside the property ordered to be sold under the decree [Kadar Hossain v. Hossain Saheb(65)]. Another instance is of course where the sale has not passed any property; as in Motilal v. Karauddin(66). In that case there were two sales of the same property, and it was found that in the second sale there was no right, title or interest of the judgment-debtor left to be sold, so the first purchaser was secure. I do not find that the present case falls within this class. There is a second class of cases in which the Court sale is valid to the extent of the judgment debtor's life interest;, but the reversioners can elect to avoid the sale and indicate their election by bringing, a suit for for possession [Bijoy Gopal Mukherjee v. Krishna Mahishi Debi(67)].

144. But this latter rule must be subjected to weighty reservations. I venture to put forward in a lengthy sentence what I conceive to be an enunciation of the law governing this case: Later I shall refer to this as my main proposition;. I am assuming, of course, that the case falls under Hindu Law.

145. If the bahuasin, as mortgagor defendant, represented the whole estate in the mortgage suit; if the trial of that suit has not been shown to have been unfair; and even if the bahuasin was personally estopped from raising certain, pleas, for instance, the absolute inalienability of the Laheri property; still, if the evidence before us shows that the debt was in fact due, and if we find, nothing to show collusion or fraud in the obtaining from the Court of the decree in that suit, then the plaintiffs are bound by it, unless and until they get that decree set aside.

146. In order to be quite fair to the plaintiffs, I am assuming that they are in the favourable position—in view of the peculiar provisions of Mithila Law accepted in this judgment—of reversioners, and therefore not "claiming under" the bahuasin in the sense of Section 11 of the CPC.

147. I have premised in my main proposition that there must be nothing to show collusion or fraud. We have before us the following facts: (a) intelligent adult members of the family, the father and three sons, either joined or took some part in the execution of the mortgage; (b) the father took a noticeable part in the litigation and so did the son, after the sale in execution; (c) the oral evidence before us consists in mere negations—attesting witnesses know nothing of the contents of the mortgage bond, processes were not

served in the mortgage suit, and so forth —there is no positive evidence of fraud having the effect of misleading the Court; (d) the suit to annul the mortgage decree was withdrawn by the present plaintiffs and never revived.

148. So, to come back to my main proposition. What weight are we to give to the fact that the bahuasin was subject to a personal estoppel, when, so far as we can see in this suit, the mortgage debt was in fact due and there was no proved fraud or collusion in the mortgage suit? For the sake of brevity, I do not propose to go at length in the authorities. My findings of fact and law are that the bahuasin in the mortgage suit was the one person in the world capable of defending the property; that she was under a duty to protect it; and that she did not, because so far as we know, she could not, contest the suit; and that her personal estoppel did not detract, so far as we know, from the fairness of the trial of the suit. I agree with the learned Judge's discussion of issue 14. He might have quoted Exhibit G. 3. I find that thebahuasin had due notice in the suit. These being my findings, I invite attention to Mayne's Hindu Law (9th edition) S. 664, read with Ss. 641 to 643, and Mulla's Commentary on the Code of Civil Procedure (7th edition), pages 50 and 51. But I quote as authorities specially pertinent Subbamal v. Avudaiyammal(68) and Gur Nanak v. Jai Narain(69).

149. I also quote the case of Parekh Ranchor v. Rai Vakhat(70) as I think it is useful to indicate my point of view. A widow, in spite of her duty to protect the estate, suffered a collusive decree and sale, and the nearest heir of the widow's husband brought a suit for a declaration that the sale was inoperative as against him. His suit was out of time under Article 12, but timely under Article 95 of the Limitation Act. It was held that Article 12 did not apply to the case and he was entitled to a decree. Now, in the present case, the plaintiffs do not allege that the mortgage decree was collusive, and they are out of time under both Articles. In the previous plaint the fraud there alleged was state to have been discovered in February 1906, and the present suit was instituted on the 24th July, 1918.

150. If the plaintiffs assert, as they do in the plaint, that they are the heirs of thebahuasin, it is clear that the decree must bind them as her heirs and legal representatives. If they attempt to assert that, having regard to the special conditions of the Mithila law, they are very much in the same position as reversioners, because it is the duty of the wile to preserve the property for the heirs, I would refer to my previous discussion of the legal position of reversioners. As to their claim to ignore the decree and the sale, I refer to the Privy Council decision in Malkarjun v. Narahari(71). In that case, notice of execution of a money decree was issued upon the nephew of the deceased judgment-debtor as his heir and legal representative, when in fact the judgment-debtor had left his properties by Will to his two daughters. The daughters had no notice. It so happened, that a mortgagee of the property sold had purchased the property in this execution. The daughters sued the mortgagee for redemption and possession. It was held that the plaintiffs must clear the ground for redemption by a suit to set aside the sale. The omission to serve notice on the two legal representatives, though a serious irregularity, did not operate to divest the execution Court of jurisdiction. In such circumstances the plaintiff could not ignore the sale. The jurisdiction being there, the Court was empowered to decide wrongly as well as rightly. The case was barrel under Article 12 of the Limitation Act. There was a similar case in Raghavendra Ayyar v. Karuppa(72), a suit to recover land, with no prayer to set aside a sale effected under a Rent Recovery Act. The suit failed, being barred by Article 12.

151. It is also to be remembered that the plaintiffs were present in Court as heirs and representatives of their mother and prosecuted her application to set aside the sale early in 1904. In their presence that application was rejected and the sale confirmed by the Subordinate Judge on the 2nd June, 1904, and an appeal from that order was dismissed in the High Court in January 1906. The order of the 2nd June, 1904 was an order "against" the present plaintiffs, in the sense of Section 312 of the old CPC. So the plaintiffs were by that enactment debarred from bringing a suit to set aside the sale on grounds which would re-open the questions decided in the proceedings under S. 311. It is clear that any suit to cancel the mortgage bond would be barred under Article 91 or 125 of the Limitation Act and any suit to have the decree set aside

on the ground of fraud would be barrel under Article 95. Article 141 is inapplicable, for, at the death of the bahuasin, the plaintiffs being equally bound with her to submit to the mortgage decree and sale ware not entitled to theproperty in the sense of the Article. How could they be when that sale was subsequently confirmed and certified? Article 142 cannot refer to mere possessory ??? (as it is called); there is a special provision for that in Article 3. At the time of delivery of possession the plaintiffs were divested of all title. No other Articles of the Indian Limitation Act appear to me to be apposite.

152. In my opinion, with great respect to my learned brother, whose judgment I have had the advantage of reading, this appeal should fail on the two grounds, that the mortgage of 1890 was a valid transfer made by the plaintiffs' mother, and that the present suit, which could not lie as long as the mortgage decree and the sale there under remain in force, is now barred and not maintainable.

[On application by the appellants for judgment in favour of the appellants under clause 28 of the Letters Patent the following judgment was delivered:]

JUDGMENT

153. Mr. K.B Dutt, appearing on behalf of the appellants, draws our attention to the decision of the Judicial Committee in Bhaidas Shivadas v. Bai Gulab(73) and contends that on the authority of that decision his clients are entitled to judgment in their favour. The first question is whether we have any jurisdiction to entertain the application which is now made before us.

