"The Family Courts Act expects the duty-holders like the court, counsellors, welfare experts and any other collaborators to make efforts for reconciliation".

**Hon'ble Mr. Justice Kurian Joseph**

*in Transfer Petition (Civil) No. 1278 of 2016 (Santhini vs. Vijaya Venketesh)*

# COMPILATION OF

# LANDMARK JUDGMENTS

# OF

# HIGH COURTS OF INDIA

(Madras High Court, High Court of Delhi, High Court of Karnataka, High Court of Kerala & High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh)

# ON FAMILY MATTERS

"These minor children, for their proper upbringing, need the company of both the parents - mother as well as the father, for financial reasons, security reasons, psychological reasons, etc. They need the love of both their parents. Not only separation of their parents from each other deprives these children 24|7 company of both the parents, when it results in legal battle of custody in the courts, the situation becomes more traumatic for these children because of various obvious reasons. That is why such cases which seriously impact these children are the most unfortunate."

**Hon'ble Mr. Justice A.K. Sikri** *in Purvi Mukesh Gada Versus Mukesh Popatlal Gada & anr. Criminal Appeal No.1553 of 2017 in para-1) decided on 4-9-2017*

"While dealing with judicial separation and divorce, the lofty ideals of the Hindu community and religion shall have to be taken into consideration".

**Hon'ble Mr. Justice N.V.Ramana**

*Dr. N. Shiva Mohana Reddy Vs Smt. Aparna Reddy Decided on 3 September, 2004 (para-6)*

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

**Hon'ble Mrs. Justice R.Banumathi**

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

# COMPILATION OF
# LANDMARK JUDGMENTS
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# HIGH COURTS OF INDIA

**(Madras High Court, High Court of Delhi, High Court of Karnataka, High Court of Kerala & High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh)**

# ON FAMILY MATTERS

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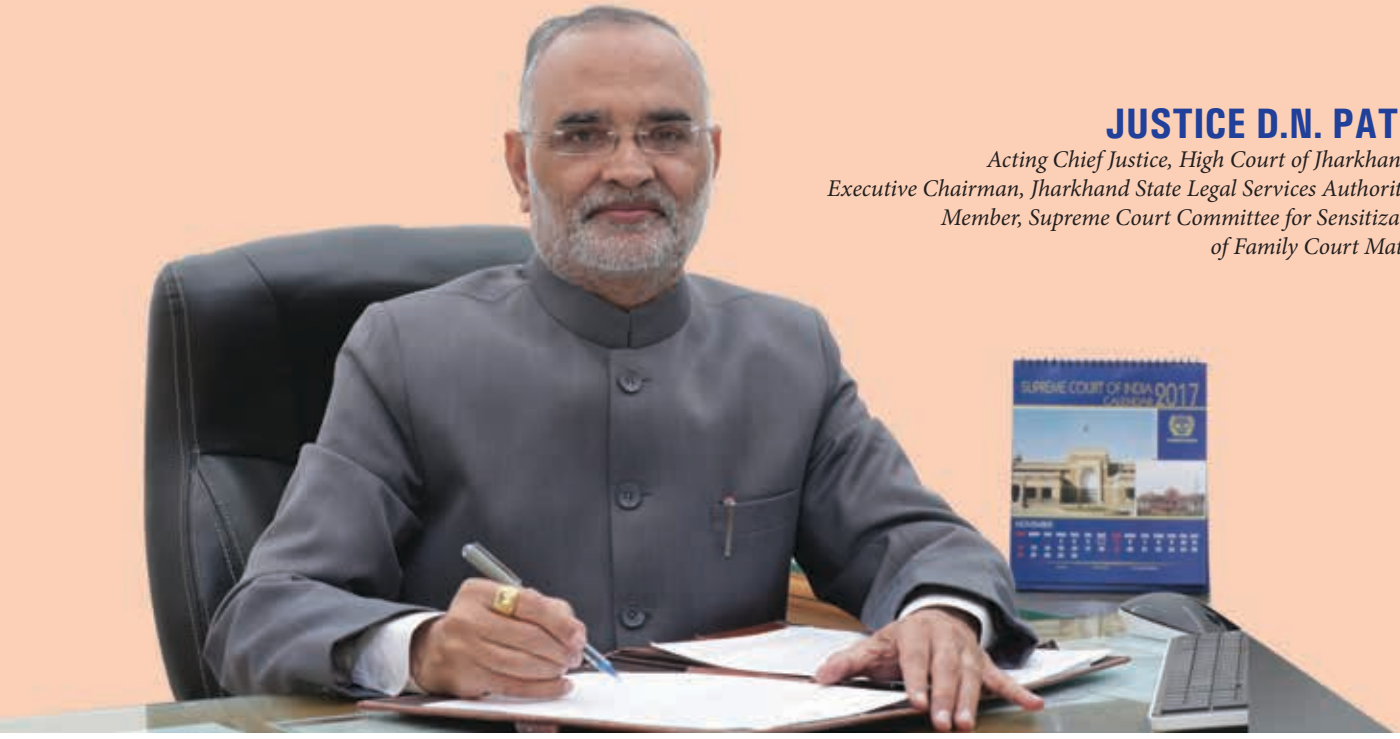
Tamil Nadu State Judicial Academy has provided immense help in compilation of landmark judgments of High Courts of India on Family Matters.




**JUSTICE D.N. PATEL**

*Acting Chief Justice, High Court of Jharkhand &*
*Executive Chairman, Jharkhand State Legal Services Authority &*
*Member, Supreme Court Committee for Sensitization*
*of Family Court Matters*

# *Preface...*

**ॐ द्यौः शान्तिरन्तरिक्षँ शान्तिः,**
**पृथ्वी शान्तिरापः शान्तिरोषधयः शान्तिः ।**
**वनस्पतयः शान्तिर्विश्वे देवाः शान्तिर्ब्रह्म शान्तिः,**
**सर्वं शान्तिः, शान्तिरेव शान्तिः, सा मा शान्तिरेधि ।।**
**ॐ शान्तिः शान्तिः शान्तिः ।।**

***May there be Peace in Heaven, May there be Peace in the Sky,***
***May there be Peace in the Earth, May there be Peace in the***
***Water, May there be Peace in the Plants,***
***May there be Peace in the Trees, May there be Peace in the Gods***
***in the various Worlds, May there be Peace in all the human beings,***
***May there be Peace in All,***
***Peace, Peace, Peace.***

*Our age old culture prays for peace and happiness for one and all. Family is the first and oldest social group. It has played an important role in stability and prosperity of the civilization. Almost everything of a lasting value in humanity has its roots in the family. Peace and harmony in family is important for all round development of children . Family value teaches us to respect the women and elders. Family is an Institution and same has to be sustained . 59th Law Report in 1974 had given its recommendation for having Special Courts for Family Court matters. The Family Courts Act was enacted after one decade in 1984 for adopting human approach in settlement of the dispute and achieving the socially desirable result. Section 9 of the Act imposes a duty upon the family Court Judge to make efforts for settlement. Hon'ble Mr Justice Kurian Joseph, Judge, Supreme Court of India & Chairman, Supreme Court Committee for Sensitization of Family Court Matters has said that the whole purpose of establishing a Family Court as a different Jurisdictional Court is to have a difference in approach and a difference in attitude. The attitude appropriate in handling a Civil Case or a Criminal Case is not the attitude or approach that one should have in handling a Family Court's case.*

*This Compilation of Landmark Judgments of Supreme Court of India is aimed at bringing about desired sensitivity in all duty holders ( Family Court Judges, Counsellors, Mediators, Conciliators, Lawyers etc). These Judgments*

*are result of several decades of hard work and experience of the authors. Family disputes have many dimensions, namely :*

- *Maintenance and Alimony*
- *Custody of Children*
- *Visitation Rights*
- *Divorce and Restitution of Conjugal Rights*
- *Stridhan*
- *Domestic Violence*

*A family Court Judge should view the family disputes not through a microscope but with a stethoscope .*

*Hon'ble Mr Justice Ranjan Gogoi has observed in Gaytri Bajaj Appellant Versus Jiten Bhalla Respondent Civil Appeal Nos. 7232-7233 of 2012 that It is not the better right of the either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take care of the child are some of the relevant factors that have to be taken into account by the Court while deciding the issue of custody of a minor.*

*In Santhini Vs Vijaya Venketesh , Hon'ble Mr Justice Kurian Joseph has said that :* ***"The Family Courts Act expects the duty-holders like the court, counsellors, welfare experts and any other collaborators to make efforts for reconciliation."***

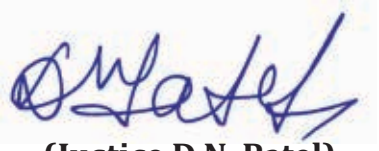
*Hon'ble Mr Justice A.K.Sikri, Judge, Supreme Court of India has said in a matter relating to the custody of child that :* ***"These minor children, for their proper upbringing, need the company of both the parents - mother as well as the father, for financial reasons, security reasons, psychological reasons,etc. They need the love of both their parents. Not only separation of their parents from each other deprives these children 24/7 company of both the parents, when it results in legal battle of custody in the courts, the situation becomes more traumatic for these children because of various obvious reasons. That is why such cases which seriously impact these children are the most unfortunate.."*** *(Purvi Mukesh Gada Versus Mukesh Popatlal Gada & anr. Criminal Appeal No.1553 of 2017)*

*All the duty holders under the Family Courts Act 1984 is obliged to handle family matters with heart . Modern day life has given birth to many unforeseen circumstances. Ego has narrowed down the scope of adjustment. Therefore, the Family Court Judge must be well versed in psychology, sociology, history and human behaviour. There is always chance of break through, therefore, Family Court Judge should never stop making effort for conciliation. Hon'ble Mr Justice Kurian Joseph Saheb , in his lordship address in the inaugural session of the 3rd Regional Conference for Sensitization of Family Court Matters at gangtok, Sikkim on 9-12-2017, has said that the Family Court Judge is like a Homeopathic doctor who studies the person, his life style and back ground and then prescribes medicine.*

*The provision in law for Maintenance is social justice legislation and the Family Courts ought to make every endeavour to decide the matter at the earliest.I am convinced that this Compilation will be able to answer all the queries of the duty holders and guide them in discharge of their duty effectively.*

*The soft copy of this book is available on the website of Jharkhand State Legal Services Authority-www.jhalsa.org and the Judicial Acadamies, Law Universities and Academicians should use this work in their respective field. Any suggestion for improvement is highly solicited for incorporating in future editions.*

*Wish Everybody a Very Happy New Year and all the Best!*



**(Justice D.N. Patel)**

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LANDMARK JUDGMENTS ON

# ALIMONY & MAINTENANCE

# CHEPURI HANUMANTHA RAIO VERSUS CHEPURI UMA BALA

**Andhra Pradesh High Court**

**Bench : Hon'ble Mr. Justice B. Siva Sankara Rao**

*Chepuri Hanumantha Raio, S/o Late Seetharmaiah, Age 54 years, R/o No. H. No. 33/1, sainagar, Road No. 1, New Nagole, Ranga Reddy District ..... Petitioner*

*Versus*

*Chepuri Uma Bala, Aged: 43 Years, Divorced W/o Hanumantha Rao, R/o H. No. 2-2-1166/1.B, Tilaknagar, New Nallakunta, Hyderabad-54 and another ..... Respondents*

**Criminal Revision Case No. 79 of 2016**

**Decided on February 27, 2017**

Counsel for the Petitioner: Sri. M.N Narasimha Reddy

Counsel for the respondents: Sri. Srinivasa Rao Ravulpati Public Prosecutor

- **Family Court, on appreciation of the material covered by petition and counter and also from the evidence of P.W 1 and Rws. 1 and 2 with reference to Exhibits R1 to R41, by the impugned order dated 28.11.2015, awarded maintenance of Rs. 10,000 per month from date of petition with proportionate costs, with a direction to pay all arrears due after deducting interim maintenance paid by him at Rs. 2,000/- per month from date of petition.**
- **The principles of Hindu Personal Law have developed in an evolutionary way out of concern for all those subject to it so as to make fair provision against destitution. The manifest purpose is to achieve the social objectives for making bare minimum provision to sustain the members of relatively smaller social groups. Its foundation spring is humanistic. In its operation field all though, it lays down the permissible categories under its benefaction, which are so entitled either because of the tenets supported by clear public policy or because of the need to subserve the social and individual morality measured for maintenance.**
- **Thus, there is no illegality or irregularity any impropriety in the award of maintenance by the lower court in its order holding the M.C petitioner is entitled to maintenance. However, coming to the quantum when he was affluent and he worked as software engineer and established own company by showing his wife also one of the promoters therein by managing the affairs by utilizing her services as employee under him and when he did not file even a scrap of paper showing its winding up even voluntarily and when as Director she was not informed even to wind up, there is nothing to show the entity is wound up and not in existence, and leave about he traveled abroad twice admittedly, he was even visiting Bangalore no doubt with a claim by him of searching jobs, it is hardly believable of his health no way permits to do any job with his expertise and skill in software field for not a hard job he has to undertake; Apart from it, it is also hardly believable of he is under the mercy of his mother and brother being otherwise affluent from the material on record and also sold away some of his properties and got means and even maintains bank accounts and same not even filed before Court which is the best evidence in his exclusive control which he cannot withhold. Thereby what the lower court from the evidence on record scanned to the relevancy concluded in awarding Rs. 10,000/- per month from the date of petition. However in the facts what this Court feels to interfere with is only**

**to reduce from Rs. 10,000/- to Rs. 8,000/- per month by otherwise confirming the order of the Court below.**

## ORDER

**Hon'ble Mr. Justice B. Siva Sankara Rao**

The Revision Petitioner/Sri Chepuri Hanumantha Rao, is sole respondent in M.C No. 262 of 2008 on the file of Judge, Family Court, Ranga Reddy District at L.B Nagar, that was maintained by his wife (Smt. Chepuri Uma Bala), the revision 1st respondent, under Section 125 Cr. P.C with a claim to grant maintenance at Rs. 25,000/- per month from date of petition.

2. The learned Judge, Family Court, on appreciation of the material covered by petition and counter and also from the evidence of P.W 1 and Rws. 1 and 2 with reference to Exhibits R1 to R41, by the impugned order dated 28.11.2015, awarded maintenance of Rs. 10,000 per month from date of petition with proportionate costs, with a direction to pay all arrears due after deducting interim maintenance paid by him at Rs. 2,000/- per month from date of petition.

3. The contentions in the grounds of revision vis-a-vis the oral submissions of the learned counsel for the revision petitioner (for short, husband) are that the impugned order is contrary to law, illegal, improper, unjust and is liable to be set aside, that the maintenance case was filed on 11.07.2008, whereas his marriage performed on dated 02.12.2004, with the revision respondent (for short, wife) was dissolved by a decree of divorce in his favour on the ground of cruelty on 16.03.2012 - in O.P No. 317 of 2008, on the file of Judge, Family Court, Ranga Reddy at L.B Nagar, that the maintenance case allowed later on 28.11.2015, from date of petition, ignoring the dissolution of the marital tie from which she is no longer wife, irrespective of a divorced wife is otherwise entitled to maintenance within the meaning of wife under Section 125 Cr. P.C, mainly for the fact that the husbands obligations and liabilities to maintain wife of subsisting marriage are different to his divorced wife, that wife is under obligation to live with husband but not for a divorced wife where either of them got liberty to have another spouse and question of neglect of a divorced wife thereby does not arise, that the standard of living to a subsisting wife with that of husband cannot be equated to a divorced wife, apart from divorced wife got other remedies by independent proceedings to have maintenance claim (alimony).