154. It is well established that there is no authority to alter or add to a judgment after it is dated and signed, save as provided by S. 152 or on review. Oar Code recognises the rule in O. 20, R. 3. But in this case we are not asked to alter or add to the judgment. The judgment pronounced by us remains. The only question is as to the procedure for giving effect to the judgment. We have differed in opinion on points of law; and the question is whether there should be a reference to a third Judge under S. 98 of the Cods or whether the appellants are entitled to judgment in their favour under clause 28 of the Letters Patent. The order which Mr. Dutt is asking us to vary did not decide anything as of right between the parties; it merely referred the matter to the decision of a third Judge. We are now asked to vary that order because of what the Judicial Committee is said to have held in the case to which I have referred. It has been held in England that, in matters of mere procedure, a Judge has power, in dealing with what has been directed by a previous interlocutory order, when new facts are brought before him, which show that following the precise directions of that previous order will cause what he considers inconvenience or other injury to the parties, to give directions that, notwithstanding the previous interlocutory order, a different mode shall be adopted for carrying into effect the substance of the previous order. [See Prestney v. Colchester Corporation(74).] The question before us is of a somewhat differ a at nature; but we are of opinion that the order which we are asked to vary not having decided anything as of right between the parties but merely laying down the procedure by which the right should be decided, we have complete jurisdiction to vary the order if we are satisfied that the right between the parties cannot be ascertained in the mole indicated by us.

155. Coming to the merits of the application, it seams to us that the order passed by us is right. No doubt the Judicial Committee held in the case cited that clause 36 of the Letters Patent of Bombay (corresponding with clause 28 of our Letters Patent) prescribes a special form of procedure by which, if the Judge hearing an appeal are equally divided, the opinion of the senior Judge prevails and that clause is not controlled by Section 93 of the CPC whish provides for a reference of the point in dispute to one or more other Judges, But it must be remembered that the Judicial Committee was dealing with a case which was heard on the Original Side of the Bombay High Court; and this was prominently referred to in the arguments of Mr. DeGruyther who pointed out that the case was on the Original Side and the procedure in appeal was regulated by clauses 15 and 36 of the Letters Patent of Bombay. Now there is no doubt that the provisions in S. 98 of the Code create a totally distinct method of procedure in the event of difference between two Judges from that which is laid down by clause 36 of the Letters Patent of Bombay. Under clause 36

the judgment of the Judge who is the senior Judge would be the judgment which the parties before the Court would have a right to obtain; under S. 98 the judgment to which they are entitled is the judgment of the majority of all the Judges who have heard the appeal, including the Judge to whom the points in difference may be referred.

156. In our opinion there is no conflict between the Code and the Letters Patent. The special procedure indicated in the Letters Patent applies to Letters Patent appeals; the procedure indicated in S. 98 of the Code applies to appeals from sub-ordinate Courts. The matter was fully considered by the Bombay High Court in Bhuta Jayatsingh v. Lakadu Dhansing(75) and we concur so completely in the judgment of the Full Bench that we think it unnecessary to state our reasons in support of the order which we have already passed. In our opinion the application must be refused.

[The appeal was laid before the Chief Justice, owing to the difference in opinion between the learned Judges:—]

157. DAWSON MILLER, C.J:— This appeal has been referred to me under Section 98 of the CPC for determination upon two points of law upon which the learned judge before whom the appeal came originally have differed in opinion.

158. The points is formulated in the judgment of Das, J., are:—First, whether the present suit is maintainable by the plaintiffs, and whether it is barred by limitation; and secondly, whether, on the interpretation of the heba-bil-ewaz, the fullest rights of ownership, including the power to alienate the property, were conveyed by Babu Durga Dutt Singh to his wife.

159. The facts are fully recorded in the judgment of Das, J., and it is unnecessary to repeat them.

160. The argument before me was mainly directed towards the second point and it will be convenient to deal with it first. It was conceded at the outset by Sir Binode Mitter, who appeared on behalf of the appellants, that if the heba-bil ewaz passed all rights of ownership to the grantee, the suit is not ma bainable. Again it is not disputed that the instrument of 1876 conveys an estate of inheritance which would, after the death of the grantee, devolve upon her own heirs and not upon those of her husband as in the case of property inherited by a Hindu widow from her husband. It is further conceded that if the grantee had been a male or even a female under no personal disability, there is nothing in the Hindu law which would exclude the right of alienation incident to a grant of an estate of inheritance.

161. It is contended, however, that in determining the intentions of the grantor it must be taken that Durga Dutt Singh was well aware that a Hindu wife governed by the Mithila law could not alienate immovable property, the gift of her husband, and that presumably his intention would be to transfer only such powers as the ordinary law recognised, and even if he erroneously supposed that the grantee might alienate the property with his consent, this can make no difference in the present case if in fact, as now found, his consent did not validate the transaction.

162. The proposition contended for is stated in the judgment of the Judicial Committee in Moulvi Mohamed Shamsool Hooda v. Shewakram(42) in the words: "In construing the Will of a Hindu, it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property of Hindus. It may be assumed that a Hindu generally deires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate." Bearing that in mind and having regard to all the expressions in the Will, which must be taken together, their Lordships held in that case that the testator's intention was to grant to his deceased son's wife a life interest only with remainder to her two daughters who were also mentioned in the Will as heirs and Maliks. This principle was again recognised by the Judicial Committee in Radha Prasad Mulick v. Ranee Mani Dassee(43). There is no doubt that the principle is one which must be given due weight. In both the cases cited, there were, however, indications in the Will itself that an interest

for life only was intended to be given to the daughters with remainder over to other persons named. So clearly was this intention expressed in the later case that, notwithstanding the provisions of Section 82 of the Indian Succession Act of 1865, which was applicable under Section 2 of the Hindu Wills Act of 1870 to the case in question, their Lordships were satisfied that only a restricted interest was intended to pass.

163. A somewhat similar principle is sometimes expressed by saying that the law of the place where the contract is made is prima facie that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention. [See Lloyd v. Guibert(37).]

164. But, after all, the intention is primarily to be gathered from the words of the instrument itself, and the application of this and similar doctrines, although they must be given due weight, must not be allowed to overrule the clear indications, of intention to be gathered from the words of the document. Perhaps it may; not be out of place to repeat here what was said by Lord Justice Turner in delivering the judgment of the Judicial Committee in Sreemutty Soorjeemoney Dossee v.Demibundoo Mullik(76) The case was one of the construction of a Will, "In determining that construction," said the learned Lord Justice, "what we must look to, is the intention of the testator. The Hindoo law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily, the words of the Will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the Will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the Will or the surrounding circumstances) displace that assumption."

165. In applying these principles to testamentary and other forms of gift, the Courts in India appear to have inclined from time to time towards two extremes: one view being that a gift of an estate of inheritance to a Hindu wife did not pass the right of alienation except when conferred by express words; the other that such a gift always gave the right of alienation except when expressly excluded.