4. His further contest is that he lost job and his health is not permitting to work and he is dependent on his brother and mother for his survival that was not properly considered in awarding maintenance, apart from the maintenance petition not even contains averment of she is unable to maintain herself. It is also the contest that she is employed as office assistant and can do job, the impugned order is only keeping in mind the past events and by ignoring pendenti lite events including the factum of divorce on the ground of cruelty on her part that also disentitles her to make claim for maintenance for no neglect or refusal there from and awarding of maintenance is thereby improper and unsustainable. It is also the contest that merely because interim maintenance was awarded, that does not entitled her to regular maintenance and the lower court should have been dismissed the maintenance claim therefrom.

5. The learned counsel placed reliance on a Division Bench expression of the Bombay High Court in Bhagwan Raoji Dale v. Sushma Alias Nanda Bhagwan, and drawn attention of this Court to certain observations in that judgment with 53 Paras, particularly to Para 26 that as per Section 125(4) Cr. P.C, (i) no. wife shall be entitled to receive the allowance from the husband, (ii) without any sufficient reason she refused to live with her husband… Section 125(1) Explanation (b) says wife includes even a divorced wife until remarried. If the relationship of husband and wife has come to an end as a result of decree for divorce, there can be no question of divorced women without sufficient cause refusing to live with her husband. After divorce, there is no occasion for a woman to live with her husband as held in by the Apex Court in Vanmala v. H.M Ranganath Bhatta.

6. Again from Para 29 that Section 25 of the Hindu Marriage Act empowers the Court exercising jurisdiction under the Act, at the time of passing of the decree or at any time subsequent thereto, to direct the spouse that he shall pay maintenance to the applicant under Section 25 of the said Act. nothing prevents her from invoking jurisdiction of competent Civil Court under Section 25 of the Act. From observation in Para 36 that some divorcee women are entitled to claim maintenance under Section 125(1) is beyond doubt. In my opinion each and every divorced wife is not entitled to claim maintenance under the said provision.

7. From Para 37, with reference Section 125(1) Explanation (b) of wife includes a divorced wife, the question is then whether a woman, who has been divorced by a decree of divorce passed by a Court of Law at the instance of her husband, is entitled to claim maintenance under Section 125 of the Code. Her case surely would not fall under second limb of Explanation (b) as it is not she who has obtained a divorce from her husband but is he who stated to have obtained divorce against her from a Court of law.

8. From Para 38, that if such a woman against whom a decree of divorce was obtained by the husband is included in the extended definition of wife under Section 125(1) of the code, it would mean that woman who was wrong doer or was guilty of desertion or cruelty against her husband would be entitled to claim maintenance after a decree of divorce is passed against her, though undisputedly, she would not be entitled for maintenance from such divorce was granted by virtues of subsection (4) of Section 125 of the Code. From Para 53, which reads since in this case (writ) petitioner-husband has obtained divorce against respondent wife, the latter is not entitled to claim maintenance, from and after the date of divorce. Hence, this writ petition must succeed.

9. Whereas, it is the submission of the learned counsel for the revision respondent wife that the order of the court below no way requires interference for this Court while sitting in revision within the limited scope defined in Section 397(1) Cr. P.C for no illegality or incorrectness or impropriety in the order of maintenance granted by the court below including in its observations and conclusions and the expression of Bombay High Court, no way a binding precedent and the interpretation must be purposive and in favour of the woman as also laid down by the Apex Court in Badshah v. Sou. Urmila Badshah Godse and drawn attention of the Court to Paras 17 to 27 therein which read as under:

> 17. Thirdly, in such cases, purposive interpretation needs to be given to the provisions of Section 125, Cr. P.C While dealing with the application of destitute wife or hapless children or parents under this provision, the Court is dealing with the marginalized sections of the society. 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.
>
> 18. of late, in this very direction, it is emphasized that the Courts have to adopt different approaches in social justice adjudication, which is also known as social context adjudication as mere adversarial approach may not be very appropriate. There are number of social justice legislations giving special protection and benefits to vulnerable groups in the society. Prof. Madhava Menon describes it eloquently: It is, therefore, respectfully submitted that social context judging is essentially the application of equality jurisprudence as evolved by Parliament and the Supreme Court in myriad situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice. Apart from the social-economic inequalities accentuating the disabilities of the poor in an unequal fight, the adversarial process itself operates to the disadvantage of the weaker party. In such a situation, the judge has to be not only sensitive to

the inequalities of parties involved but also positively inclined to the weaker party if the imbalance were not to result in miscarriage of justice. This result is achieved by what we call social context judging or social justice adjudication. (Delivered a key note address on Legal Education in Social Context)

19. Provision of maintenance would definitely fall in this category which aims at empowering the destitute and achieving social justice or equality and dignity of the individual. While dealing with cases under this provision, drift in the approach from adversarial litigation to social context adjudication is the need of the hour.

20. The law regulates relationships between people. It prescribes patterns of behavior. It reflects the values of society. The role of the Court is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. It is based on a given factual and social reality that is constantly changing. Sometimes change in law precedes societal change and is even intended to stimulate it. In most cases, however, a change in law is the result of a change in social reality. Indeed, when social reality changes, the law must change too. Just as change in social reality is the law of life, responsiveness to change in social reality is the life of the law. It can be said that the history of law is the history of adapting the law to societys changing needs. In both Constitutional and statutory interpretation, the Court is supposed to exercise direction in determining the proper relationship between the subjective and objective purpose of the law.

21. Cardozo acknowledges in his classic (The Nature of Judicial Process).no system of jus scriptum has been able to escape the need of it, and he elaborates: It is true that Codes and Statutes do not render the Judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however, obscure and latent, had none the less a real and ascertainable pre-existence in the legislators mind. The process is, indeed, that at times, but it is often something more. The ascertainment of intention may be the least of a judges troubles in ascribing meaning to a stature. Says Gray in his lecture (From the Book The Nature and Sources of the Law by John Chipman Gray) The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine that the legislature did mean on a point which was present to its mind, but to guess what is would have intended on a point not present to its mind, if the point had been present.

22. The Court as the interpreter of law is supposed to supply omissions, correct uncertainties, and harmonize results with justice through a method of free decisionlibre recherch sceintifique i.e free Scientific research. We are of the opinion that there is a non-rebuttable presumption that the Legislature while making a provision like Section 125 Cr. P.C, to fulfill its Constitutional duty in good faith, had always intended to give relief to the woman becoming wife under such circumstances.

23. This approach is particularly needed while deciding the issues relating to gender justice. We already have examples of exemplary efforts in this regard. Journey from Shah Bano (AIR 1985 SC 945) to Shabana Bano (AIR 2010 SC 305) guaranteeing maintenance rights to Muslim women is a classical example.

24. In Rameshchandra Daga v. Rameshwari Daga (AIR 2005 SC 422), the right of another woman in a similar situation was upheld. Here the Court had accepted that Hindu marriages have continued to be bigamous despite the enactment of the Hindu Marriage Act in 1955. The Court had commented that though such marriages are illegal as per the provisions of the Act, they are not immoral and hence a financially dependent woman cannot be denied maintenance on this ground.

25. Thus, while interpreting a statute the court may not only take into consideration the purpose for which the statute was enacted, but also the mischief it seeks to suppress. It is this mischief rule, first propounded in Heydons Case ((1854) 3 Co. Rep.7a, 7b) which became the historical source of purposive interpretation. The court would also invoke the legal maxim construction ut res magis valeat guam pereat, in such cases i.e where alternative constructions are possible the Court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than one which will put a road block in its way. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation should be avoided. We should avoid a construction which would reduce the legislation to futility and should accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result. If this interpretation is not accepted, it would amount to giving a premium to the husband for defrauding the wife. Therefore, at least for the purpose of claiming maintenance under Section 125, Cr. P.C, such a woman is to be treated as the legally wedded wife.

26. The principles of Hindu Personal Law have developed in an evolutionary way out of concern for all those subject to it so as to make fair provision against destitution. The manifest purpose is to achieve the social objectives for making bare minimum provision to sustain the members of relatively smaller social groups. Its foundation spring is humanistic. In its operation field all though, it lays down the permissible categories under its benefaction, which are so entitled either because of the tenets supported by clear public policy or because of the need to subserve the social and individual morality measured for maintenance.

27. In taking the aforesaid view, we are also encouraged by the following observations of this Court in Capt. Ramesh Chander Kaushal v. Veena Kaushal ((1978) 4 SCC 70):

> The brooding presence of the Constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advances the cause the cause of the derelicts.

10. Heard both sides at length on facts and law referred supra and perused the material on record. Before answering the scope of the revision lis within the limited scope of law in sitting against the impugned order of the lower court, it is necessary to reproduce Section 125 Cr.P.C, which reads as follows:

> 125. Order for maintenance of wives, children and parents:
>
> (1) If any person having sufficient means neglects or refuses to maintain—
>
> (a) his wife, unable to maintain herself, or
>
> (b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
>
> (c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
>
> (d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:
>
> PROVIDED that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate

is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

PROVIDED FURTHER that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

PROVIDED ALSO that an application for the monthly allowance for the interim maintenance and expenses of proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.

Explanation.— For the purposes of this Chapter,—

(a) minor means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875); is deemed not to have attained his majority;

(b) wife includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) Any such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each months allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, remaining unpaid after the execution of the warrants to imprisonment for a term which may extend to one month or until payment if sooner made:

PROVIDED that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

PROVIDED FURTHER that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.— If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wifes refusal to live with him.

(4) No Wife shall be entitled to receive an allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

11. From the above, coming to the facts, admittedly, the maintenance case filed in the year 2008 is during subsistence of the marital tie between the couple outcome of marriage dated 02.12.2004 and the divorce granted in O.P 317 of 2008 on the ground of cruelty and not on the ground of desertion at all, is otherwise undisputedly subject matter of Family Court Appeal No. 298 of 2013. To say, though there is no suspension of the decree of divorce granted by the Family Court, there is no finality attained to the said divorce decree in view of the pendency of the appeal, which is continuation of the main proceeding till attains finality. It is also not in dispute that before filing of the maintenance case on 11.07.2008, wife already filed a private complaint against the husband for the offence under Section 498-A and 323 IPC. What he claimed though there is no date of his filing the divorce petition O.P 318 of 2008, was subsequent to his filing divorce petition, the criminal case and maintenance case filed against him.

12. In the evidence covered by Exs.R1 to R41, prior to his filing of the divorce case, there was no exchange of notices. Coming to the evidence on record in the maintenance case including with reference to the documents supra, according to her very petition for maintenance, after marriage at Hyderabad dated 02.12.2004, her husband left for U.K on 05.12.2004 and returned to India on 25.12.2004 to take her to his company in U.K and their marriage was consummated only on 29.12.2004 and according to her, harassment started right from the marriage consummation day, apart further from he suppressed the factum of he already married another woman and divorced the first wife and married the petitioner. Her further averment in the maintenance case is that they both left for U.K on 31.12.2004 and she suffered for two weeks due to ill-health there and even thereafter, he started suspecting her fidelity and abusing for not conceiving children. They went to a Gynecologist in U.K in 2005, January and the Doctors there on diagnosis found it was he that suffering from prostrate. In their stay till they returned back to India for his fathers death on 10.12.2005, where even she was treated with hostility and ill-will by him and his family members. In October, 2006, she suffered from abortion. In November, 2006, they returned to India again to attend the funeral ceremony of her mother, however, he did not attend the same, but for stayed at his family and it is there he was poisoned more to divorce her also the reason for not meeting the additional monetary demands of them. They left for U.K on 01.02.2007 and after that he used to beat her by demanding to sign on papers for his undergoing a third marriage else with threats that he is going to convert into Muslim religion to marry number of wives. It was on 12.01.2008, he mercilessly beaten her for not given consent to his demand for divorce and she was in hospital by the time she regained conscious, and later she received a phone call that he was under police arrest and she has to tell the police of she attempted to commit suicide for not begetting children and on depression by conserving pills and cut her hands and she gave statement to the U.K police accordingly and therefrom the criminal proceedings against him were dropped. She averred further that what she mentioned the events in her diaries were even destroyed by him. On 27.03.2008, they both came to India and he and his family members sent her to her parents house at Khammam and since then, he was avoiding her and even she and her father went to his house, he and his brother Srinivasa Rao, kicked her on the stomach and pulled by holding her tuft by compelling to sign on documents for divorce and created a big scene and it is he that deserted her and treated with harassment and cruelty and made to suffer all the agony which ultimately made her to file the criminal complaint against him and his family members.

13. In addition to the facts pleaded by her of she was deserted and neglected with ill-treatment even during their living together, so far as his means and her inability to maintain concerned, she claimed that he is a software engineer working for Prudential Company in U.K and getting more than 50,000/- per annum equal to about Rs. 41,00,000/- in Indian currency and also he got assets worth Rs. 6.00 Crores in Indian currency there and he suppressed his means and these could be known by her from the e-mail conversations between him and his brother and he worked for sometime in Netway Technologies Limited and also for sometime in Mars Confectionary by earning about 4,60,000 pounds per annum there from. He withdrew money of her from I.S.A Account with Barclays Bank at U.K He is highly rich. He is in the habit of sending money to his brother in India in purchasing properties in and around Hyderabad city

and his brother also being paid Rs. 10,000/- per month towards his charges for supervising his properties and in purchasing properties and their e-mail conversations are also clear in this regard. She is now residing with her sister and she needs minimum Rs. 25,000/- per month for her house rent, food and clothing etc., and she is not having any income or fixed assets of her, her father is also an aged person and not in a position to support her and she is in dire need of maintenance including interim maintenance pending the petition from the date of petition besides legal expenses. She placed reliance on documents viz., marriage photos, photo copy of marriage registration certificate and photo copies of the e-mail correspondences between him and his brother referred in her petition.

14. Thus, the contention of the revision petitioner husband that the petition for maintenance claim of his wife is bereft of particulars much less of the legal requirements of Section 125 and particularly of Section 125(4) Cr. P.C are untenable. In fact, the Madhya Pradesh High Court categorically held in Smt. Radhamani v. Sonu, that irregularities in the petition should not come in the way of the wifes entitlement to the claim of maintenance if the facts show her entitlement from appreciation of material on record, as Court in these matters should not be too right dogmatic and technical in evaluating the overall evidence on record.

15. No doubt, it was a case where maintenance petition filed by the wife without showing the children as co-petitioners in claiming maintenance or even in awarding maintenance by the court including for the minor children. In that contest from the contest of pleading are in-sufficient, said finding was rendered. The same was quoted with approval by Patna High Court in Criminal Revision Case No. 385 of 2006, dated 20.04.2009 in Amarnath Dubey v. State of Bihar, holding that court cannot be very hyper technical in maintenance matters but for to adopt the objective approach and where from the hearing if the court finds it is necessary to order court has to, to sub-serve the ends of justice and in the interest of justice. In fact, there is a clear plea regarding the acts of cruelty and desertion and neglect and refusal to pay maintenance and she is a destitute with no means and he is affluent.

16. Leave about the denial of her petition averments in his counter, what he contended otherwise is that he spent moneys for her treatment including by borrowing while at U.K in Oxford Fertility Unit and John Radcliffe Hospital among others and also in India for various health problems. He admitted that on 27.03.2008, they came to India and denied the alleged beating of her by him and his brother and any ill-treatment by his family members and the criminal case filed by her is a false one and the same is after filing of that divorce case. In his counter dated 09.04.2009, in Para 9, he stated further that for the last one year he is in India and not in U.K and he is doing job or earning huge moneys there or highly rich are untrue so also of the allegation of he withdrew her moneys from her bank accounts in U.K or purchasing properties through his brother and managing through him, by paying to him. His further contention from Para 11 of the counter is that she is a cunning and in the habit of stealing amounts from him apart from extracting money from him by harassing or black mailing or putting him in mental torture through abuses and she has stolen and swindled ten thousand British pounds from him while they were in U.K, which is the money he procured on loans from his friends and kept for her treatment and she has withheld all the gold given to her by him and his parents and she is having sufficient amounts in liquid which she has swindled from with foresight and she illegally extracted moneys from him of Rs. 40,000/- in January 2005, Rs. 80,000/- in May 2005, Rs. 1,00,000/- in June 2005, Rs. 40,000/- in October, Rs. 20,000/- in March 2006 and Rs. 15,000/- in November 2006 by pressure tactics and send to her sisters and she depleted his physical health, mental peace and finance and deserted him in a sick, jobless and debt laden with dependency on his parents. She had worked as a teacher, principal and administrator in various schools in Khammam like Marvel Model School and Scholars Public School and also as City Cable TV news reader in Khammam and also worked as lawyer and using all her knowledge, she narrated false stories against him, also put baseless allegations against him, also hatched a plan to squeeze his moneys and she is not entitled to the claim of maintenance. Ever since March 2008, after they came to India, he is staying in India without Job and also due to severe recession prevailing in market and for

his health problems. As he is a chronic Prostatitis with Coccyx tail bone injury undergone long treatment and his sitting and standing functions are affected with pain to lower abdomen and perineum and he is not in a position to work and he is taking help of his mother for his daily needs for no source of income to him.