166. I think it may be gathered from the decisions of the Judicial Committee that neither of these views quite correctly expresses the proper rule of construction in such cases. In Surajamani v. Rabinath(50), the High Court at Allahabad following earlier decisions of the same Court had held that under the Hindu law a testamentary gift of immovable property by a husband be his wife, although made in terms creating an haritable estate, did not confer upon her any power of alienation unless such power was given by express words in the instrument. The High Court considered that in the absence of such express power it must be presumed that as regards her power of alienation the testator intended that she should be under the same restrictions as the Hindu law imposes upon a widow in the case of property inherited from her husband. On appeal to His Majesty in Council, their Lordships overruled the decision and held that where full proprietray rights are clearly granted over the property this conferred the power of alienation unless there was something in the context or the surrounding circumstances showing a different intention and the fact that the donee was a woman was not in tint case sufficient in itself to impute a different intention. [See Surajamani v.Babinath Ojha(49)]. It is important to remember that case, although it applied to a Will made after the year 1870, did not come within the operation of Section 2 of the Hindu Wills Act of that year and Section 82 of the Indian Succession Act had therefore no application. In that case also the decision of Mitter, J., in Kollany Kooerv. Luchmee Pershad(77) was cited with approval.

167. The High Court at Madras on the other hand, appears in more recent decisions to have inclined towards the opposite extreme. In Ramachandra Rao v.Ramachandra Rao(48), a case of a testamentary gift to

a Hindu wife, it was held by Seshagiri Ayyar, J., that the earlier decisions of the same High Court in Bhujanga v.Ramayamma(45) and Nunnu Meah v. Krishna Swami(46)." must be deemad to have been overruled by the decision of the Judicial Committee lin Surajmani's case(49), and that unless there is an express or implied qualification to the contrary the donor must be deemed to have conveyed all that he was possessed of in the propertygranted including the power of alienation. The words of the grant in that case were: "Out of the remaining property my adopted son shall be entitled to enjoy one-half of the property. Out of the remaining half my two wives shall take half and half." I do not wish to be understood either as questioning the propriety of that decision or expressing concurrence with it; I merely wish to point out that on appeal to the Judicial Committee, where the decision was overruled upon another point, their Lordships, although it was not necessary for them to determine the effect of the deed of gift at the same time thought it expedient to issue a note of warring, as some misapprehension appeared to them to exist in the High Courts in India as to the effect of certain decisions of the Board and notably that of Surajmani v. Rabinath Ojha(49). Lord Buckmaster, in delivering the judgment of the Judicial Committee, says: "In the case referred to (Surajmani's case), when originally heared before the High Court, it had been stated that under the Hindu law in the case of a gift of immovable property to a Hindu widow she had no power to alienate unless such power was expressly conferred. The decision of this Board did no more than establish that proposition was not accurate, and that it was possible by the use of words of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership, including of course the power to alienate, which the High Court had thought required to be aided by express declaration. In that case it is true some comparison was drawn between the gift to a Hindu widow and the gift to person not under disability, but that was not the foundation of the decision, which depended entirely upon the wide meaning of the words in which the gift to the widow was clothed. More recent decisions of this Board in Sasiman Chowdhurain v. Shib Narayan Chowdhury(51) and Bhaidas Shivdas v. Bai Gulab(52) do nothing but repeats the same proposition in other words' [See Ramchandra Rao v. Ramaohandm Rao(44).]

168. The effect of these decisions appears to me to be that there is nothing in the Hindu law which prohibits a woman, whether wife or widow, from acquiring an absolute estate in property including the power of alienation. If words of grant are used importing the transfer of full proprietary rights, then effect must be given to them irrespective of the sex of the grantee. It may appear, however, from the context or from the surrounding circumstances that a limited power of disposal was intended to be conferred, even where an estate of inheritance is granted. Where ambiguity exists in the document itself or where the words are not of sufficient amplitude to confer full powers of alienation it is legitimate to assume that the grantor had in mind the ordinary disability which the Hindu law attaches to a woman's rights over property and this may be considered in determining the intention even where an estate of inheritance is granted. But where words are used which in their context express an intention of transferring full rights of ownership, it seems to me that the other principles of interpretation relied on are of minor importance and should not be allowed to restrict the natural meaning of the words.

169. Before considering the interpretation of the document, I desire to point out that I am bound by the findings already come to by the learned judges who heard the appeal in so far as they are agreed. I do not therefore prosose to discuss the question whether under the Mithila law as expounded in the Vivada Chintamani, theproperty was alienable during the husband's life-time and with his consent. Whether the learned judges were agreed that the heba-bil-ewaz was a gift or a sale is perhaps not altogether free from doubt. Das, J. held a clear view that the transaction was a gift. Poster J., thought that it was rather an act of gratitude than a sale for value and says:

In spite of its form it seems to me to be reasonable to regard this transfer of the Laheri property as in substance a gift (dattam) within the meaning of 'the Hindu texts',

but he adds—

unless of course it is an absolute grant."

170. I have some difficulty in seeing how the nature of the transaction could depend upon whether it was an absolute or a restricted grant. I think what the learned Judge probably had in mind was that the ordinary Hindu law would not prevail over an absolute grant carrying a power of alienation, and not that the quality of the estate granted would affect the nature of the transaction. It full rights of ownership were transferred it would not matter whether the transfer was effected by gift or by sale. In either case the right of alienation would subsist. I think however I ought no assume that the learned Judges were agreed that the transaction was one of gift, and, what ever my own views on the subject may be, I must hold that on the terms of the reference I am precluded from re-opening, the point. This question arose in argument in discussing the intention of the grantor in connection with what may be called the surrounding circumstances. It was urged by Mr. Hasan Imam, on behalf of the respondents, that Durga Dutt-Singh would never have transferred theproperty to his wife in the form of a heba-bil-ewaz, which text-book writers appear to agree, carries with it the incidents of a sale, if he really intended the Hindu law restraining alienation in the case of a gift to a wife to apply. Foster, J., appears to accede to this argument although as I have stated, he eventually agreed that it was a gift. It was also argued that although it has now been decided that the instrument is one of gift it does not follow that Durga Dutt Singh took the same view some 50 years ago when he transferred the property to his-wife and therefore the presumption which would arise in the case of a gift either disappears or is materially weakened.

171. In the same connection it was also argued on behalf of the respondents that in all the cases in which the principle enunciated in Shamsool Hooda's case(42) has been applied, the Hindu law applicable was well known and established and knowledge thereof might well be imputed to the person making a disposition of hisproperty whereas in the present case it does not follow that the law now laid down, after a critical examination of the texts, was so universally acknowledged in 1876 as to carry any presumption that the grantor was then aware of it. It is argued that even if it be clearly stated in the Vivada Chintamani, and it appears to be so, that a wife cannot at her pleasure alienate immovable property given to her by her husband, the finding that she cannot do so even with his consent during his lifetime and in order to pay his creditors is arrived at rathe as an inference drawn from the text of Bachaspati Misra than from any direct prohibition therein contained, and that there has hitherto been no decided case in which the Mithila law has been so expounded. The question then arises how far it whould be safe in the present case to presume that Durga Dutt Singh in effecting the transfer was aware of the restraint on alienation imposed by the Mithila law as now expounded, upon a wife during her husband's life time with his consent and for the purpose of satisfying his creditors. I am not sure that it would be safe to presume more than this, namely, that the grantor was aware that in the Mithila country a wife could not at pleasure dispose of the property given to her by her husband. Sir Binode Mitter contended that even then the husband's consent would not make the alienation valid if in fact the law prohibits it in spite of his consent. I quite agree but the question is not, for this purpose, what the law is, but how far it can be presumed that the grantor was aware of it and intended the transaction to be governed by it.