17. From the pleadings, coming to the evidence, he did not file a scrap of paper of his closing the entities of him in U.K or when he resigned or lost any job in respect of his entities. His very counter averments shows the allegation of several amounts said to have been swindled from him by her shows his high earnings and his affluence.

18. She deposed in the cross-examination of prior to her marriage with respondent, she did job in Maripell Model School at Khammam and elders arranged the marriage and the marriage arrangement took place at Hyderabad at her sisters house and he is a software engineer in London. On his suggestion, it is submitted by her of his cadre and working as software engineer in London as true, which he confirmed of he is a software engineer at London there from. She denied the suggestion of her husband informed of his first marriage and divorce before their marriage engagement. She deposed as true of her husband sent Rs. 45,000/- through western money union service, however says the same is to purchase medicines to be sent to him for his Prostatitis health problem. She also deposed about Rs. 40,000/-, Rs. 45,000/- and Rs. 80,000/- thrice including the above sent through western money union service by him to her or to her parents. She deposed that since 2005, he got Prostatitis problem. She deposed that he started company in U.K with name Netway Technologies and the company affairs is operating from his residence only and she worked under him as office assistant and drawn salary of 500 pounds equal to Rs. 40,000/-. However, it is he that used to draw in her name the salary and the said company continued by him even after they came back to India. She deposed that though she passed L.L.B and enrolled in Bar Council of A.P, she never practiced as advocate but for she worked in Madas High School in 2010 June to August as office assistant and denied the suggestion of later even she worked till 2012 in that school and also denied the suggestion of she later stopped her employment in order to claim maintenance. She deposed that her husband went to Bangalore in search of employment and denied the suggestion of since her filing of criminal case, he stopped searching jobs, for attending courts or he has no source of income or he is dependent on his mother and he is not in a position to pay any maintenance to her and he has no assets or earnings. She denied the suggestion of her husband closed the company Netway Technologies by the time they came back to India. She also denied the suggestion of because of her suicide attempt he out of fear left his valuable job in U.K and came to India. It is in fact absurd to believe. He did not file, as referred supra, even a scrap of paper about his resigning the job or staying in India only and not even submitted his Passport to know any endorsements of transit permissions and traveling abroad to say he is not going or not staying in U.K or not running any business and not even filed record regarding closure of the own business of him a software company by name Netway Technologies in U.K

19. What further deposed by her on re-call cross-examination is that her parents are having lands in Talluru Village of Sattenapally Mandal of Guntur District. It is not even the case that it is an ancestral property. It is brought on record that she got 7 more brothers and sisters and her father is alive. Once it is his property, the question of her succeeding in his lifetime even does not arise. Thus there is nothing to appreciate any contention of she got share in any properties of her father in the absence of showing those are coparcenary properties and she got right therein by birth.

20. His Chief Examination is nothing but repetition of those facts covered by his pleadings and cross-examination suggestions to P.W 1 and by denying her version and with claim of he got no means and she got means or can otherwise earn with experience to work. What further deposed by him is that he is a naturalized citizen of U.K and the income tax department of U.K sent tax return notices to him to file IT returns Exhs.R2 to R6 for the years 2008-09 to 2012 and he filed returns through online covered by Exhs. R7 to R12 showing nil income and there from claiming he is not in a position to pay the maintenance to her and also the other version that after death of his father in December 2005, his mother is getting

dependent pension of Rs. 8,000/- per month and he is living with his brother and mother in the rented house as dependent from 27.03.2008 with no employment and also for his health problem for Prostatitis and neck and back pain covered by Exhs.R27 to R33 medical diagnosis and treatment material.

21. Admittedly, he is an M.Tech of the year 1985 and after completion in the year 1985 itself, he joined in National Insurance Corporation and in the year 2000, he left for U.K and in 2007, he got British Citizenship and he is a citizen of London even now having relinquished Indian citizenship and he is having otherwise overseas citizenship of India. He filed divorce petition against his first wife in Secunderabad Civil Court and divorced his first wife and later married the M.C petitioner. He deposed that the criminal case filed by his wife in C.C 162 of 2009 is pending against him besides the maintenance case. He deposed that there are no documents filed by him to show his wife worked in Maripell Model School or in any local TV channel. He admitted that the petitioner was worked as office assistant in Netway Technologies, U.K, while there were living in London and he and the petitioner are also the promoters of Netway Technologies, which is a private company. He deposed that the company was closed in January 2009 and he filed IT returns till then saying it is a voluntary winding up and the petitioner was not informed of the same and there is no permission of the petitioner for its winding up saying it is not required. He did not file any income tax returns of Netway Technologies till so called winding up and no proof regarding its alleged winding up voluntarily that too when his wife is one of the Directors without her knowledge. His evidence speaks that there is income tax partial exemption to it from the British Government, as while denying the same, his answer again is he is not aware of the partial exemption. Exhs.R22 speaks name of the purchaser which he claims he purchased gold under Ex.R22 by saying at the force of his wife when he attended the obsequies of his father. It is also quite unbelievable in such a situation from alleged version. He deposed that he did not file any record to show that his mother is staying in a rented house. He deposed that after he filed divorce O.P 376 of 2008, he twice went to U.S and stopped in U.K by break journey and he stayed in U.S for two months as a tourist to meet his brother. He deposed that during 2000-2001, he worked in Web League Limited, U.K and during 2002-2005, in Netway Technologies and during 2006-2008, he did not work due to health problems, though he is notionally an employee of Netway Technologies during that period, saying he used to earn 5,000 pounds per month. He deposed that he got one NRI account 14432 with Canara Bank, Mettuguda and he is professionally expertise in IT support and he worked in the domain of software installation and maintenance up to 2005. He admitted about the encumbrance certificate reflects sale of open plot in the year 2008 by getting revocation of gift deed by his mother which was executed in his favour and under Ex.R39 E.C and he deposed that he sold to one Sri. A. Srinivas Reddy, Plot No. 15 of Nagole Village in the year 2009. For which he says he and his brother sold the same and claiming his brother sold the same. Though what made him to join if it is that of his brother as a co-vendor, nothing come out from him. From this evidence when the petitioner himself says his wife also worked under him in Netway Technologies, besides she was one of the promoters then whatever any amounts she sent if at all or he sent to her father or sisters for thrice including for any treatment to one of her sisters or for his medicines purchase, it cannot be said not out of her any earnings. It is not even his case that out of those earnings, she saved anything. Once, she claimed she never practiced as an advocate, mere standing of her name in the roles of the Bar Council for not even shown member of any Bar Association, no way shows she can practice and earn.

22. The law is very clear in this regard that mere possessing of qualification is different from earning and in the absence of showing wife is earning, showing qualification is not enough to refuse maintenance. Leave about any source of income even she got, that is not the be all to refuse maintenance, but for at best that also to be taken into consideration.

23. There are sale transactions by him even from the showing including from his cross-examination even he did not file any of his accounts including that after the bank account at Canara Bank, Mettuguda, to reflect his means and income. Coming to the contention of there is no neglect or refusal; this evidence on record clearly shows the neglect and refusal, because there is after decree of divorce on ground of cruelty

particularly if at all from her filing of the criminal case under Section 498-A IPC, even considering the same, that is different from desertion, for not his version of he provided anything for her survival at any time. The contention that on the ground of cruelty once divorce granted by the court even appeal is pending since decree of trial court not suspended, it cannot be construed as neglect or refusal to maintain his wife is untenable, for not a case of divorce on the ground of desertion by wife. Acts of cruelty even caused knowingly or unknowingly from the conduct of the wife to the husband to get the divorce are different from his neglect or refusal to provide maintenance. Even from the expression of the Bombay High Court in Bhagwan Raoji Dale (Supra), the facts undisputedly different to the facts on hand for there a restitution of conjugal rights decree obtained by husband and still wife did not join and from the same also as a ground, he filed divorce petition and obtained divorce and thereby, it was observed on facts of it was she that deserted and there was no neglect or refusal by him and for there is a finality in the divorce proceedings, she at best can claim permanent alimony in not granting maintenance therein. In fact, as held in the expressions of the Apex Court, the burden of proof lies on the husband that he did not neglect or refuse to maintain his wife.

24. In this regard, what the law further says is once wife even divorced entitled to continue with the status of wife for the entitlement of maintenance under Section 125 Cr. P.C, till her re-marriage and thus unless it is shown that she is re-married she is entitled to the claim. It is held by the Apex Court in Sunita Kachwaha v. Anil Kachwaha and Bhuwan Mohan Singh v. Meena of it is the duty of the husband towards wife to provide proper maintenance and said duty continues, to lead a life similar to him with all dignity according to their social status and strata, regard being had to solemn pledge at the time of marriage and also in consonance with statutory law that governs the field to see that his wife does not become a destitute as it is the sacrosanct duty of the husband to provide maintenance once he can earn either by physical labour from able bodied or otherwise for there is no escape route unless there is an order from court of wife is not entitled to get maintenance on any legally permissible grounds. It was also justified granting maintenance from date of petition and the proceedings even taken nine years in attaining finality from date of petition.

25. In this regard, legal position is further clear that Section 125 Cr. P.C is a measure of social legislation and is to be construed liberally for the welfare and benefit of the wife and children. Having regard to the above, once the expressions supra clearly say the proceedings under Section 125 Cr. P.C are a stop-gap measure, the availability of remedy for permanent alimony in the event of finality of the appeal proceeding against the divorce on ground of cruelty obtained by husband, in the appeal filed by wife still pending, leave about the expression of Division Bench of this Court in Jayakrishna Panigrahi of even court without written application while granting decree of divorce or confirming, can grant permanent alimony, if at all granted the remedy open to the husband is to file application under Section 127 Cr. P.C from the changed circumstances from permanent alimony awarded if at all, for not to be made further liable to pay maintenance under Section 125 Cr. P.C and till then, he cannot avoid maintenance under Section 125 Cr. P.C Further continuation of the petition for maintenance claim, even divorce obtained by him which is undisputedly not finalized as appeal pending, the court can at best take the same into consideration as a subsequent event pending lis and even taken it into consideration for not a case of any permanent alimony awarded, for there is no bar legally under Section 125 Cr. P.C proceedings to claim maintenance even after divorce by wife but for specifically if at all under Section 18 of the Hindu Adoptions and Maintenance Act, for divorced wife is not wife there under; on that ground he cannot avoid maintenance that too when the law is very clear in purposive interpretation required from the expression of the Apex Court applied in Badsha case (referred supra) by scanning the law.

26. Thus, there is no illegality or irregularity any impropriety in the award of maintenance by the lower court in its order holding the M.C petitioner is entitled to maintenance. However, coming to the quantum when he was affluent and he worked as software engineer and established own company by showing his wife also one of the promoters therein by managing the affairs by utilizing her services as employee under

him and when he did not file even a scrap of paper showing its winding up even voluntarily and when as Director she was not informed even to wind up, there is nothing to show the entity is wound up and not in existence, and leave about he traveled abroad twice admittedly, he was even visiting Bangalore no doubt with a claim by him of searching jobs, it is hardly believable of his health no way permits to do any job with his expertise and skill in software field for not a hard job he has to undertake; Apart from it, it is also hardly believable of he is under the mercy of his mother and brother being otherwise affluent from the material on record and also sold away some of his properties and got means and even maintains bank accounts and same not even filed before Court which is the best evidence in his exclusive control which he cannot withhold. Thereby what the lower court from the evidence on record scanned to the relevancy concluded in awarding Rs. 10,000/- per month from the date of petition. However in the facts what this Court feels to interfere with is only to reduce from Rs. 10,000/- to Rs. 8,000/- per month by otherwise confirming the order of the Court below.

27. Accordingly and in the result, the impugned order of the lower court granting maintenance at Rs. 10,000/- per month from date of petition is but for to reduce to Rs. 8,000/- per month, in other respects for - no way requires interference, the Revision is allowed in part to the above extent. No costs.

28. Miscellaneous petitions pending, if any, in this case shall stand closed.

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# ABBAYOLLA M. SUBBA REDDY VERSUS PADMAMMA

**Andhra Pradesh High Court**

*Abbayolla M. Subba Reddy*
*Versus*
*Padmamma*

**Bench: Hon'ble Mr. Justice P V Reddi, Hon'ble Mr. Justice K S Shrivastav and Hon'ble Mr. Justice A Hanumanthu**

**1998 (5) ALD 465, 1998 (5) ALT 152, I (2000) DMC 266**

**Decided on 27 July, 1998**

**The legal point involved in this appeal is whether a Hindu Woman who is married, after coming into force the Hindu Marriage Act, 1955 (hereinafter called as 'Act'), to a Hindu male having a living lawfully wedded wife, can maintain a claim for maintenance under Section 18 of the Hindu Adoption and Maintenance Act, 1956 (hereinafter called as 'Maintenance Act).**

**The appellant-defendant resisted the claim of the respondent-plaintiff. He categorically disputed the allegation that he married the plaintiff. He also pleaded that his first wife was living and that he has got two married daughters and that he has no reason to marry the plaintiff. He also denied the income as alleged in the plaint. The defendant also pleaded that the plaintiff is living in adultery and that she is not entitled to claim maintenance**

**In the light of the foregoing discussion, we hold on the point that a Hindu Woman who is married after coming into force of the Hindu Marriage Act, 1955 to a Hindu male, having a lawfully wedded wife cannot maintain a claim for maintenance under Section 18 of the Hindu Adoption and Maintenance Act, 1956. In view of this decision, the decision of the learned single Judge of this Court in is liable to be over-ruled. Accordingly, the said decision is over- ruled.**

**ORDER**

**Hon'ble Mr. Justice A. Hanumanthu**

1. The legal point involved in this appeal is whether a Hindu Woman who is married, after coming into force the Hindu Marriage Act, 1955 (hereinafter called as 'Act'), to a Hindu male having a living lawfully wedded wife, can maintain a claim for maintenance under Section 18 of the Hindu Adoption and Maintenance Act, 1956 (hereinafter called as 'Maintenance Act).

2. Having disagreed with the view expressed by a single Judge of this Court in C. Obuta Konda Reddy v. Pedda Venkala Lakshmamma, , that the 'Hindu wife' contemplated by Section 18 of the Maintenance Act means, a Hindu wife whose marriage is solemnized, though void under the Hindu Marriage Act, she is entitled to claim maintenance from the husband, our learned brother Ramesh Madhav Bapat-i made this reference to lay down the correct position of law to the Division Bench/Full Bench/Larger Bench. This is how this appeal has come up before this Full Bench.