172. It was also argued by Mr. Hasan Imam for the respondents that the subsequent action of Durga Dutt Singh in joining in the mortgage transaction was in itself a strong indication that when he made the gift in 1876 he did not intend theproperty to be inalienable even with his consent. I think, however, it would be highly dangerous and hardly legitimate to interpret his intentions in 1876 by reference to his conduct 14 years later when the considerations which then influenced him may have been entirely different. He has not been charged and no question of estoppel by his conduct arises. I have referred to these matters somewhat fully out of respect to the learned Counsel who argued them at some length, but in the view I take of the meaning of the heba-bil-ewaz it is not necessary to determine how far the presumption of intention contended for by the appellants is affected by the considerations mentioned. I should be prepared to hold, if necessary, that there are circumstances present in this case which tend to weaken the presumption which, speaking generally, arises in such cases. I refer more particularly to the

form in which the transfer took place and the fact that a substantial consideration passed from the donee to the donor as indications that Durga Dutts Singh may, after all, not have had in mind the restraint on alienation in the case of gifts to a wife when he transferred the property. I do not however wish to base my decision upon the strength or weakness of the presumption in the present case and it is unnecessary to discuss it further, for, giving full weight to the principle enunciated in the cases already cited, there was, in my opinion, in theheba-bil-ewaz a clearly expressed intention to transfer full rights of ownership including the right of alienation.

173. The document begins by describing Durga Dutt Singh as the proprietor (malik) of the Laheri property. It then recites that a decree obtained against him by his creditor for Rs. 41,532 is in course of execution in the Court of the District Judge and that the property in suit and another property of his have been advertised for sale on the following day; that he has tried and failed to raise the money and as the sale will entail loss of both the milkiat properties, having taken the sum stated above from, his wife, he makes heba-bil-ewaz to her, his wife, of his share in taluka Laheri. "With trees, fruit-bearing and non-fruit-bearing and ahar and pokhar and reservoir and tank and katcha and pakka wells and sair and salt sairs and houses occupied by tenants and all my zamindari rights which up to now have (or has) been in my possession without the copartnership of anyone".

174. It then recites that he has paid off the sum due under the decree and got theproperty released from sale and put musammat in possession and directs that by becoming possessed of the property she should spend the produce with sons, generation after generation and the declarant his heirs and representatives shall have no concern in demanding the subject of the heba or the consideration money fromm usanmat orher heir and representatives. It is admitted that the words "with sons generation after generation" used in their context convey an estate of inheritance. There is no restraint either express or implied on alienation but on the contrary all the zamindari rights are transferred by the donor. The zamindar is the proprietor and the zamindari rights are proprietary lights I cannot accept the view of my brother Das, J., that the words "and all my zamindari rights" add nothing to the words immediately preceding them or that they must be construed by reference to the ejusdem generis rule. The preceding words, as he truly observes, appear to be specific items of property, but they are of a corporeal nature such as trees, wells, etc., whereas the zamindari rights are intangible or incorporeal and not of the same genus. I can hardly believe that such words would have been used had they been intended merely as descriptive of the preceding category. It would have been sufficient to say "and other things" or similar words if that were the meaning. The learned Judge appears to have had a difficulty in holding that abstract rights could be the subject of gift or could be possessed. I confess I do not share the difficulty. In connection with this point some discussion arose before me in argument as to the word which is rendered "have" in the expression.

"which up to now have been in my possession without the copartnership of anyone."

175. Mr. Hasan Imam said the word in the original document, which was translated by him in Court and taken down by the learned Judge, was "has" and not "have", and that either he had made a slip in dictating the translation or he had not been properly understood. I do not think the question is one of material importance; but to set the matter at rest I sent for the translator who originally translated the document as it appears at page 7 of Part III of the record. It seems that in the original the word is "has" and as a matter of syntax it must be governed by the earlier words "my share, etc., in taluka Laheri" and not to the zamindari rights and other matters mentioned. This reading would no doubt obviate the difficulty felt by Das, J. It was further argued on behalf of the respondents that the reference to the heirs and representatives of the grantee indicated an intention to grant an alienable estate as the word "representatives" would include assigns who were not heirs. The word translated "representatives" is qaim-moqaimian which literally means "those who stand in another's place" and is correctly translated "representatives". I believe the word representatives" when used in an English conveyance has a technical meaning and includes executors or administrators but not assigns. However this may be, I am not aware that the word "qaim-

moqaim-ian" is a term of art in such a document in India. But it is clear that the expression coming as it does in what amounts to a covenant for quiet enjoyment cannot add anything to the extent of the grant. It might possibly throw some light upon the earlier part of the document if there were any ambiguity; but even assuming that it includes "assigns" the use of such a word would not indicate an absolute power of alienation, for it is admitted that in certain events, such as legal necessity, the grantee might alienate. I do not think any importance can be attached to the use of the word.

176. It was argued on behalf of the appellants that the words directing the grantee to spend the produce indicated that she was given the usufruct only. Those words are coupled with the words with sons generation after generation which admittedly passed an estate of inheritance. But it is not suggested that the son who followed after would be in any way restrained from alienating the property. Moreover, although the grantee was directed to spend or enjoy the produce, the enjoyment was that of a person having full rights of ownership which were also conferred. Such words are not uncommonly used in India in conveyances which transfer an heritable and alienable estate. An instance will be found in the case ofLalit Mohun Singh Roy v. Chukkun Lal Roy(55). The words used there were my nephew.…… becoming on my death my sthalabhishikta and becoming owner (malik) of all my estates and properties, etc., shall……enjoy with son, grandson and so on in succession the proceeds of my estate."

177. Lord Davey, in delivering the judgment of the Board, said; "Nor was it disputed that the words of gift to the appellant were such as to confer on him also an heritable and alienable estate. The words 'become owner (malik) of all my estates and properties' would, unless the context indicated a different meaning, be sufficient for that purpose even without the words 'enjoy with son, grandson and so on in succession' which latter words are frequently used in Hindu Wills and have acquired the force of technical words conveying an heritable and alienable estate." So far as I am aware such words have never been interpreted as restricting the full rights of ownership conferred in an earlier part of the instrument of grant.

178. In my opinion the heba-bil-ewaz was intended to and did pass an heritable and alienable estate and the words used were of sufficient amplitude for that purpose.

179. If this view of the meaning of the document is accepted it is admitted that the suit is not maintainable. But as this case may go before a higher tribunal, I propose to express shortly my opinion on the question of maintainability and limitation on the assumption that an unrestricted power of alienation was not conferred.