3. In the reference order, our learned brother has narrated the facts leading to filing of this appeal and briefly stated, they are as under :

The appellant herein is the defendant and the respondent herein is the plaintiff in O.S. No.131 of 1987 on the file of the Principal Subordinate Judge, Chittoor. The respondent-plaintiff filed the said suit informa pauperis claiming maintenance from the appellant at the rate of Rs.1,000/- per month and Rs.13,000/- towards the cost of gold chain and other ornaments gifted to her by her father at the time of her marriage with the appellant herein, and also to create a charge over the 'B' schedule property for the amount that may be decreed against the appellant-defendant. The case of the respondent-plaintiff is that the appellant married her according to Hindu rites and customs on 1-7-1984 in Kasi Vishwanada Svvami Devasthanam, Palamaner, that the marriage was also registered before the Sub-Registrar, Palamaner on 7-11-1984, that after consummation of the marriage in the plaintiffs parents' house, she was taken by the appellant to his village and there she came to know that the appellant was already married to one Parvathamma who begot two daughters through him and the said two daughters were already married and that the first wife Parvathamma was residing in the appellant's house in the village. It was also her case that during the negotiations for her marriage, the appellant did not inform the respondent and her parents that he was already married and his first wife was living and that the plaintiff was made to believe as if it was his first marriage. It was also the case of the plaintiff that she reconciled herself on the advice of the elders and lived with him discharging her conjugal responsibilities till the middle of 1985 and that differences arose between the plaintiff and the defendant's first wife Parvathamma and on the instigation of the first wife, the appellant began to ill-treat her and neglected to maintain her and beat her on two or three occasions and drove her out of the house on 30-12-1985 after snatching away gold chain worth Rs. 13,0007- which was presented to her at the time of her marriage by her father, and that the plaintiff returned to her parents and since then she is residing with them. It is also the case of the plaintiff that she would not have agreed to marry the appellant if he had divulged the fact that he was a married man having his first wife living. The plaintiff filed the said suit for the reliefs stated supra.

The plaintiff also contended that the appellant gets an annual income of Rs.20,000/- from his agricultural lands, that he has money lending business and that the plaintiff does not have separate property or any independent source of income and that the plaintiff is entitled to get maintenance from the defendant who is her husband.

4. The appellant-defendant resisted the claim of the respondent-plaintiff. He categorically disputed the allegation that he married the plaintiff. He also pleaded that his first wife was living and that he has got two married daughters and that he has no reason to marry the plaintiff. He also denied the income as alleged in the plaint. The defendant also pleaded that the plaintiff is living in adultery and that she is not entitled to claim maintenance.

5. The trial Court settled the necessary issues and allowed the parties to lead the evidence. The respondent-plaintiff examined PWs.l to 5 and marked Exs. A-l A-2, A- 2(a) and A-2(b). The appellant-defendant examined DWs.l to 3, but no documents were marked on his behalf. The first wife of the defendant was examined as DW-2 and she deposed with regard to her marriage with defendant and begetting two daughters through him. She also denied the marriage of the plaintiff with the defendant. The trial Judge on a consideration of the oral and documentary evidence placed before him, held that the solemnization of the marriage of the plaintiff with the defendant has been established, and as such, she is the legally wedded wife of the defendant and that the defendant neglected to maintain her without any reason and that the defendant snatched away the gold chain, and other ornaments of the plaintiff. The learned trial Judge relying on the decision in , held that the plaintiff is entitled to claim maintenance under Section 18(2) of Maintenance Act. Hence, the plaintiff's suit has been decreed as prayed for, but without costs. Aggrieved of that judgment and decree, the defendant has preferred the appeal.

6. It may be stated here, as a fact, that the plaintiff examined as PW-1 stated in her crossexamination thus:

"It is true that I became pregnant about one and half years after I filed this suit. The defendant used to visit my house. It is not true to suggest that I did not (sic) become pregnant through somebody else."

The father of the plaintiff examined as PW2 stated in his cross-examination thus: "The defendant used to visit our house for about 6 months now and then after he drove away PW1. He was coming even for one year after he drove away PW1."

This evidence of PWs.1 and 2 is also relevant in the light of the plea taken by the defendant that the plaintiff is living in adultery. The trial Judge has not considered this aspect.

7. The learned Counsel Sri S. Ramamitrthy Reddy appearing for the appellant-defendant raised the sole contention that the alleged marriage of the appellant with the respondent even if it is admitted to have been solemnized, is null and void in view of the provisions of Section 5 read with Section 11 of the Hindu Marriage Act and such a marriage, therefore, cannot confer status of a wife on the respondent-plaintiff which would entitle her to make a claim for maintenance under Section 18 of the Maintenance Act. He further elaborates that in order that a woman is entitled to claim maintenance under the said provision, she must satisfy the Court that she is the 'legally wedded wife' and a woman whose marriage contravenes the provisions of Section 5 read with Section II of the Hindu Marriage Act cannot claim the status of a 'wife' and the mere fact that necessary ceremonies of a marriage under the customary Hindu Law have been gone into, cannot confer on her the status of a "legally wedded wife" which is a condition precedent for claiming maintenance under Section 18 of the Maintenance Act. The learned Counsel further submitted that a marriage if void ab initio does not alter or affect the status of parties and does not create between them any rights and obligations which must normally arise from a valid marriage.

8. On the other hand, Sri C. Pattahhi Rama Rao, appearing for the respondent-wife raised the following contentions:

   (i) The Maintenance Act does not define "Hindu Wife" and subsection (1) of Section 18 says that a "Hindu Wife" married either before or after the commencement of the Act shall be maintained by her husband and subsection (2)(d) of Section 18 says that a "Hindu wife" shall be entitled to live separately from her husband without forfeiting her claim for maintenance if he has any other wife living and reading of the two subsections together, a "Hindu wife" whether married cither before or after the commencement of the Act is entitled to live separately from her husband without forfeiting her claim for maintenance if he has any other wife living and as the first wife of the appellant-defendant is living, the respondent-plaintiff is entitled to live separately and claim maintenance from her husband, the appellant herein.

   (ii) Section 18 of the Maintenance Act confers a statutory right of maintenance on every wife irrespective of her marriage being legal or void and there is no valid reason to restrict the application of such right only to a legally wedded wife.

   (iii) All that a wife has to establish in such a case is that her marriage was performed after going through the necessary ceremonies as per the customary Hindu Law and once that is established, it would not make any difference whether her marriage with the appellant contravenes Sections 5 and 11 of the Hindu Marriage Act.

   (iv) The marriage of the respondent with the appellant is a voidable marriage under Section 12 of the Marriage Act as the appellant suppressed the feet that he was already married and his first wife is living and suppression amounts to playing fraud on the respondent and her father and if that feet had been divulged by the appellant to the respondent, the latter would not have agreed to marry him and therefore, the marriage is voidable under Section 12 of the Act and as no steps were taken either by the appellant or respondent to annul that voidable marriage, it remains valid and continues to subsist for all purposes unless a decree is passed by a Court annulling the same. Hence, the marriage of the respondent with the appellant is subsisting and by virtue of her status as wife of the appellant, she is entitled for maintenance.

(v) The Maintenance Act is a piece of beneficial and social legislation, it must be liberally construed in the context of present social changes and the intention of the Legislature to confer additional rights on women and children. Therefore, even if the marriage is void ab initio, the respondent is entitled for maintenance as she continued to lead conjugal life with the appellant as a married wife.

(vi) Section 25 of die Hindu Marriage Act confers jurisdiction on the Court to grant permanent alimony and maintenance to a wife or a husband while passing any decree for restitution of conjugal rights, judicial separation, dissolution of the marriage by divorce, etc. and that even a woman, whose marriage is declared, to be null and void under Section 11 of that Act, is entitled to get alimony and maintenance and therefore, it has to be inferred that Legislature intended to confer statutory right for maintenance and alimony even in cases where her marriage contravenes the conditions prescribed under Section 5 and is declared to be null and void under Section 11 of that Act.

9. It is not in dispute that the parties to the proceedings arc Hindus and they are being governed by their personal laws. The Hindu Marriage Act, 1955, The Hindu Adoption and Maintenance Act, 1956. The Hindu Minority and Guardianship Act, 1956 and the The Hindu Succession Act, 1956 are package of enactments being part of socio-legal scheme applicable to Hindus. In view of the divergent schools governing the personal laws of the Hindus, the Parliament codified the personal law relating to the Hindus and enacted the said four Acts. Hindu Marriage Act codifies the law relating to marriages, and the Hindu Adoption and Maintenance Act, 1956 codifies the law of maintenance applicable to Hindus.

10. In the instant case, it is not disputed that the appellant had a legally wedded wife living with him at the time when he married the respondent on 01-07-1984 as per the Hindu rites and customs. Though the appellant had disputed the said marriage of the respondent with him, the trial Court, on an appreciation of the oral and documentary evidence on record, has rightly held that the marriage of the respondent with the appellant had taken place on 01-07-1984 as per Hindu customs and the said marriage was also registered on 11-7-1984 as seen from Ex.A2. i.e. the Register of Marriages maintained in the office of the Sub- Registrar, Palamaner and there is an entry with regard to the marriage of the appellant with the respondent in that Register and the same has been marked as Ex.A2(a) and the signature of PW4 in the said Register has also been marked as Ex.A2(b). PWs.3 and 5 have proved the said documents. Thus, the respondent has, factually, established her marriage with the appellant. It is also the case of the respondent-plaintiff that the appellant had a living wife DW2 at the time of her marriage. The respondent-plaintiff, both in her plaint as well as in her evidence as PW1 admitted that when she was taken to the house of the appellant, she found, to her surprise, that he had already married one Parvathamma (DW2) and he got two daughters through her. She has also not disputed the validity of the marriage of the appellant with his first wife Patvathamma. Therefore, the next aspect to be considered is what is the status of the respondent vis-a- vis her marriage with the appellant and whether she could get the status of a legally wedded wife of the appellant.

11. For appreciating the status of a Hindu woman marrying a Hindu male having a spouse living, some of the provisions of the Hindu Marriage Act, 1955 have to be examined. Section 5 of the Act lays down conditions for a Hindu Marriage solemnized after the commencement of the Act. Clause (I) of that Section lays down the necessary condition that "neither party has a spouse living at the time of the marriage". Section 11 of the Act declares such a marriage solemnized in contravention of clause (i) as null and void in the following terms:

"Section 11.

Voidmarriages :-Anymaniage 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 of the conditions specified in clauses (i), (iv) and (v)of Sections."

"Section 17 reads thus:

Section 17. Punishment of bigamy .--Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living; and the provisions of Sections 494 and 495 of Indian Penal Code, 1860 (45 of 1860), shall appiy accordingly,"

Thus, Section 17 not only, declares such a marriage as void, but the parties to that marriage are also liable for bigamy. Section 12 of the Act relates to voidable marriages and it reads as follows:

"Sec. 12, Voidable marriages :--(1) Any Marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree- of nullity on any of the following grounds, namely:

(a) that the marriage has not been consummated owing to the impotence of the respondent; or

(b) that the marriage is in contravention of the condition specified in clause (ii) of Section 5; or

(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner (was required under Section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978) the consent of such guardian was obtained by force (or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent); or

(d) that the respondent was at the time of the marriage pregnant by some person other then the petitioner.

(2) Notwithstanding anything contained in sub-section (1) no petition for annulling a marriage

(a) on the ground specified in clause (c) of sub-section (1) shall be entertained if

(i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;

(b) on the ground specified in clause (b) of sub-section (1) shall be entertained unless the Court is satisfied;--

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement within one year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the said ground."

Provisions under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 may also be extracted as the respondent herein is claiming maintenance under the said Act. It reads thus :

"Section 18-

Maintenance of wife ;-(1) Subject to the provisions of this Section, a Hindu Wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her life- time.

(2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance

(a) (b) (c) not relevant.

(d) if he has any other wife living;

(3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to other religion.".

(c), (f), (g) not relevant.

12. Section 5(i) of the Hindu Marriage Act which lays down that the marriage will be solemnized between any two Hindus if neither party has a spouse living at the time of the marriage, introduces monogamy in the Hindu Law. The word 'spouse" used in this Section means, a "lawfully married husband or wife". Therefore, before a valid marriage can be solemnized after the commencement of the Act, it must be shown that the parties to the marriage must be either single or divorcee or a widow or widower and then only, they are competent to enter into a valid marriage. If at the performance of the marriage rites and ceremonies, one or other had a spouse living and the earlier marriage had not already been set aside, the later marriage is no marriage at all and being in contravention of the condition laid down in Section 5(i) of the said Act, it is void ab initio. Section 11 of the Act as quoted earlier, lays down that any marriage solemnized after the commencement of this Act is null and void if it contravenes conditions specified under Section 5(i) and may, on a petition presented by either party thereto, so be declared by a decree of nullity. It has been consistently held by this Court and various other High Courts and Supreme Court that under the provisions of the Hindu Marriage Act, a second marriage contracted while the first marriage is subsisting, is void.

13. The learned Counsel appearing for the respondent submitted that the marriage of the respondent with the appellant, in the instant case, comes under "voidable" marriage described under Section 12 of the Act as the respondent was not informed about the appellant's earlier marriage when she was married to him and thus, the appellant obtained her consent by playing fraud on her, and that till the marriage is annulled, that marriage is a valid one and the respondent gets all the rights as a wife under a valid marriage. We are unable to accept this contention of the learned Counsel for the respondent.

14. Sections 11 and 12 of the Act as quoted earlier, deal with cases where a marriage is void and cases where a marriage is voidable at the option of either of the party to the marriage respectively. In Section 11, the expression used is "null and void" while the word "voidable" is used in Section 12. This indicates the intention of the Parliament that they wanted to make a distinction between a void marriage and a voidable marriage. The distinction is further indicated by Section 17 which makes the parties to void marriage criminally liable, while there is no such penalty for the parties to a voidable marriage. Of course, both Sections 11 and 12 speak of a decree of nullity; but Section 11 speaks of only declaration of the marriage as null and void by such a decree, while Section 12 speaks of the annulment of a voidable marriage by a decree. As a void marriage is non-existent in the eye of law, only a declaration is sufficient, but an annulment of a voidable marriage is necessary because such a marriage shall be deemed to be valid until it is annulled by a decree of nullity. Further, the marriage which is null and void for contravening the provisions of Section 5(i) ofthe said Act cannot be treated as voidable under Section 12. We get support for this view from the decision of Supreme Court in Smt. Yamunabai Anant Rao Adhav v. Ananta Rao Shivram Adhav and another, . It is also held in the same decision that the fact that the wife was not informed about the husband's earlier marriage when she married him would be of no avail and the wife cannot rely on the principle of estoppel so as to defeat the provisions of the Act. Thus, there can be no doubt that the words "void" and "voidable" have been used in the Act in two distinct senses. The argument that after solemnisation of marriage, the appellant treated her as his wife is again of no avail as the issue lias to be settled under the provisions of the Act, It is the intention of the Legislature as could be seen from the provisions of the Act which is relevant and not the attitude of the party.

15. A Hindu is under an obligation to maintain his wife, his minor sons, unmarried daughters and aged Parents. The obligation is personal. It arises from the very nature of the relationship and exists whether he possesses any property or not. The Maintenance Act gives statutory form to that obligation. The right of a Hindu wife for maintenance is an incident of the status of matrimony. Subsection (1) of Section 18 of the Act substantially reiterates that right and lays down the general rule that a Hindu wife whether married either before or after the commencement of the Act is entitled to be maintained by her husband during her life time. The rule laid down in this Section is subject to the exceptions stated in sub-section (3) which lays down that she cannot claim separate residence and maintenance if she is unchaste or ceases to be a Hindu by conversion to another religion. Under sub-section (2) of Section 18 wife is entitled to live separately from her husband without forfeiting her claim for maintenance, in the circumstances stated in clauses (a) to (g) mentioned in that subsection. Under clause (d), wife is entitled for separate residence without forfeiting her claim for maintenance if her husband has any other wife living. The claim for maintenance is maintainable under this Section irrespective of the fact that the marriage had taken place after or before the marriage of the applicant wife, provided the other wife is living. The ground laid down in this Section can, obviously exist only in case of any marriage solemnized before the Hindu Marriage Act came into operation. It is obviously for the reason that the Hindu Marriage Act, 1955 laid down monogamy as a rule of law and Hindu husband cannot marry another wife after the commencement of that Act. A bigamous marriage contracted after the coming into force of that Act, would be null and void and no question of having another wife can arise. Therefore, the word "Hindu wife" in Section 18(1) connotes only a legally wedded wife of Hindu and such wife alone is entitled to claim maintenance from her husband under this Section. If her marriage is void ab initio, she is not entitled to claim maintenance under this Section. "Hindu wife" in this Section, we reiterate, only means a wife whose marriage is valid under the provisions of the Hindu Marriage Act, 1955. The wife whose marriage has been solemnized, but is void on the ground that the first wife of the husband is living at the time of the marriage is not entitled to claim maintenance under this provision.