180. The plaintiffs who obtained possession of the property after their mother's death in 1904 and remained in possession until the 14th December, 1906, when they were dispossessed by the Maharaja, would in the ordinary course have 12 years from that date in which to sue for recovery of possession under Article 142 of the Schedule to the Limitation Act. The suit was instituted in July 1918 within the period of limitation. But it is contended that they were barred by Section 47 of the CPC as they ought to have raised the question of their mother's right to alienate when they were substituted in her place in the execution proceedings. As pointed out by Das, J., the application made by them to set aside the sale on the ground of irregularity under S. 311 of the old Code, although purporting to be an application under S. 244 also, did not in fact raise any question coming under the latter section and did not cover the point now raised. In my opinion it was not open to the appellants to raise the question in those proceedings. The executing Court is bound to execute the decree and could not, apart from fraud, consider whether the decree ordering sale of the property was one which the trial Court ought rightly to have passed. The representatives of the mortgagor could not successfully reopen the question which, if it were open at all, should have been urged before the trial Court.

181. Next it was contended that the suit was barred by Section 11 of the CPC. It is pointed out that the appellants claim under their mother as her heirs. They are not reversioners taking as heirs of their father subject to the life interest in their mother, nor are they remainder men taking under their father's Will. Primarily therefore they would be bound by the acts of their predecessor-in-title as well as by any decree

obtained against her. But in truth it can hardly be said that the mother in this case represented the estate for all purposes so as to bind those who succeeded her. Ex hypothesi she had no power of alienation. In this respect her position is very like that of a Hindu widow taking by inheritance. She could no more bind the estate in the hands of the heirs by an alienation than a Hindu widow inheriting from her husband could bind the reversioner. She assumed a power which the law denied her. She could not transfer a good title to the mortgagee. If the mortgage was not binding upon the heirs, then, as long as their possession was not disturbed, they could, I think, ignore it and treat it as non-existent. Being in possession they were under no obligation to assert their title by a declaratory suit or to sue for possession. Does it then make any difference that a mortgage decree was passed in favour of the mortgagee? I think not. The mortgagor did not, and could not, in that suit plead her disability, she could not derogate from her grant and the question was, neither substantially, or at all in issue within the meaning of Section 11 of the CPC, nor could the inalienability be made a ground of defence in that suit within the meaning of Explanation IV of the section.

182. It is contended, however, that a decree against a Hindu widow can bind even the reversioners taking as heirs of her husband, and a fortiori her own heirs must be bound. Shivagunga's case(78) [Katama Natchiar v. Raja of Shivagunga] and Risal Singhv. Balwant Singh(79) were relied on in support of the argument. But in both those cases the question for decision had arisen and been determined in the previous suit to which the widow was a party and all the pleas available to the reversioners had been taken by her and after a fair trial had been determined against her.

183. In the present case I think the principle followed by their Lordships of the Judicial Committee in Bijoy Gopal Mukherji v. Krishna Mahishi Debi(80) is applicable. That case, it is true, was a case of alienation by lease by a Hindu widow followed by a suit by the reversioners after her death to recover the property; but the ground of the decision was that the alienation was not binding on the reversioners who could therefore treat it as a nullity without first seeking the intervention of the Court to set it aside and I think the same principle is applicable to the heirs whom the alienation did not bind. Nor do I consider that the fact that a decree has been passed against the mortgagor in the present case can give the transaction any more binding force if the mortgagor's power of alienation was not in question before the Court which passed the decree. I agree, however, that if, contrary to the view just expressed, it is necessary to set aside the decree before the present suit is maintainable, the period within which the decree could be set aside has long since passed and the suit in that case could not proceed. In my opinion, however, on the assumption that the right of alienation did not exist the suit is maintainable and is not barred by limitation.

184. The result of my findings is that the suit fails and the appeal should be dismissed.

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SITAJI VERSUS B.N CHOUDHARY

1949 SCC OnLine Pat 67 : ILR (1949) 28 Pat 447 : AIR 1951 Pat 356

In the High Court of Patna

Appellate Civil

(Before Hon'ble Mr. Justice Sinha & Hon'ble Mr. Justice Ramaswami, JJ.)

Appeal from Original Decree No. 74 of 1945

Sitaji

v.

*B.N Choudhary**

Decided on : APRIL 13, 1949

Hindu Law -Stridhan— widow getting the last male holder's estate by succession — widow acquiring other properties from income of the estate — such acquisition, whether accretion to the corpus or becomes stridhan of the widow — no evidence led on the intention of the widow. ---that the onus was upon the party who alleged accretion, to show that the property which was purchased by the widow from her own savings was not her own but was intended to be an accretion to the estate.

Appeal from Original Decree no. 74 of 1945, from a decision of Mr. Kanhaiya Singh, Additional Subordinate Judge of Darbhanga Appeal from Original Decree no. 74 of 1945

Decided on March 18, 1949, March 21, 1949, March 22, 1949, March 23, 1949, March 24, 1949, March 25, 1949, March 28, 1949, March 29, 1949 and April 13, 1949

Practice and Procedure — functions of appellate court — decision resting on appreciation of oral evidence — trial court's appraisement of such evidence not to be disturbed — Hindu Law — widow getting the last male holder's estate by succession — widow acquiring other properties from income of the estate — such acquisition, whether accretion to the corpus or becomes stridhan of the widow — no evidence led on the intention of the widow.

Where the decision mainly rests on oral evidence, the Court of Appeal must have regard to the exceptional value of the opinion of the judge of first instance. He has had the opportunity of watching the demeanour of the witnesses, he has observed the drift and conduct of the case, he has impressed upon him by hearing every word, the scope and nature of the evidence in a way that is denied to any Court of Appeal. In a case which turns on the conflicting testimony of witnesses; and the belief to be reposed on them, the appellate court can never recapture the initial advantage of the Judge who saw and believed.

Powell and Wife v. Streatham Manor Nursing Home(1), Wait or Thomas v. Thomas(2) andPrem Singh v. Deb Bashist Singh(3), referred to.

Where a Hindu widow inherited the estate of her husband by succession and from the savings of the estate acquired other properties and the reversioner alleged those acquisitions as accretion to the corpus,

Held :

That the reversioner's case must fail, he having failed to establish that it was the intention of the widow to treat the acquisition as accretion to the corpus, that besides there were other circumstances to establish that the widow treated the accretion as herstridhan.

Ramran Bijoy Pd. Singh v. Krishna Madho Singh(1), dissented from.

Dulhin Parbati Kuer v. Baijnath Prasad(2), Jamuna Prasad v. Ram Padarath(3), Raja of Ramnad v. Suhdara Pandiyasami(4), Sheolochan Singh v. Saheb Singh(5), Saodamini Dasi v. The Administrator General of Bengal(6), Venkatadri Appa Rao v. Parthasarathi Appa Rao(7), Navaneethahrishna Marudappa Thevar v. Collector of Tinnevelly(8) andBalasubramanya v. Subhayya(9), referred to.

Appeal by defendants 1st and 2nd parties.

The facts of the case material to this report are set out in the judgment of Ramaswami, J.

B.C De, Ramakant Varma and K.D De, for the appellants.

L.K Jha, B.N Mitter, Prem Lall, A.K Mitter and Srinath Singh, for the respondents.

The Judgment of the Court was delivered by

RAMASWAMI, J.:— This appeal is by the defendants first and second parties from a decree of the Additional Subordinate Judge of Darbhanga. The plaintiffs brought the suit claiming that they were the nearest reversioners of one Naubat Lab Jha, who died in 1878, leaving two widows, Mostt. Nunuwati and Mostt. Chemawati and his mother Mostt. Sahajwati Ojhain. The following pedigree will elucidate the relationship of the parties.