16. The expression " any other wife" in Section 18(2)(d) of the Act came up for consideration before Karnataka High Court in Subbe Gowda v. Hanamma, , and it is held by that Court that: 'The expression 'any other wife .' in Section 18(2)(d) means, any other legally wedded wife.

    Therefore, even if the husband is living with another woman treating her as his wife, it cannot be said that he has any other wife living within the meaning of Section 18(2) (d)."

    While the personal law governing the parties prohibits bigamous marriage, on a parity of reasoning, it. can also be stated that the expression 'Hindu wife' in Section 18 means only a legally wedded wife and not a wife whose marriage is void under the provisions of the Hindu Marriage Act. The second marriage/ bigamous marriage being void cannot create a legal statute of "husband" and "wife" between the parties. That marriage is void ab initio and the woman cannot get the status of a wife nor the male gets the status of husband to her. Therefore, she cannot get a right to claim maintenance under Section 18 of the Act.

17. It is also significant to note that no attempt was made to amend or make provision in the Act to include the case of a woman whose marriage is void by reason of provision of Section 5(i) of the Hindu Marriage Act, for claiming maintenance against a person with., whom she underwent illegal marriage. Even though the Parliament in its anxiety to protect the legitimacy of the paternity of the child born out of that void marriage made a provision in Section 16 of Marriage Laws (Amendment) Act, 1976, it has not extended similar protection in respect of the mother of that child. Further, in our considered opinion it does not appear to be the intention of the Act while such marriage is rendered void, nevertheless, the bigamous relationship should be recognised for purpose of maintenance.

18. It is no doubt true that Maintenance Act is a piece of beneficial legislation conferring additional rights on women and children. But, it cannot be construed as conferring maintenance rights on a woman whose marriage is void under Hindu Marriage Act. While a legislative enactment may be liberally construed,

the liberality cannot overstep the legislative limits of interpretation, putting to the legislation something which is not there. If it is felt that a particular enactment causes hardship or inconvenience, it is for the Legislature to redress it, but, it is not open to the Court to ignore the legislative injunction.

19. Now, we will refer to some of the decided cases on the point. In Bami Dharjha v. Chabbi Chalterji, AIR 1967 Pat. 217, Division Bench of Patna High Court white dealing with the claim of a woman for maintenance under Section 125 Cr.PC and such a woman being married to a married man whose wife was living at the time of her marriage, held that if the petitioner on the date of marriage with the claimant-woman had already wedded wife, his marriage with the claimant woman is void under Section 11 of the Hindu Marriage Act and a marriage void ab initio does not alter or affect the status of parties nor docs it create between them any rights and obligations which must normally arise from valid marriage and a void marriage is non-existent in the eye of law.

20. In Pothula Manika Reddy and Another v. Govt of A.P, rep. by the Special Tahsildhar, l&nd Reforms, Ranga Reddy, 1978 (1) APLJ 360.

a learned single Judge of our High Court, while considering the status of a second wife who was married to a person while his first wife was living, held that a woman who is married to a party who has already living spouse cannot be treated as his spouse in the legal sense and such a second marriage is null and void and it docs not create any rights and obligations.

21. While considering the scope of Section 11 of the Hindu Marriage Act, the Division Bench of Patna High Court in AIR 1967 Patna 277 (supra) held thus: "A marriage which contravenes the conditions referred to in Section 5 is in law no marriage at all being void ipsojure and it is open to the party to the marriage even without recourse to the Court to treat it as a nullity. Neither party is under any obligation to seek the declaration of nullity under this Section though such a declaration may be asked for the purpose of pre-caution or record."

22. At page 687 of Mulla's Hindu Law 14th Edition a passage reads thus: "The person, an innocent party to a bigamous marriage, may go to a Court for declaration that a bigamous marriage is null and void. That would be for the purpose of precaution or record or evidence. That the bigamous marriage is a nonexistent and simply because there is no recourse to the Court, it cannot be said that it exists unless and until a decree is passed declaring it to be null and void."

Therefore, the mere fact that the parties had not approached the Court for declaration as contemplated under Section 11 does not in any way alter the conditions and thereby, it cannot be said that the marriage is a valid and subsisting one.

23. In Baji Rao Gagoba Thambra v. Ms. Tholan Bhai and another, 1980 Crl. LJ 473, a Division Bench of Bombay High Court white considering the claim of a woman whose marriage was void, for maintenance tinder Section 125 Cr.PC held thus.

"A woman whose marriage was void cannot get the legal status of a wife and therefore, if the marriage is void by reason of contravention of Section 5 read with Section 11 of Hindu Marriage Act, she is not competent to make an application under Section 125 of the Cr.P.C That provision merely speaks of a" Wife" and its meaning cannot be extended to a case of a void marriage."

24. In Smt. Yetmtnabai Anantha Rao Adhav v. Anantha Rao Shivram Adhav and another, (supra) while considering the question whether a Hindu woman who is married after coming into force of the Hindu Marriage Act, 1955, to a Hindu male having a living lawfully wedded wife, can maintain an application for maintenance under Section 125 Cr.P.C. the Supreme Court held thus:

"Section 5(i) of Hindu Marriage Act lays down, for a lawful marriage, the necessary condition is that neither party should have a spouse living at the time of the marriage. A marriage in contravention of this condition therefore, is null and void. The plea that the marriage should not be treated as void because

such a marriage was earlier recognised in law and customs cannot be accepted. By reason of the over-riding effect of the Act as mentioned in Section 4 no aid can be taken of the earlier Hindu Law or any custom or usage as a part of that Law inconsistent with any provision of the Act, such a marriage also cannot be said to be voidable by reference to Section 12. So far as Section 12 is concerned, it is confined to other categories of marriages, and it is not applicable to one solemnized in violation of Section 5 (i) of the Act."

It is further observed by the Supreme Court thus:

"It is also to be seen that while the Legislature has considered it advisable to uphold the legitimacy of the paternity of a child born out of a void marriage, it has not extended a similar protection in respect of the mother of the child" The Court further observed thus: "For the purpose of extending the benefit of the Section to a divorced woman and to an illegitimate child, the Parliament considered it necessary to include in the Section specific provisions to that effect, but it has not done so with respect to woman not lawfully married."

The above decision of the Supreme Court will apply in all tours to the case on hand arising under the Hindu Marriage Act.

In Sayatma v. Lakshmi Bhai Alias Hanuma Bhai and another, , this Court while relying on the decision of the Supreme Court in (supra) observed: "When the Legislature itself incorporated in the Hindu Marriage Act that a second marriage contracted while the first marriage is subsisting is void, it cannot be comprehended how the second wife is entitled for maintenance."

25. Thus, the Supreme Court and various High Courts including Andhra Pradesh High Court had taken the view that a woman whose marriage is valid under the provisions of the Hindu Marriage Act alone is entitled to claim maintenance from her husband and the woman whose marriage is void ab initio cannot make any claim for maintenance; as such a marriage cannot create a legal status of husband and wife between the parties. We are also of the firm view that the words "Hindu Wife" appearing in Section 18 of Hindu Adoption and Maintenance Act has to be interpreted as a wife whose marriage is valid according to the provisions of the Hindu Marriage Act. We do not agree with the observations of the learned single Judge in "" (supra) that the provisions of Hindu Adoption and Maintenance Act do not warrant interpretation of such a Hindu wife and such an interpretation renders the provisions of Section 18 of Maintenance Actotiose.- In our view such an interpretation stands to reason when we take into consideration all these four Acts which were passed as a package of enactments being part of one Socio-legal scheme applicable to Hindus and codifying the various laws prevailing in various parts of the country before that codification. By codifying the personal laws prevailing and applicable to Hindus, the Parliament intended to have monogamy among the Hindus and therefore, Hindu Marriage Act was passed to prevent bigamous marriages and for that purpose, it is enacted that a bigamous marriage is void and also constituted such a marriage as a crime for which punishment has been provided. Therefore, it does not appear to be the intention of the Parliament that while such a bigamous marriage is rendered void, the bigamous relationship should be recognised for purpose of maintenance. Further, as observed earlier, the Parliament while passing Marriage Laws Amendment Act, 1976 (68/76) has considered it advisable to uphold the legitimacy of the paternity of children born out of a void marriage; it has not extended a similar protection in respect of the mother of such children.

Further, if the bigamous relationship should be recognised for the purpose of maintenance of a woman, the very purpose of introducing the provisions in the Hindu Marriage Act while introducing monogamy among the Hindus will be defeated.

26. The learned Counsel for the respondent submitted that under Section 25 of the Hindu Marriage Act, a wife whose marriage is void would be entitled, as of right, of relief of permanent maintenance once her marriage is annulled by a decree of nullity under Section 11 or passing a decree of a kind envisaged under

Sections 9 to 14 of the Hindu Marriage Act, and therefore, it allows that the Hindu Marriage Act, 1955 recognizes notwithstanding the fact that the marriage is null and void, that the wife has the status atleast for limited purpose of applying for alimony and maintenance. This statutory intention, according to the learned Counsel for the respondent, has to be borne in mind in considering the claim of the respondent in this case to maintenance. The support of this contention the learned Counsel relied on the decision of a learned single Judge of Bombay High Court in Smt. Rajesh Bai and others v. Shantha Bai, AIR 1982 Bom. 331. In that case, the first wife of the deceased filed a suit for partition against the brothers of her deceased husband and the 2nd wife of her husband by name Rajesh Bai. The defendants in that suit took the plea that the plaintiff was divorced by her husband as per the caste custom and after divorce, he married 2nd wife Rajesh Bai. The learned single Judge while holding that the marriage of Rajesh Bai is void in view of the subsisting first marriage of the deceased with Shantha Bai, granted maintenance to 2nd wife Rajesh Bai relying on the part materia provisions of Section 25 of the Hindu Marriage Act and also relying on the inherent powers of the Court under Section 151 C.P.C. to meet the ends of justice. The learned single Judge observed thus:

"The rights recognised by Section 25 of the Hindu Marriage Act can clearly be worked out in any civil proceedings subject to consideration of facts and circumstances so as to meet the ends of justice by resort to the inherent powers conferred upon the Courts by Section 151 C.P.C. The statutory references do not indicate that there is any prohibition or any specific Provision in this regard. On the other hand, the principle is statutorily recognised that upon a decree being passed for nullifying the marriage as void de jure, the Court is possessed with ample power to make order as to alimony and maintenance. What could, therefore, be available in special proceedings cannot be said to be not available when the same issue is involved collaterally in competent civil proceeding."

The learned Judge further observed: "Ultimately, having based the relief under Section 151 C.P.C. with the aid of inherent powers and drawing upon the principle underlying Section 25 of the Hindu Marriage Act, it is implicit that before maintenance is granted, the need to grant such must exist as well as the grantee must fulfil the ordinary conditions like that of chastity, not being married with any other person and further of not being in a position to maintain herself."

With due respect, we are not in a position to accept the said reasoning of the learned Judge. Firstly, the assumption that Section 25 recognizes the right of a woman bigamously married to claim maintenance at the time when a decree of nullity is passed is not correct. Secondly in the absence of a proceeding under Sections 9 to 14 such a relief cannot be granted by invoking Section 151. Section 151 could liave no application to such a situation.

27. Section 25 of the Hindu Marriage Act as it now stands after amendment by Act 68/76 is reproduced hereunder:

"25. Permanent alimony and maintenance :-

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

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

(3) If the Court is satisfied that the party in whose favour an order has been made under the Section has remarried, or if such party is the wife that she has not remained chaste, or if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may, at the instance of the other party, vary, modify or rescind any such order in such manner as the Court may deem just."

It is clear from this provision that it confers a statutory right on the wife and the husband and confers jurisdiction on the Court to pass an order of maintenance and alimony in proceedings under Sections 9 to 14 of the Hindu Marriage Act. At any time before or after the decree is passed in such a proceeding, therefore, the wife or husband could make such a claim and the conditions of Section 25(1) will have to be satisfied. There must be a matrimonial petition filed under the Hindu Marriage Act, then, on such a petition, a decree must be passed by the Court concerning the material status of the wife or husband. It is only when such a decree is passed that the right accrues to the wife or the husband and confers jurisdiction on the Court to grant alimony. Till then, such a right does not take place. Not only that the Court retains the jurisdiction even subsequent to passing of such a decree to grant permanent alimony when moved by an application in that behalf by a party entitled to, 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 gamut of a broken marriage. Thus, the Legislature while codifying the Hindu Marriage Act, reserved the right of permanent maintenance in favour of the husband or the wife as the case may be depending on the Court passing a decree of the kind as envisaged under Section 14 of the Act. Thus, Section 25 should not be construed in such a manner as to hold that notwithstanding the nullity of the marriage, the wife retains her status for purposes of applying for alimony and maintenance. In our view, the proper construction of Section 25 would be that where a marriage admittedly is a nullity, this Section will have no application. But, where the question of nullity is in issue and is contentious, the Court has to proceed on the assumption until the contrary is proved, that the applicant is the wife. It is in that sense Section 25 should be appreciated. Further, in the instant case, there are no proceedings between the parties and there is no decree of the kind as envisaged under Section 14 of the Act disrupting the material status of the respondent with appellant. Hence, the respondent is not entitled to invoke the provisions under Section 25 of the Act. On the other hand, the respondent is seeking maintenance under Section 18 of Hindu Adoption and Maintenance Act. When the marriage of the respondent is void ab initio, she is not entitled to claim maintenance under the said Act. Hence, it is not open to the Court to grant relief of maintenance under Section 25 of Hindu Marriage Act in the proceedings initiated under the provisions of Hindu Adoption and Maintenance Act, as held by the Apex Court in Smt. Chand Dhawan v. Jawaharlal Dhawan, 1993 (3) Scale 1. As is evident, both these statutes are codified laws on the respective subjects and by liberality of interpretation, inter-changeability cannot be permitted so as to destroy the distinction on the subject of maintenance.

28. We are also of the opinion that even the principles of justice, equity and good conscience do not come to the rescue of the respondent as the subject of maintenance is covered by statute law and Abbayolla M. there is no scope to invoke those principles where the legislative enactments on the subject do not permit the grant of maintenance to a woman who was a party to a bigamous marriage.

29. Moreover on the facts of the case also, the chastity of the respondent is doubtful as she admits in her evidence that she became pregnant after she was driven out of the matrimonial home of her husband, the appellant herein. Thus, viewed from any angle, the respondent is not entitled to maintenance.

30. In the light of the foregoing discussion, we hold on the point that a Hindu Woman who is married after coming into force of the Hindu Marriage Act, 1955 to a Hindu male, having a lawfully wedded wife

cannot maintain a claim for maintenance under Section 18 of the Hindu Adoption and Maintenance Act, 1956. In view of this decision, the decision of the learned single Judge of this Court in is liable to be over-ruled. Accordingly, the said decision is over- ruled.

31. In view of the above decision taken by us, the claim of the respondent for maintenance, whose marriage is void ab initio, against the appellant is not maintainable of 1987 on the file of the Principal Subordinate Judge, Chiltoor, is liable to be set aside.

32. In the result the appeal is allowed. The judgment and decree in O.S.No.131 of 1987 on the file of the Principal Subordinate Judge, Chittoor, is set aside and the suit O.S.No.131 of 1987 is dismissed.

In the circumstances of this case, parties are directed to bear their costs through out.

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# K. NARASINGA RAO VERSUS K. NEERAJA @ RAJINI

**Andhra Pradesh High Court**

**Bench : Honble Sri Justice Ramesh Ranganathan and Honble Sri Justice M. Satyanarayana Murthy**

*K. Narasinga Rao*
*Versus*
*K. Neeraja @ Rajini*

**C.M.A.No. 1056 OF 2006**

**Decided on 1 June, 2015**

- **It is evident that the marriage between the respondent and the petitioner has irretrievably broken down, and there is no possibility of their living together. The respondent is, admittedly, working as a Commercial Tax Officer, while the petitioner is only a housewife whose only source of livelihood is the maintenance granted to her, in the maintenance case, of Rs.3,500/- per month. Though he claims that the petitioner is doing tailoring work, the respondent has himself admitted, in his counter, that he is not able to produce any evidence to prove that she derives any income from tailoring. There is no evidence on record to establish that the petitioner is having any independent source of income for her survival, much less to lead a life of comfort on par with the respondent who is working as a C.T.O.**
- **Taking into consideration all relevant factors, including the monthly salary of the respondent, the petitioner not having any independent source of income, and as the petitioner should be secured financially for her to lead the same standard of life as that of the respondent, we consider it appropriate to fix the permanent alimony, payable to the petitioner by the respondent, as Rs.15,00,000/-. The respondent shall pay the said amount in three equal half yearly instalments of Rs.5.00 lakhs each, the first of which shall be paid by 31st December, 2015, the second instalment of Rs.5.00 lakhs latest by 30.06.2016, and the third and final instalment of Rs.5.00 lakhs latest by 31.12.2016. The only other aspects which remains to be considered is the manner in which this Court should secure payment of permanent alimony of Rs.15,00,000/-, by the respondent to the petitioner**
- **It is no doubt true that gratuity, provident fund and other retiral benefits, are not immovable property. Section 100 of the Transfer of Property Act, 1882 (for short, 'the 1882 Act) enables a charge to be created on the immovable property of one person by the act of parties, or by operation of law to secure the payment of money to another. Section 25 of the Act, which enables a charge to be created on immovable property, does not explicitly provide for a charge being created on movable property. Ordinarily conferment of power, by a specific statutory provision, is a pre-requisite for its exercise. However, exceptional circumstances may justify exercise of power in the absence of any statutory prohibition. we direct that the permanent alimony, payable by the respondent to the petitioner in terms of the order now passed by this Court, shall be secured by way of a charge over the retiral/ terminal benefits of the respondent. The charge shall, however, be limited only to such of those retiral benefits for which there is no statutory prohibition for creation of a charge or attachment.**

**Honble Sri Justice Ramesh Ranganathan**

C.M.A. No.1056 of 2006 is filed by the appellant husband against the order passed by the Principal Senior Civil Judge, Warangal, in O.P. No.64 of 2004 dated 17.08.2006, dismissing his petition seeking dissolution of

marriage under Section 13(1)(ia) of the Hindu Marriage Act, 1955. The petition, in C.M.A. M.P. No.200 of 2014 in C.M.A. No.1056 of 2006, is filed by the petitioner-wife against the respondent-husband under Section 25 of the Hindu Marriage Act, 1955 (for short, 'the Act) for grant of Rs.25,00,000/- towards her permanent alimony and Rs.20,00,000/- to Kumari K. Navya, (the daughter of the petitioner and the respondent), towards her maintenance, education and marriage expenses.

The marriage between the petitioner and the respondent was performed as per Hindu rites on 22-02-1996 and they were blessed with a female child by name Kumari K. Navya who is now studying Engineering. However, for various reasons which do not necessitate elaboration, their marital ties broke down, and the respondent filed O.P.No. 64 of 2004 on the file of the Court of the Principal Senior Civil Judge, Warangal (for short, 'the trial Court'), to dissolve their marriage under Section 13 (1) (ia) of the Act on the ground of cruelty. The said petition was dismissed by the trial Court declining grant of divorce on the ground of cruelty. Aggrieved by the order passed by the trial Court dated 17-08-2006, the respondent preferred C.M.A.No. 1056 of 2006 before this Court. During the pendency of the appeal, the petitioner filed an affidavit before this Court stating that she had no objection for grant of divorce as there was no possibility of their now living together after a long lapse of 17 years. She requested that she be granted permanent alimony creating adequate security for payment of the said amount. Sri J. Prabhakar, Learned Counsel for the petitioner, would submit that, in view of the long and excruciating legal battle between the petitioner and the respondent for the past more than 17 years, there is no possibility of their now living together. Since the petitioner has conveyed her no objection for the grant of a decree of divorce dissolving their marriage without admitting the acts of cruelty attributed to her, and as there is no possibility of their living together after a long separation of 17 years and a bitter legal battle for the past more than a decade, a decree of divorce is granted, and the marriage between the respondent and the petitioner is dissolved. C.M.A. No.1056 of 2006 is disposed of accordingly.

It is the petitioners case, in C.M.A.M.P. No.200 of 2014 in C.M.A. No.1056 of 2006, that the respondent did not provide them with even the minimum sum required to meet their bare necessities; she is being paid Rs.3,500/- p.m. towards maintenance, that too only because of the orders passed in the maintenance case filed by her under Section 125 of the Code of Criminal Procedure (for short, 'Cr.P.C.'); the respondent has met the expenses for their daughter Kumari K. Navya only when a specific direction was issued by the Court; the respondent is a Commercial Tax Officer, drawing a monthly salary of Rs.60,000/- p.m; he acquired valuable movable and immovable properties including a house at Vanastalipuram; he also owns and possesses a 500 square yards site at Desaipet Village, Warangal District; he has been in service for the last 20 years and, with the income from his employment and on availing a loan from his General Provident Fund account, he acquired huge properties; not only does the respondent possess movable and immovable properties, he is also earning a substantial monthly salary as a Commercial Tax Officer; and he possesses sufficient means to maintain the petitioner and their daughter. It is also the petitioners case that she is not employed, she has no source of income even for bare sustenance; earlier she relied on her brother for her survival, but he died in the year 2007; thereafter some of her relatives have been extending a helping hand; her living condition is pathetic and the monthly maintenance of Rs.3,500/-, being paid by the respondent, is not even enough to pay for her rent; she did not seek enhancement of the monthly maintenance with the fond hope that her marital ties would be restored; and the respondent did not meet even the education expenses of their daughter till she completed her 10th class. The petitioner claims Rs.25,00,000/- towards permanent alimony for herself; and Rs.20,00,000/- for their daughter towards her education and marriage expenses without prejudice to her rights; and prays that an order be passed granting her permanent alimony, and a fixed sum for the education and marriage expenses of their daughter. The respondent filed his counter thereto, denying the petitioners allegations. It is his case that the amount claimed by the petitioner, towards permanent alimony of Rs.25,00,000/-, is highly excessive; she is not entitled to claim the said amount in the facts and circumstances of the present case; the amount claimed by her of Rs.20,00,000/-, towards the education and marriage expenses of their daughter, is not permissible under Section 25 of the Act; no amount need be paid by the respondent either to the petitioner or their daughter under Section 25 of

the Act; he is not receiving Rs.60,000/- as monthly salary; his gross salary is only Rs.47,076/-; and he has not acquired any property, much less a house and a plot at Vanastalipuram and Desaipet village.

According to the respondent the conduct of the petitioner is not beyond reproach; due to her hostile and highly inimical attitude towards him, they have been living separately for the last 18 years; the reason for their living apart is solely on account of the petitioners behavour; the petitioner is, therefore, disentitled from claiming permanent alimony under Section 25 of the Act; the petitioner addressed letters dated 15-07-1996 and 16-07-1996 levelling false and baseless allegations against him; she also threatened to commit suicide; she did not even attend the meetings held by the family members on 11-08-1996 and 02-02-1997; he and his family members were falsely implicated in a criminal case for the offence punishable under Section 498-A of the Indian Penal Code (for short, 'I.P.C.'); he was forced to obtain anticipatory bail and was, thereafter, forced to run around the police station; she made unfounded allegations that he had married a woman naxalite, and had tried to kill her which were later found to be false; she addressed letters to the Anti Corruption Bureau to take action against him; she also addressed letters to the Andhra Pradesh Public Service Commission questioning his selection as an Assistant Commercial Tax Officer; and her abominable conduct disentitles her being granted permanent alimony under Section 25 of the Act. The respondent would further submit that the petitioner had filed maintenance case claiming maintenance for herself and their daughter; the matter came up before this Court in Criminal Revision Case No. 2138 of 2009, and was dismissed by order dated 07-11-2013; while matters stood thus, this Court had directed him to pay Rs.24,000/- towards the education expenses of his daughter for the year 2012-2013 and Rs.64,000/- for the year 2013-2014; he is paying the same as directed by this Court; and, while his gross salary is Rs.47,076/- p.m, his net salary is only Rs.19,166/- p.m as he is contributing Rs.10,000/- p.m. towards his Government Provident Fund account, Rs.12,500/- p.m. is being deducted towards the loan taken by him from the G.P.F. account, Rs.3,000/- p.m. is being deducted towards A.P.G.L.I, and Rs.1,400/- is being deducted, in addition to the regular contribution, towards discharge of the A.P.G.L.I. loan. The respondent would also submit that, in order to meet the education expenses of his daughter as directed by this Court, for the medical expenses of his aged mother, and to pay the legal expenses, including fees to advocates in various Courts for the last 17 years, (after changing at least 5 advocates), he has incurred huge debts having borrowed money from private money lenders; he has only 5 years service left; his earnings, during his remaining service, may be only around Rs.8,00,000/- to Rs.9,00,000/-, subject to enhancement of expenditure; and, in such circumstances, the petitioner is not entitled to claim a huge sum of Rs.25,00,000/- towards permanent alimony, and Rs.20,00,000/- towards the education and marriage expenses of their daughter.

According to respondent, the petitioner is carrying on tailoring activity, but it is difficult for him to produce any evidence in proof thereof; on the other hand, he has become a pauper and is almost a bankrupt owing to the long years of litigation; he has been paying maintenance for the last 17 years as directed by the Court; for the first time, the petitioner filed C.M.A.M.P. No. 357 of 2012 and C.M.A.M.P. No. 651 of 2013, and both the applications were ordered directing him to pay Rs.24,000/- and 64,000/- respectively towards the education expenses of their daughter for the academic years 2012-13 and 2013-14; the evidence on record, both in the maintenance case and in the original petition, would establish her conduct for the past 17 years; while considering the question of grant of permanent alimony, this Court should take note of the status, income and conduct of the parties to the petition; and if the conduct of the petitioner is taken into consideration, applying the principles laid down in Vinny Parmvir Parmar v. Parmvir Parmar , she would be disentitled to claim any amount as permanent alimony. The respondent has also referred to certain admissions in the maintenance case, and other proceedings, to contend that the petitioners conduct is abominable and, therefore, she is disentitled for the grant of permanent alimony. He has placed before this Court a copy of his salary certificate dated 28-01-2014, and the annual property statement for the year 2010-2011 submitted by him to the department, and has prayed that the petition be dismissed.

Sri J. Prabhakar, Learned Counsel for the petitioner, would submit that the petitioner is penniless, and the amount being paid by the respondent towards her monthly maintenance, in terms of the orders passed in the maintenance case, is insufficient even to pay for her monthly rent; even if any amount is awarded towards

permanent alimony, after taking into consideration all the relevant circumstances under Section 25 of the Act, it would be difficult for her to realize the amount awarded by this Court from the respondent; the respondents conduct, in avoiding payment, is evident even from the proceedings sheet of the appeal; it is clear therefrom that he has been reluctant even to pay for their daughter's education expenses; in case the amount is not appropriately secured, it would be difficult for the petitioner to even survive; and, therefore, this Court should create a charge or security over the G.P.F. amount and other retiral benefits payable to the respondent on his attaining the age superannuation or on his retirement. Learned Counsel would rely on State Bank of India v. S.B. Shah Ali (Died) for L.Rs ; Thota Sesharathamma v. Thota Manikyamma ; B.P. Achala Anand v. S. Appi Reddy ; and Rajesh Burman v. Mitul Chatterjee . Sri B. Sree Rama Krishna, Learned counsel for the respondent, has filed his written submissions wherein he reiterated the contentions urged in the counter. He has drawn our attention to certain admissions made by the petitioner in different proceeding, and the letters addressed by her to the respondent, in support of his submission that her abominable conduct disentitles her being granted any permanent alimony, much less for Rs.25,00,000/-. Learned Counsel would submit that the conduct of the petitioner, throughout the past 17 years, and the various acts attributed to her and admitted by her in her evidence, are sufficient to deny her permanent alimony; though he is getting a meagre income of Rs.19,166/- as his net monthly salary, and he does not possess any immoveable property, he has been paying the petitioner maintenance, in the maintenance case, of Rs.3,500/- p.m besides bearing the education expenses of their daughter Navya; no charge can be created against his G.P.F. account and other retiral benefits as Section 100 of the Transfer of Property Act, 1882 (for brevity, 'the 1882 Act), permits creation of a charge only against immovable property; no charge can, therefore, be created against the respondents retiral benefits; and the petitioner is not entitled to claim Rs.20,00,000/- towards the education and marriage expenses of their daughter under Section 25 of the Act. He would place reliance on A. Jayachandra v. Aneel Kumar , to contend that the petition is liable to be dismissed.

In so far as the petitioners claim of Rs.20,00,000/-, towards the education and marriage expenses of their daughter is concerned, Sri B. Sree Rama Krishna, Learned Counsel for the respondent, while asserting in para No. 5 of his written arguments that the respondent is ready and willing to look after his daughter, and meet all her reasonable expenses towards her maintenance, education and marriage, would, however, contend that, in a petition filed under Section 25 of the Act, no amount can be granted towards the education and marriage expenses of children who have attained majority. Section 25 of the Act enables the Court to award permanent alimony only to the spouse, and not to the child/children. However, under Section 26 of the Act, the Court may pass an order for the maintenance and education of minor children by way of a decree, or by way of an interim order in case the proceedings, for obtaining such a decree, are still pending. The power conferred on the Court, under Section 26 of the Act, can be exercised only to grant maintenance, and to provide for the educational expenses of a minor child. In the present case Kumari K. Navya, the daughter of the petitioner and the respondent, is undergoing her first year degree in Engineering, and does not appear to have completed 18 years of age as on date. Though the petition is filed under Section 25 of the Act, this Court has the power, under Section 26 of the Act, to direct the respondent to pay for her maintenance and education expenses till she attains majority. We consider it appropriate, therefore, to direct the respondent to meet the entire education expenses of Kumari K. Navya, and pay her Rs.7,500/- per month towards her maintenance till she attains majority. We make it clear that this order does not preclude Kumari K. Navya, the daughter of the petitioner and the respondent, from claiming maintenance, education and marriage expenses under the Hindu Adoption and Maintenance Act, 1956 (hereinafter called the 1956 Act) by instituting appropriate legal proceedings.

With regards her claim of permanent alimony of Rs.25,00,000/-, it is the petitioners case that she has no means to survive, let alone lead a life on par with the respondent who is working as a Commercial Tax Officer; the amount of Rs.3,500/- per month, being paid by him towards her maintenance, is insufficient even to meet the rent for her residence; she is penniless, and is unable to make both ends meet; and the respondent receives a huge salary as a C.T.O, besides possessing both movable and immovable properties. Her apprehension is that, in case the respondent retires from service, it would well nigh be impossible for her to realize the amount, if any, awarded towards permanent alimony and for the maintenance of their daughter. The petitioner requests

this Court to create a charge over the G.P.F. and other retiral benefits of the respondent, which Sri B. Sree Rama Krishna, Learned Counsel for the respondent, would contend is impermissible as there is no provision in the Act for a charge to be created over the respondents retiral benefits.