After death of Naubat Lal both the widows obtained possession of the estate but Mostt. Sahajwati was granted only maintenance. Sahajwati died in 1909; and Nunuwati in 1191 when the whole estate devolved on Mostt. Chemawati. On 5th November 1915, Mostt. Chemawati dedicated all the properties to certain deities by a registered deed of Samarpannama. She constituted herself as shebait for her life time but she provided that after her death Mahant Ramsarup Das would succeed as shebait. Mahant Ramsarup Das however, died in the life time of Mostt. Chemawati. In 1931 she, therefore, executed a deed of shebaitnama appointing Mahant Gopal Das as shebait of the said deities. In 1933 the plaintiffs instituted a suit against the defendants for a declaration that the deed of endowment executed by Mostt. Chemawati was void and not binding upon their reversioners. In that suit the defendants contended that the plaintiffs were not the nearest reversioners of Naubat Lal Jha. But the plaintiffs obtained a decree. On appeal the High Court dismissed the suit on the ground that it was barred by time; but the other issues raised were expressly left open. After Mostt. Chemawati died on 5th August, 1940, the plaintiffs brought the present suit. They sought a declaration that the deed, of endowment and shebaitnama executed by Mostt. Chemawati were void and fraudulent and they were entitled to possession of the properties on the death of Mostt. Chemawati. It is necessary to state that plaintiffs second party have conveyed 10 annas share of the properties to plaintiffs first party who in consideration thereof have agreed to meet the costs of litigation.

The defendants first party contested the suit on the ground that the plaintiffs second party were not the nearest agnates of Naubat Lal Jha. As regards the disputed properties the defendants first party claimed that Naubat Lal was not the owner thereof; that the properties had from long before appertained to the deities and Naubat Lal Jha had acted merely as a shebait. In the alternative, defendants first party claimed that at any rate the properties mentioned in schedule 3 of the deed of endowment were the stridhan of Mostt. Chemawati and she could make a valid endowment in favour of the deities.

The learned Subordinate Judge found that the plaintiffs were the nearest reversioners of Naubat Lal Jha, that the properties in dispute belonged to Naubat Lal Jha and not to the Thakurbari. As regards schedule 3 of the deed of endowment the Subordinate Judge held that there was no evidence to show that these properties constituted the stridhan of Mostt. Chemawati and she had power to alienate. Upon these findings the Subordinate Judge pronounced a decree in favour of the plaintiffs.

Two main questions were discussed in hearing of the appeal, viz. (1) whether the plaintiffs were the nearest heirs of Naubat Lal Jha and so were competent to bring the suit; (2) whether the learned Subordinate Judge was correct in holding that the properties mentioned in schedule 3 of the deed of endowment did not constitute thestridhan of Mostt. Chemawati.

On the important question of pedigree the parties have produced evidence of a very contradictory nature. The plaintiffs alleged that their ancestor Shiva Jha and Java Jha, were the brothers of Dewan Jha, who was the great grandfather of Naubat. They stated that Shiva Jha, Jaya Jha and Dewan Jha, were all sons of Nande Jha, who belonged to Jajuare Pachahi Mul. The defendants did not dispute that the plaintiffs are descendants of Shiva Jha and Java Jha or that Naubat Lal was descendant of Nande Jha and belonged to Jajuare Pachahi Mul. The defendants, however, denied, that Shiva Jha and Jaya Jha were brothers of Dewan. They asserted on the contrary that Shiva Jha, Jaya Jha and Karan Jha were sons of one Guni Jha and that they all belonged to Jajuare Bhargao Mul. The question at issue, therefore, is whether Shiva, Jha, Jaya Jha, Dewan Jha and Karan Jha were full brothers, as claimed by the plaintiffs. P.W 6, Khantar Jha, is the principal witness examined for the plaintiffs. He testified that Shiya Jha, Jaya Jha, Karan Jha and Dewan Jha were full brothers and that they were all sons of Nande Jha. He stated that Parsi Lal Jha performed the sradh of Naubat in 1878 and Hirday Jha performed the sradh of Nunuwati in 1909 and of Sahajwati in 1911. The trial Judge has expressly said that he accepted the evidence of Khantar Jha, which if true, would completely prove that the plaintiffs are nearest agnates of Naubat Lal Jha. The testimony of Khantar Jha is corroborated by the evidence of P.Ws 2, 6, 11, 26, 28, 34 and 35, who are alleged to be related to Naubat. P.Ws 1, 4, 5, 8, 9, 10, 17 and 24 have also said that the plaintiffs are the nearest agnates of Naubat. All the witnesses have deposed that they attended the sradh of Sahajwati or Nunuwati. On behalf of the defendants, directly contradictory evidence has been given. D.Ws 7, 14, 17, 21, 39 and 41 who are admittedly relations of Naubat Lal have stated that the plaintiffs 2nd party are not his gotias. D.Ws 4, 8, 24, 26, 36 and 38 have also given similar evidence. But there is proof that most of these witnesses were either employees or dependant upon the Mahanth, defendant 2nd party. Their evidence has not commended itself to the learned Subordinate Judge. According to the defence, Mostt. Nunuwati performed the sradh of Mostt. Sahajwati and Mostt. Chemawati the sradh of Nunuwati. D.Ws 1, 2, 4, 6, 8, 17, 24, 26, 32, 36 and 41 gave evidence on this part of the case. The learned Subordinate Judge has examined their evidence in great detail and found it wholly unreliable. On the contrary, he held that the plaintiffs' witnesses have given true evidence. He held it to be proved that Parsi Jha performed the sradh of Naubat Lal Jha and Hirday Jha thesradh of Mostt. Sahajwati and Nunuwati, and that the plaintiffs were the nearest agnates of Naubat Lal Jha.

It should be stated that the appellants made a prayer that the deposition of Mostt. Chemawati in the previous title suit should be taken as additional evidence. After having heard the parties we decided that this additional evidence should be admitted in order to enable the Court to pronounce judgment in this case. On behalf of the appellants it was pointed out that in her deposition Mostt. Chemawati had definitely denied that the plaintiffs were the reversioners. But it is doubtful if the evidence of Mostt. Chemawati on this point can be accepted as true. In the course of her statement Mostt. Chemawati denied that Mostt. Durgawati, Bhulia Dai and Uchit Jha were her relations. She could not say whether Jagdamba was the name of the sister of Deonarain. But D.W 41 admitted that Mostt. Chemawati herself performed the kaneyadan of the daughter of Mostt. Durgawati. The witness conceded that his daughter Jagdamba and grand-daughter Mostt. Bhulia had paid visits to Mostt. Chemawati at Nandenagar. For the respondents it was suggested that Mostt. Chemawati had asked the plaintiffs to convey certain properties to her relations Uchit Jha, Bhulia Dai and others, that the plaintiffs had refused and for this reason Mostt. Chemawati had executed the deed of endowment in favour of the deities. The suggestion was denied by Mostt. Chemawati; but the respondents' case is supported by important documentary evidence. Mostt. Chemawati admittedly executed the deed of shebaitnama, exhibit 8, which she registered on 7th January, 1931. On the same date Mahant Gopal Das executed a registered sale deed in favour of Mostt. Durgawati with respect to 20 bighas of land appertaining to Dharampore Asthal. On 6th January, 1931, Babuje Lal Jha executed a kebala, exhibit 2.d, in favour of Mostt. Bhulia, which was registered on 17th January 1931. On the same date a sale deed, exhibit 2.e, was executed by Babuye Lal Jha in favour of Hirday Jha with respect to 4 bighas, 12 kathas

belonging to the Thakurbari. These documents support the suggestion of the plaintiffs that Mostt Chemawati had asked them to alienate a portion of the properites in favour of her relations and on their refusal Mostt. Chemawati had disowned the plaintiffs to be the reversioners of Naubat Lal Jha.