Section 25 of the Act provides that any Court, exercising jurisdiction under the Act, may, at the time of passing any decree or at any time subsequent thereto, on an application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant, for her or his maintenance and support, such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent. Section 25 of the Act enables the Court to direct the respondent to pay the applicant a gross sum for her maintenance and support. The term maintenance is defined, in Blacks Law Dictionary (6th Edn., pp. 953-54), as the furnishing by one person to another, for his or her support, of the means of living, or food, clothing, shelter, etc. particularly where the legal relation of the parties is such that one is bound to support the other, as between father and child, or husband and wife. Likewise the word support, as defined in the said dictionary (p. 1439), is that which furnishes a livelihood; a source or means of living; subsistence, sustenance, maintenance, or living. In a broad sense the term includes all such means of living as would enable one to live in the degree of comfort suitable and becoming to his/her station of life. It is said to include anything requisite to housing, feeding, clothing, health, proper recreation, vacation, travelling expense, or other proper cognate purposes; also, proper care, nursing, and medical attendance in sickness, and suitable burial at death. (Rajesh Burman).

Section 25 of the Act confers a right on the spouse to claim maintenance or permanent alimony. The Section is incorporated to secure the interests of the alienated spouse, provide for her maintenance and to ensure that she continues to lead a life which, in the view of the Court, is just and proper.

Permanent alimony is to be granted taking into consideration the social status, the conduct of the parties, the way of living of the spouse, and such other ancillary aspects. (Viswanath Agrawal v. Sarla Vishwanath Agrawal ). While granting permanent alimony, the Court is required to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband. It shall depend upon the status of the parties, their respective social needs, the financial capacity of the husband and other obligations. (U. Sree v. U. Srinivas ; Vinny Parmvir Parmar).

Before deciding whether the petitioner is entitled for grant of permanent alimony and, if so, the amount payable to her in this regard, it is necessary for us to examine the contentions, urged on behalf of the respondent, that the petitioner is disentitled for grant of permanent alimony because of her abominable conduct such as her addressing letters threatening to commit suicide; giving false complaints against the respondent and his family members for the offence punishable under Section 498-A I.P.C; making them run around Courts and police stations; lodging a complaint with the Anti-Corruption Bureau for action being taken against him for his corrupt practices; addressing letters to the Andhra Pradesh Public Service Commission questioning his selection as an Assistant Commercial Tax Officer; and making unethical allegations of his having married a woman naxalite with whom he was alleged to have developed an illicit relationship while working as a Village Revenue Officer.

The conduct of the parties to the petition is one of the factors to be taken into consideration by the Court in determining whether or not permanent alimony should be granted. In N. Varalalakshmi Vs. N.V. Hanumantha Rao , a Division Bench of this Court held that, even after a decree of divorce, permanent alimony can be granted to the spouse who has applied for it unless the conduct of the spouse is abominable; and that mere desertion of the spouse would not amount to abominable conduct. It is only if the conduct of the petitioner is abominable, would this Court be required to consider whether, and to what extent, such conduct would have an effect on the grant of permanent alimony. The word abominable means odious, offensive. The conduct of both the parties

before, during the pendency of proceedings, and after filing the present petition is relevant. The material on record does show that the petitioner has made serious allegations against her husband. She filed a criminal case against him for the offence punishable under Section 498-A I.P.C. She also threatened to commit suicide. While her conduct is not beyond reproach, is it such as to disentitle her from being granted permanent alimony?

Sri B. Sree Rama Krishna, Learned counsel for the respondent, has, in his written submissions, referred to the variance in depositions in O.P.No. 64 of 2004 and M.C.No. 8 of 2003. According to him, the petitioner specifically pleaded in O.P.No. 64 of 2004 that she was not educated, and had no source of income, but she deposed in the maintenance case that she studied till intermediate; the complaint dated 12-11-2002 made to Commissioner, Commercial Taxes, was in her handwriting in English, and she used to sign in English only. Her acquaintance with English, and her inconsistent statements of her knowledge of English, is wholly irrelevant to the question whether her conduct is so abominable as to disentitle her being granted permanent alimony.

Sri B. Sree Rama Krishna, Learned counsel for the respondent, has also drawn our attention to the examination in chief recorded in C.C.No. 217 of 2004 dated 03-08-2005; the finding of the appellate Court in Criminal Appeal No. 129 of 2009; and to the petitioners allegations regarding his second marriage with a woman naxalite etc., to submit that the petitioner had failed to establish the second marriage and other allegations made in the criminal complaint. Failure to prove the second marriage in criminal proceedings, where the standard of proof is far higher in degree, cannot form the basis for denial of alimony in matrimonial proceedings.

Sri B. Sree Rama Krishna, Learned Counsel for the respondent, has also relied upon several complaints filed by the petitioner before the respondents superiors making false allegations against him. These documents were not marked either before this court, or before the trial court, as additional evidence. As such this Court would not be justified in examining the allegations in these documents to decide whether or not the conduct of the petitioner is so abominable as to justify denial of permanent alimony. If these letters and complaints etc., are eschewed, the other sketchy material on record cannot form the basis for denying the petitioner her claim for maintenance.

However, in O.P.No. 64 of 2004, the respondent produced certain letters to show that the petitioner had threatened to commit suicide. Such letters could well have been written in a fit of rage, or as an emotional outburst consequent upon the unexpected break down of marital ties. Factors which are relevant for grant of divorce on the ground of cruelty, may not justify denial of permanent alimony to the divorced wife. While the threat to commit suicide may well be a ground for grant of divorce, it cannot be held to be an abominable conduct disentitling the petitioner from claiming permanent alimony. It is difficult for us, therefore, to hold that the conduct of the petitioner is so abominable as to disentitle her from claiming permanent alimony.

In U. Sree, the Supreme Court, despite several allegations being made against the wife regarding her abominable conduct like picking up quarrels and subjecting the respondent to cruelty etc, awarded permanent alimony of Rs.50,00,000/-, and directed the respondent-husband to deposit the said amount before the Family Court within a period of 4 months. In Vishwanath, the Supreme Court, placing reliance on several of its earlier judgments, awarded permanent alimony of Rs.50,00,000/- to the wife despite granting a decree of divorce, on the ground of cruelty, in a petition filed by the husband attributing several acts of cruelty to her. Similarly, in K. Srinivasa Rao v. D.A. Deepa , the wife filed a complaint against the husband under Section 498-A of I.P.C., which ended in his acquittal. She had also complained to the department that action be taken against him.

Such acts were accepted by the Supreme Court as acts of cruelty. Yet the Supreme Court awarded permanent alimony of Rs.15,00,000/- to the wife holding :-

"..While we are of the opinion that decree of divorce must be granted, we are alive to the plight of the Respondent-wife. The appellant- husband is working as an Assistant Registrar in the Andhra Pradesh High Court. He is getting a good salary. The Respondent-wife fought the litigation for more than 10 years. She appears to be entirely dependent on her parents and on her brother, therefore, her future must be secured by directing the Appellant-husband should be directed to pay a sum of Rs.15,00,000/- (Rupees Fifteen Lakhs only) to the Respondent-wife as and by way of permanent alimony. In the result, the impugned judgment is quashed and set aside. The

marriage between the Appellant-husband-K.Srinivas Rao and the Respondent-wife-D.A.Deepa is dissolved by a decree of divorce. The Appellant-husband shall pay to the Respondent-wife permanent alimony in the sum of Rs.15,00,000/-, in three instalments. The first installment of Rs.5,00,000/- (Rupees Five Lakhs only) should be paid on 15/03/2013 and the remaining amount of Rs.10,00,000/- (Rupees Ten Lakhs only) should be paid in installments of Rs.5,00,000/- each after a gap of two months i.e. on 15/05/2013 and 15/07/2013 respectively. Each installment of Rs.5,00,000/- be paid by a demand draft drawn in favour of the Respondent- wife-D.A.Deepa"

The law declared in the aforesaid judgments of the Supreme Court is that, while filing of false criminal cases by the wife may be a ground to grant the husband divorce, it is not a ground to deny her permanent alimony. The facts in K. Srinivasa Rao are almost identical to the facts of the present case, and the principles laid down therein would squarely apply to the facts of the present case for grant of permanent alimony. In Durga Prasanna Tripathy v. Arundhati Tripathy , the Supreme Court, despite holding that the respondent-wife had subjected the petitioner-husband to cruelty, she had deserted him without reasonable cause, the appellant husband was facing criminal prosecution and was out of job, the respondent wife was employed, and the Family Court had directed the appellant husband to pay the respondent-wife Rs.50,000/- as permanent alimony, granted her additional maintenance of Rs.1,00,000/- as permanent alimony taking into account her plight, and considering several other circumstances.

From the material on record, it is evident that the marriage between the respondent and the petitioner has irretrievably broken down, and there is no possibility of their living together. The respondent is, admittedly, working as a Commercial Tax Officer, while the petitioner is only a housewife whose only source of livelihood is the maintenance granted to her, in the maintenance case, of Rs.3,500/- per month. Though he claims that the petitioner is doing tailoring work, the respondent has himself admitted, in his counter, that he is not able to produce any evidence to prove that she derives any income from tailoring. There is no evidence on record to establish that the petitioner is having any independent source of income for her survival, much less to lead a life of comfort on par with the respondent who is working as a C.T.O.

The respondent produced his salary certificate for the month of December, 2013, dated 28-01-2014, according to which he receives a gross salary of Rs.47,076/- per month. The respondent has, however, not filed any of his recent salary certificates to show his present gross and net salary. The respondent claims to have contributed, and to continue to contribute, a huge amount towards G.P.F. and A.P.G.L.I; to have obtained a loan from G.P.F. and A.P.G.L.I. to meet his legal and other incidental expenses incurred by him in his long legal battle with the petitioner for the past 17 years. He claims that his having to repay the loans has resulted in his getting a meagre monthly salary which is insufficient to meet his necessities, and he does not possess any property - either movable or immovable. He places reliance on the property statement submitted by him to the Government for the years 2011-2012 and 2012-2013. Sri J. Prabhakar, Learned Counsel for the petitioner, would submit that the respondents obligation to repay the GPF loan would come to an end by December, 2015 and, thereafter, there would be no deductions from his salary towards repayment of the GPF loan. If that be so, the respondent would be getting a far higher sum as his net salary.

No details have been furnished by the respondent of the reasons mentioned in the application submitted by him seeking GPF and APGLI loans, or regarding the manner of its utilization. His self serving assertion that he had to take the loans to meet his legal expenses is not supported by any documentary evidence of the amounts paid by him as legal fees, and to whom and when. In the absence of any evidence being produced in this regard, we see no reason to accept his submission of being deep in debt only because of his legal battle with the petitioner. That this self-serving statement of penury has been made, only to deny the petitioners claim for permanent alimony, cannot be ruled out. If the submission of Sri B. Sree Rama Krishna, Learned Counsel for the respondent, in his written submissions, that the respondent has become bankrupt because of heavy indebtedness on account of the litigation, is accepted, it would amount to misconduct under Rule 8 of the Andhra Pradesh Civil Services (Conduct) Rules, 1964. Without understanding the implication of such an admission, this contention has been urged, evidently, to avoid payment of permanent alimony to the petitioner. Even otherwise, that is not a ground to deny payment of permanent alimony to a needy spouse.

It is not even the case of the respondent that the petitioner possesses either movable or immovable properties and, in any event, the respondent has not produced any documentary evidence in this regard. Likewise, the petitioner has also not produced any evidence to establish that the respondent owns and possesses a plot and a residential house at Desaipet village and Vanastalipuram respectively. The annual property statement, submitted by him to the Government, does support the respondents claim not to possess any immovable property of his own. The salary certificate produced by the respondent, for the month of December, 2013, represents his pre-revised scales of pay as a Commercial Tax Officer in the State of Telangana. The respondent has, conveniently, avoided producing the salary certificates for the recent months, as the pay scales of all employees in the State of Telangana have been recently revised in terms of the pay commission recommendations.

We see no justification, therefore, in taking into consideration his monthly income as Rs.47,076/- on the basis on the salary certificate produced by him for the month of December, 2013. In so far as his contributions to G.P.F. and A.P.G.L.I. are concerned, they represent his savings. Except for the statutory payment towards income tax, this Court would not be justified in taking into account only his net salary, after deduction towards his savings, in fixing the quantum of permanent alimony.

This Court, while granting the respondent divorce, cannot ignore the plight of a single mother, and the travails she must have undergone in bringing up her daughter with little financial support from the respondent for the past seventeen years. While determining the question of permanent alimony payable to the petitioner, this Court must also take into account the maintenance awarded to her under Section 125 Cr.P.C. The present income of a senior C.T.O. in Telangana State, after revision of pay scales, would undoubtedly be more than Rs.60,000/- per month. On the other hand, the petitioner-wife has no independent source of income even for her bare survival, much less to lead the same standard of life which the respondent is leading. While the monthly income of the respondent would be around Rs.60,000/-, the petitioners only source of sustenance is the meagre monthly maintenance being paid to her by the respondent of Rs.3,500/- per month. Section 25 of the Act, which has been enacted only to ensure financial security of the spouse, is in addition to the provisions of Section 125 Cr.P.C. and maintenance under the 1956 Act, and is intended to provide speedy redressal of the petitioners claims of alimony or maintenance.

In fixing the quantum of permanent alimony, no straightjacket formula is prescribed under Section 25 of the Act, nor can any rule of mathematical exactitude be adopted (U. Sree). The Court should take into consideration factors such as possession of property by either of the spouses, their independent source of income, their social status etc. In the instant case, the respondent is, admittedly, a Commercial Tax Officer working in the State of Telangana whereas the petitioner does not have any independent source of income even for her bare sustenance, and is living in penury.

Her financial needs for her future, and during her remaining lifetime, must be secured. Taking into consideration all relevant factors, including the monthly salary of the respondent, the petitioner not having any independent source of income, and as the petitioner should be secured financially for her to lead the same standard of life as that of the respondent, we consider it appropriate to fix the permanent alimony, payable to the petitioner by the respondent, as Rs.15,00,000/-. The respondent shall pay the said amount in three equal half yearly instalments of Rs.5.00 lakhs each, the first of which shall be paid by 31st December, 2015, the second instalment of Rs.5.00 lakhs latest by 30.06.2016, and the third and final instalment of Rs.5.00 lakhs latest by 31.12.2016. The only other aspects which remains to be considered is the manner in which this Court should secure payment of permanent alimony of Rs.15,00,000/-, by the respondent to the petitioner. As noted hereinabove, Sri J.Prabhakar, Learned Counsel for the petitioner, submitted that the respondent would retire shortly and, in case permanent alimony is granted and he does not pay the said amount while he is in service, it would not be possible for the petitioner to realize the amount unless a charge is created over his retiral benefits.

In Rajesh Burman, the learned counsel for the appellant strenuously contended before the Supreme Court that both the courts had committed an error of law in granting medical reimbursement to the wife; the appellant husband was not responsible for the injuries sustained by the wife; it was a case of an accident - pure and

simple - and the wife was to be blamed for it; no order could, therefore, have been passed by Courts directing the appellant husband to pay any amount to the wife; the parties were governed by the Special Marriages Act, 1954 (for short 1954 Act) which does not provide for payment of any such expenses; an application under Section 151 of the Code filed by the wife was, therefore, not maintainable; and the Court had no jurisdiction to entertain such an application or to make any order. Repelling these contentions, the Supreme Court held:-

..Having heard learned counsel for the parties, in our opinion, no interference is called for against the order passed by the trial court and modified by the High Court. So far as maintainability of application filed by the wife is concerned, we see no substance in the contention of the learned counsel for the husband that such an application is not tenable. Proceedings had been initiated in accordance with the provisions of the 1954 Act and matrimonial suit was pending. In the circumstances, in our view, it was open to the applicant wife who had initiated the proceedings for dissolution of marriage in a competent court to institute such application. Even otherwise, looking to the scheme of the Act, it is clear that provisions of the Code would apply to courts exercising power under the Act. The preliminary objection raised by the learned counsel for the appellant as to the jurisdiction of the trial court has no substance and must be rejected.