At this stage it is necessary to state that both parties exhibited Panjis to corroborate the oral evidence of pedigree. Panjis are palm-leaf manuscripts of pedigree systematically maintained by panjiaras for genealogists) in the community of Maithil Brahmins. It is the agreed case of the parties that such a system is scrupulously maintained, in order to prevent marriages being contracted within forbidden degrees. There is a reference to this custom in Crooke's Tribes and Castes. Volume III, page 411, 1896; O'Mallev's Gazetteer of Darbhanga District, page 39:Journal of Bihar and Orissa Research Society, Volume III, page 515. Panjikars are selected after they pass a regular test prescribed by the Maharaiah of Darbhanga, who is the head of Maithil Brahmins, and who issues certificates to successful candidates. The primary duty of the panjikars is to maintain regular records of pedigree of the Maithil Brahmins. In order to keep their records up-to-date, thepanjikars go on regular tours and make enquiries. The panjis are considered so important that no marriage can be celebrated unless panjikar issues a certificate of sanction called Siddhanta. Before issuing the certificate the panjikar must satisfy himself that the bride and bride-groom may be lawfully married.

"With a Maithil Brahmin, marriage is a religious rite; it is based upon spiritual considerations—spiritual benefits derivable from such a union. A Brahman ought to marry because it is one of the Sanskars (purifications) of his life without which he is not 'complete' nor competent to do any of the duties of Girhasta (householder). He ought to marry because a son born of such marriage will save the parents from the hell named 'Pun'. A son (Putra) means he who saves one from the hell 'Pun'. Consequently the marriage must be in conformity with Shastric injunctions. A bride must be more than fifth in descent on the mother's side and more than sixth on the father's—from the last common ancestor of her and the bridegroom. One cannot marry the daughter of his step-mother's brother, nor can he marry a girl who is an offspring of his grandfather, and so forth. Any infringement of these rules not only invalidates the marriage but is a grievous sin. And as a safeguard against such an invalid marriage, entries of the relationship with names of members of all the different Maithil families are kept from an ancient time by the 'panjikars or panjiars(genealogists) of Mithila" (Journal of Bihar and Orissa Research Society, Volume III, page 515).

For the plaintiffs panjis (Exs. 4 series) were exhibited in order to support the oral evidence of pedigree. If these panjis be authentic, they would completely establish the plaintiffs' case that Dewan Jha, Shiva Jha, Karan Jha and Jaya Jha were the sons of Nande Jha. P.W 29 Nirsu alias Biswanath and P.W 31 Lachmi Narain Jha proved thepanjis (Exs. 4 to 4.g). Kumar Lal Jha had proved exhibit 4.d in the previous title suit. His evidence is exhibit 25.A. On behalf of the appellants it was pointed out that in the previous suit, exhibits 4 to 4.c and 4.e were not filed. But it is undisputed that exhibits 4.d, 4.f and 4.g were filed in that suit. For the appellants comment was made that Khantar Jha admitted in his evidence that he had dictated genealogy to Kumar Lal Jha. Kumar Lal Jha, however, stated that exhibit 4.d was written partly by his father, that he was unable to identify the hand writing of the other part. There is to my mind no real contradiction between the evidence of Khantar and of Kumar Lal Jha. It was then objected for the appellants that unless the handwriting of the whole of exhibit 4.d was proved, the document was not admissible in evidence. But this argument is untenable. In my opinion, it is not necessary for the plaintiffs to prove by whom thepanji was written, if we recognise the admitted system of maintaining panjis in Mithila. In the present case Kumar Lal Jha has stated that exhibit 1 is partly written by his father and partly by his ancestor whose writing he could not identify. The Subordinate Judge has rightly accepted his evidence as true. If so, the panjis (Ex. 4.d) is admissible in evidence. In a similar case Jahangir v. Sheoraj Singh(1) a document ancient, and genuine purporting to be a family pedigree was produced in evidence in a mutation case by one Jiraj. Jiraj stated that he had received the pedigree from his grandfather. But it was not proved who had prepared the pedigree. The High Court held that it was not necessary to show who has made the statements mentioned in the pedigree and that it was admissible in evidence under section 32, clause (6) of the Evidence Act. In Anandi v. Nand Lal(2) it was pointed out that a family pedigree may be a pedigree kept by a member of the family or by another person on its behalf. In that case a book maintained

by the members of a family of hereditary bards and containing entries of domestic events occurring from time to time in the family to which they rendered services as bards, was held admissible as evidence concerning the relationship of the various members of the family, whose history was entered therein.

On behalf of the defendants the pedigrees (Exs. X to X/3) have been produced. If these panjis are closely examined, they indirectly support the pedigree, as set forth in the plaint. According to exhibit X Lalita was wife of Nande and they had one son Dewan and four daughters, Beda, Ranjani, Mira and Nira. It is stated that Arjun of Deghwa Nagar Mool was nana of Lalita. But from exhibit X/2 it appears that Lalita was married to Guni and had four daughters. Beda, Ranjani, Mira and Nira and three sons, Shib, Karan and Jaga. It is stated that Lalita was daughter of Dhir and grand-daughter of Arjun of Deghwa Nagar Mool. It is manifest that there has been a clumsy attempt on the part of the defence to fabricate certain entries in their panjis. A comparison of exhibits X and X/2 supports the plaintiffs' case that Lalita, the alleged wife of Guni, was in fact the wife of Nande and that she had four daughters, Ranjani. Beda, Mira and Nira and four sons, Shib, Karan, Jaga and Dewan. It is also significant that exhibits X and X/1 show that Lalita was the wife of Nande Jha but in exhibits X/2 and X/3 the wife of Nande Jha is stated to be Devshyana.

In my opinion, the Subordinate Judge rightly held that the panjis (Exs. 4 series) are genuine. They completely support the oral evidence adduced by the plaintiffs that they are the nearest agnates of Naubat Lal Jha.

In this context it is of great importance to remember that the functions of a Court of Appeal in dealing with a question of fact are limited in their character and scope. Where the decision mainly rests on oral evidence, the Court of Appeal must have regard to the exceptional value of the opinion of the judge of first instance. He has had the opportunity of watching the demeanour of witnesses, he has observed the drift and conduct of the case, he has impressed upon him by hearing every word, the scope and nature of the evidence in a way that is denied to any Court of Appeal. In a case which turns on the conflicting testimony of witnesses and the belief to be reposed on them, the appellate court can never recapture the initial advantage of the judge who saw and believed. In Powell and Wife v. Streatham Manor Nursing Home(1), Lord Wright observed: "Two principles are beyond controversy. First, it is clear that, in an appeal of this character, that is from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal must, in order to reverse, not merely entertain doubts whether the decision below is right but be convinced that it is wrong". In Watt or Thomas v. Thomas(1) Lord Thankerton restated the principle: "Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion". In Prem Singh v. Deb Bashist Singh(2) the Judicial Committee quoted this statement of principle, reversed the High Court decree and restored that of the Subordinate Judge, holding that the finding of the trial judge on the oral evidence should have been accepted by the High Court.

In the present case the learned Subordinate Judge has expressly accepted the testimony of P.W 6, Khantar Jha, and P.Ws 26, 30 and 38 on the question of pedigree. He rejected the evidence of the defendants' witnesses on this point. He expressly held that D.W 22 Awadh Behari Das, being a Bairagi could not have performed thesradh of Mostt. Chemawati; and that his evidence that he did perform the sradh was manifestly false. As regards the panjis, the Subordinate Judge held that the panjikars(P.Ws 29 and 31) have given credible evidence and the panjis, they produced, were genuine and absolutely, reliable. On the contrary he disbelieved the evidence of D.W 35, Nirsu Jha, and the panjis (Exs. X series) produced for defendants on behalf of the appellants Mr. B.C De addressed elaborate arguments to show that the plaintiffs' evidence was unreliable. But we cannot take the responsibility of reversing the conclusion of the trial judge, for we are not satisfied that his decision is wrong or that the evidence on which he relied is so improbable as to be unbelievable, or otherwise unworthy of acceptance.

It was next contended on behalf of the appellants that even if the plaintiffs were the nearest reversioners of Naubat Lal, they could not succeed with respect to the properties mentioned in schedule 3 of the deed of endowment. In paragraph 9 of the plaint the plaintiffs alleged that the properties in schedule 3 had been wrongly described as self-acquired properties of Mostt. Chemawati. In paragraph 20 of the written statement the defendant's specifically asserted that the properties werestridhan of Mostt. Chemawati. It is the agreed case that these properties were purchased after the death of Naubat Lal Jha out of the income of the estate. But neither party has adduced evidence to prove whether Mostt. Chemawati intended the properties purchased to be her stridhan or to be accretions to her husband's estate. For the respondents reliance was placed on Sheo Lochan Singh v. Saheb Singh(1) in which the purchased properties were dealt with by the widows as accretions to their husband's estate, and the original properties and such accretions were treated by the widows precisely alike in the deed of gift which they executed in favour of the alleged adopted son. The Judicial Committee held upon the evidence that the properties were accretions and proceeded to observe: "Where a widow comes into possession of the property of the husband, and receives the income, and does not spend it, but invests it in the purchase of other property, their Lordships think that, prima facie, it is the intention of the widow to keep the estate of the husband as an entire estate, and that the property purchased would, prima facie, be intended to be accretions to that estate". But this is only adictum which must be understood with reference to the facts and circumstances of that case. It cannot be read as a statement of law for it is expressed merely in terms of an inference of fact. The obiter dictum is more than counterbalanced by the actual decision of the Judicial Committee in a much later case Saodamini Dasi v. The Administrator-General of Bengal(1) where the income which accrued from the husband's estate after his death for about eight years subsequent to his death and which was not disposed of by his will came to his widow as heir at law, and she invested the same in Government Securities worth two lakhs of rupees; and after the lapse of about twenty years she disposed of the same as her own. It was held that the money, so invested by her belonged to her as income derived from her widow's estate and was subject to her disposition. The Judicial Committee observed: "It was said she had placed it in investments of a permanent nature. Had she done so, it does not appear to their Lordships that this circumstance alone would have added the fund to the estate devolving on her husband's heir". In Venkatadri Appa Rao v.Partjiasarathi Appa Rao(2) the widow never obtained actual possession of the income to which she was entitled and the question arose as to whether she was entitled to dispose of it by will. Their Lordships observed: "That income or any part of it, she could, while she remained entitled to it, have added as an accretion to the Medur estate if she had wished to do so. There is no evidence to suggest that she had ever added any part of that income as an accretion to the Medur estate. She was consequently entitled to dispose of it by will or otherwise". In Navaneethakrishna Marudappa Thevar v. Collector of Tinnevelly(3) the Madras High Court held as well established that the income of a woman's estate remained at her disposal in the absence of anything done by her to show that she treated the accumulation as part of the last male holder's estate. In Balasubramanya v.Subbayya(1) the Judicial Committee affirmed that decision holding that both the savings which were in the hands of the Court of Wards and the money which was in the widow's own possession were the personal property of the Rani and would pass under her will.

The true position is stated by Lord Phillimore in Raja of Ramnad v. Sundara Pandiyasami(2): "A widow may so deal with the income of her husband's estate as to make it an accretion to the corpus. It may be that the presumption is the other way. A case has been cited to their Lordships which seems so to say (I.L.R 25 Madras 351). But at the outside it is a presumption and it is a question of fact to be determined, if there is any dispute, whether a widow has or has not so dealt with her property". On behalf of the respondents reference was made to Ramran Bijoy Prasad Singh v.Krishna Madho Singh(3) where a Division Bench held that if a widow invests the income of the husband's estate in the purchase of other property the intention of the widow must be prima facie deemed to make the purchased property an accretion to the husband's estate. But (with the greatest respect) this decision appears incorrect for it is opposed to the Privy Council authorities and is inconsistent with Dulhin Parbati Kuer v. Baijnath Prasad(4) and Jamuna Prasad v. Ram Padarath(5) in which the learned Judges held that the onus was upon the party who alleged accretion to show that the property which was purchased by the widow from her own savings was not her own but was intended to be an accretion to the estate. In the present

case the plaintiffs have alleged that the properties of schedule 3 of the deed of endowment were accretion to the widow's estate. The onus of proof was upon them; but they have not produced any evidence to show that the widow's intention was such. On the contrary in the deed of endowment Mostt. Chemawati herself has clearly recited that the schedule 3 properties were self-acquired. This important recital together with the circumstance that the widow separately enumerated the properties in the deed of endowment clearly suggest that the widow never intended to merge the properties with her husband's estate. As regards these properties, it is manifest that Mostt. Chemawati could validly execute a deed of endowment, and the plaintiffs are not entitled to a decree.

Upon these grounds I hold that the deed of endowment and Shebaitnama are valid with respect to the properties mentioned in schedule 3 of these documents. As regards the properties mentioned in schedules 1 and 2, the plaintiffs being found to be the nearest reversioners of Naubat Lal Jha are entitled to a declaration of their title and recovery of possession, and to mesne profits from the date of death of Mostt. Chemawati till possession is delivered.

Accordingly I would alter the decree of the learned Subordinate Judge and allow the appeal to this extent with proportionate costs.

SINHA, J.:— I agree.

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High Court of Judicature at Allahabad

High Court of Chhattisgarh

High Court of Jharkhand

High Court of Judicature at Patna

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