It was also contended that the Act is a self-contained Code and hence while interpreting the provisions of the 1954 Act, interpretation of various provisions of the Hindu Marriage Act, 1955 or the Hindu Adoptions and Maintenance Act, 1956 cannot be blindly accepted nor can a case be decided on the basis of those decisions. We are unable to uphold the contention (emphasis supplied).

Placing reliance on Rajesh Burman, Sri J. Prabhakar, Learned Counsel for the petitioner, would submit that the provisions of the Civil Procedure Code can be applied by Courts while exercising power under the Hindu Marriage Act; in interpreting the provisions of the Hindu Marriage Act, the provisions of other enactments can be relied upon; Section 40 of the Parsi Marriage and Divorce Act, 1936 confers power on the Court to secure payment of permanent alimony, if necessary, by a charge on the movable and immovable property of the defendant; as the Supreme Court in Rajesh Burman rejected the contention that the interpretation placed on the provisions of the Hindu Marriage Act or the Hindu Adoptions and Maintenance Act cannot be applied in interpreting the provisions of the Special Marriages Act, 1954, this Court should rely on Section 40 of the Parsi Marriage and Divorce Act, 1936 in interpreting Section 25 of the Hindu Marriage Act, 1955, and create a charge on the retiral benefits of the respondent, even though it is movable and not immovable property. Relying on Venkatachalam v. Venkatrami ; and S.B. Shah Ali2, Sri J. Prabhakar, Learned Counsel for the petitioner, would submit that creation of a charge on future crop to be produced, which is a moveable property, is recognised as permissible under Indian Law. Divorce is the termination of matrimonial relationship, and brings to an end the status of a wife as such. On the status of a wife being terminated, by a decree for divorce under the Hindu Marriage Act, the rights of the divorced wife seem to be cribbed, confined and cabined by the provisions of the Hindu Marriage Act and to the rights available under Sections 25 and 27 of the Act. (Kirtikant D. Vadodaria v. State of Gujarat ). Section 25 of the Act confers power on the Court to secure payment of permanent alimony, if necessary, by a charge of the immovable property of the respondent. The said provision confers a discretion on the Court, and enables exercise of the power to create a charge on immovable properties if the Court considers it necessary to do so. In the present case, the respondent did not provide any financial support either to the petitioner or to their daughter till he was called upon, by the Court below in the maintenance case, to do so. It is only because of the order of the Court below has he been paying Rs.3,500/- per month as maintenance to the petitioner. Prior to the academic year 2012-13, the respondent did not provide any financial assistance even towards the education expenses of their daughter. His complete indifference to the educational needs of their daughter is evident from the fact that it is only pursuant to the order of the Court did he pay Rs.24,000/- and Rs.64,000/-, for the educational expenses of their daughter, for the academic years 2012-13 and 2013-14 respectively. The acrimony between the petitioner and the respondent, their long and arduous legal battle, and the fact that the respondent is due to retire from service shortly, are all factors which this Court must bear in mind in securing payment by the respondent of the permanent alimony granted by this Court to the petitioner. Suffice it to hold that the possibility of the respondent avoiding payment,

except on compulsion, cannot be ruled out. We are satisfied, therefore, of the need to secure payment by him of the permanent alimony granted by this Court to the petitioner.

While Section 25 of the Act provides for creation of a charge on immovable property for securing payment of permanent alimony, the respondent denies having any immovable property and, despitealleging that he has a house and a plot at Vanasthalipuram and Desaipet, the petitioner has been unable to produce any evidence in this regard. In the absence of any evidence in support of the petitioners plea, this Court must proceed on the premise that the respondent does not have any immovable property. Should this Court then fold its hands, and express its inability to come to the aid of a single mother who has been struggling for the past seventeen years not only to make both ends meet, but also to provide for the education of their daughter for the past several years? The answer can only be in the negative. It cannot be lost sight of that the law does not remain static, and does not operate in a vacuum. As social norms and values change, laws too have to be reinterpreted, and recast. Law is really a dynamic instrument fashioned by society for the purposes of achieving harmonious adjustment, human relations by elimination of social tensions and conflicts. Law does not stand still; it moves continuously. Once this is recognised, then the task of a judge is put on a higher plane. He must consciously seek to mould the law so as to serve the needs of the time. Unusual fact situation, posing issues for resolution, is an opportunity for innovation. Law, as administered by Courts, then transforms into justice. (B.P. Achala Anand). Article 15(3) of the Constitution requires the Court to endeavour to give full effect to the legislative and constitutional vision of socio-economic equality to women. (Thota Sesharathamma3). Bearing these principles in mind, the Court must interpret statutory provisions so as provide succour to a hapless mother who has single handedly, and without support from the father of her child, brought her up and has successfully secured her admission in a B.Tech. course.

It is no doubt true that gratuity, provident fund and other retiral benefits, are not immovable property. Section 100 of the Transfer of Property Act, 1882 (for short, 'the 1882 Act) enables a charge to be created on the immovable property of one person by the act of parties, or by operation of law to secure the payment of money to another. Section 25 of the Act, which enables a charge to be created on immovable property, does not explicitly provide for a charge being created on movable property. Ordinarily conferment of power, by a specific statutory provision, is a pre-requisite for its exercise. However, exceptional circumstances may justify exercise of power in the absence of any statutory prohibition. In Durga Das v. Tara Rani , after noting that the learned single judge had secured the payment of permanent alimony, by a charge on the moveable and immovable properties of the appellant, a Division Bench of the Punjab and Haryana High Court held that such a charge is inadmissible in so far as the provident fund amount of the appellant is concerned, in view of Section 3 of the Provident Fund Act, 1925. The order of the learned single Judge was modified by the Division Bench holding that the charge created, on the movable and immovable property of the appellant, for securing the permanent alimony allowed to the respondent, would not include his provident fund amount. This modification by the Division Bench of the Punjab and Haryana High Court, of the order of the Learned Single Judge, was necessitated because of the statutory prohibition under Section 3 of the Provident Fund Act, 1925. In the absence of any prohibition in Section 25 of the Act, and as held by the Punjab and Haryana High Court in Durga Das14, we direct that the permanent alimony, payable by the respondent to the petitioner in terms of the order now passed by this Court, shall be secured by way of a charge over the retiral/terminal benefits of the respondent. The charge shall, however, be limited only to such of those retiral benefits for which there is no statutory prohibition for creation of a charge or attachment.

Both C.M.A. No.1056 of 2006, and C.M.A.M.P.No.200 of 2014 in C.M.A.No.1056 of 2006, are disposed of accordingly. The miscellaneous petitions pending, if any, shall also stand disposed of.

No costs.

**RAMESH RANGANATHAN, J.**

**M. SATYANARAYANA MURTHY, J.**

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# VIKAAS AHLUWALIA VERSUS SIMRAN AHLUWALIA

**Delhi High Court**

**Bench : Hon'ble Mr. Justice S. Ravindra Bhat and Hon'ble Mr. Justice Najmi Waziri**

*Vikaas Ahluwalia ..... Appellant*
*Sh. Y.P Narula, Sr. Advocate with Sh. Aniruddha Choudharyand Sh. Abhey Narula, Advocates.*
*Versus*
*Simran Ahluwalia ..... Respondent*

**FAO 143/2013 and C.M No. 4725/2013**

Sh. Kirti Uppal, Sr. Advocate with Sh. Manish Saryal, Ms. Sushma Unni and Sh. Anshumaan Sahni, Advocates.

**Decided on December 20, 2013**

- **Ss. 24 and 26 of the Hindu Marriage Act, 1955.**
- **Interim maintenance**
- **How much Interim maintenance could be**
- **Held : there can be no limit . Wife claimed maintenance of Rs. 4,60,000 per month .**
- **Court should consider status of parties — Amount of maintenance should be such that wife is able to live in "reasonable comfort". There cannot be two opinions in respect of life style .**
- **Husband is a big businessman . He was Ranked 167 in Super Rich list during 2010 . Wife maintained three helpers, supervisor, cook, two maids . Appeal filed by husband dismissed. interim maintenance of Rs. 1,25,000 per month awarded by Family Court confirmed**

**Family Laws — Hindu Marriage Act, 1955 — Ss. 24and 26 — Matrimonial Dispute — Interimmaintenance — Maximum limit — How much it could be — No limit — Held, interim maintenanceof Rs. 1,25,000 per month awarded by Family Court confirmed — Wife claimed maintenance of Rs. 4,60,000 per month — Husband suppressed his earnings — Relied upon a decision rendered by SC in Jasbir Kaur Sehgal, (1997) 7 SCC 7 — Court to consider status of parties — Amount ofmaintenance should be such that wife is able to live in "reasonable comfort" — Parties had love marriage — There cannot be two opinions in respect of life style — Husband is a big businessman — Ranked 167 in Super Rich list during 2010 — Wife maintained three helpers, supervisor, cook, two maids — Court opined that maintenance suit was attractive — Court directed the husband to provide her chauffeur-driven car — Settled proposition of law — Highest amount determined to be paid asmaintenance — Appeal filed by husband dismissed**

**Hon'ble Mr. Justice S. Ravindra Bhat**

1. The present appeal, arising out of matrimonial proceedings, has been filed by the respondent/husband, who impugns an order dated 08.02.2013 of the Family Court, Saket, New Delhi in an application under Sections 24 and 26 of the Hindu Marriage Act, 1955 (hereafter "HMA") in pending matrimonial proceedings, i.e HMA 134/2011. The Family Court directed the husband to pay Rs. 1,25,000/- per month as interim maintenance to the wife and a further sum of Rs. 1,00,000/- as litigation expenses. The husband/appellant today claims that the direction given is beyond his means, since his salary is Rs.

13,88,862/- before tax deduction. After deduction, he claims that his net income is approximately Rs. 10.90 lakhs.

2. The parties to the litigation married on 26.11.2001 in accordance with Hindu rites and customs. Given that the marriage was against the husband's parents' wishes, the couple was living separately in a rented accommodation at Jal Vayu Vihar, Gurgaon, after marriage. It is alleged that in April-May, 2001, the husband met his parents at the wife's instance as she was pregnant and needed to be cared for. The husband's parents allowed the parties to reside with them at B-10, Saket, New Delhi after various ceremonies, celebrations and pujas. On 04.09.2002, the baby was born to the parties and her arrival was celebrated by the family. However, it is claimed that after living together in the husband's parents' house for some time, the couple developed differences, andconsequently, in March, 2008, they separated and the wife moved to her parental home in Gujrat Vihar, along with the minor daughter. The husband's father had purchased a residential high-end apartment at ATS Green, Noida in his name for the wife's residence andhe gave her money to furnish it. The wife, however, refused to shift into the apartment allegedly claiming that it had not been purchased in her name. Thereafter, she filed a petition for restitution of conjugal rights under Section 9 of the HMA on 01.09.2008 against the Appellant, being HMA 247/08 in the Karkardooma Court. That petition and the interim maintenanceapplication were withdrawn on 04.07.2009, when the appellant/husband agreed to live with the respondent/daughter keeping in view the welfare of their daughter.

3. Subsequently, the appellant claimed the custody of his daughter under Section 25 of the Guardians andWards Act (G.P No. 8/2008) which is pending in the Court of the Guardian Judge, Karkardooma Court, Delhi. The wife filed a criminal complaint on 14.07.2009, against the husband, his parents and married sisters, which according to the husband, was false andfrivolous. The wife, thereafter, on 25.08.2009, acting for herself and as a guardian of the minor daughter of the parties, filed a suit for maintenance and separate residence under the Hindu Adoptions andMaintenance Act,1956 before this Court (hereafter called "the maintenance suit"). An application seeking an interim monthly maintenance of Rs. 5,00,000/- was also filed in that suit. The Court by order dated 05.03.2013 awarded Rs. 75,000/- per month as the interim maintenance, (in the maintenance suit) which the appellant has started to comply with. The wife, acting as a next friend of the minor daughter of the parties, also filed a suit for partition against all the family members, being Suit No. 2202/2011 and same is pending till date.

4. The husband, claiming that the marriage of the parties had completely broken down, filed a divorce petition against the wife on 07.01.2011 on the grounds of cruelty and desertion. In that petition the wife filed her written statement and also filed an application for interim maintenance on 04.08.2011, which was decided by order dated 08.02.2013 This order is the subject matter of the present appeal.

5. The appellant argues that in the maintenance suit filed by the wife, he offered to pay Rs. 50,000/- per month towards maintenance of the respondent andthe minor daughter, which the wife refused stating that she would at least require Rs. 75,000/- per month. This Court made an order on 25.04.2011 when it permitted the husband to deposit Rs. 15,000/-. Since the wife was unwilling to accept the said amount, the Court directed it to be kept in a FDR for a period of one year. Further, it is submitted that in the partition suit, the wife impleaded all the companies of the husband's father as defendants. Therefore, his father filed an application (I.A No. 11007/2010) seeking deletion of the said companies as defendants in the said suit and this Court by order dated 07.02.2011 deleted all the said companies from the array of parties in the said suit. There is no dispute that that order has become final between both the parties.

6. With respect to the present proceedings, the husband submits that in the application filed under Sections 24and Section 26 of the HMA on 04.08.2011 before the Family Court, the respondents, inter alia, claimed an exorbitant amount of Rs. 4,60,000/- per month on various untenable heads. It was submitted that these included costs for security, personnel (Rs. 70,000/-), insurance, car maintenance, etc. It was submitted that analysis of the various amounts showed that the annual sum of Rs. 20,60,000/- was claimed under

several other additional heads. It is submitted that these betrayed rank unreasonableness and a tendency to exploit,and further, it is urged that the Court has to consider only expenses based on reasonable probabilities andestimate of having regard to the lifestyle, but not pander to the fancies of an applicant. Counsel emphasized that the assessment of maintenance has to be realistic, based on expenses that can be legitimately incurred. In other words, it cannot become an exercise in asset or wealth building of the applicant at the expense of the respondent.

7. The husband, in his reply to the said application on 23.11.2011 had also filed three affidavits with regard to his assets and income on 23.11.2011, 13.01.2012 and31.03.2012 The respondent had filed her affidavit of assets and income on 30.11.2011 That affidavit was not in terms of order passed by this Court in Puneet Kaur v. Inderjit Singh Sawhney, CM(M) 79/2011.

8. Learned counsel for the husband submits that the Family Court, Saket heard the arguments of the parties on several dates and has passed the impugned judgment without appreciating the documents anddecisions placed on record by the husband. It is submitted that the Family Court fell into error in deciding the quantum of maintenance as the wife never gave any details of her reasonable needs as required under Section 24. Further, it was submitted that the husband's current income is approximately Rs. 10,00,000/- per annum, after deduction of tax, as is evidenced from his tax returns for the years 2006-2007, 2007-2008, 2008-2009, 2009-2010, 2010-2011, which were filed on 23.11.2011

9. Further, counsel highlighted that the wife did not accept the maintenance amounts when tendered, andthis fact clearly establishes that she is not in real need of any amount towards maintenance. To the contrary, it is argued that he is not in a position to afford to give her the kind of maintenance amount she claims. It was submitted that apart from bare averments, there is nothing to show that the wife was entitled to her claim of enjoying such a status that compares unfavourably with the lifestyle she enjoys presently.

10. Counsel argued that this Court, in the maintenancesuit, correctly assessed the reasonable needs of the wife, and directed payment of Rs. 75,000/- per month, in addition to casting obligations upon the husband to ensure that a chauffeur-driven car and a certain quantity of petrol was made available to the wife andchildren. It was also submitted that the reasonable expenses of the child's upkeep would be the responsibility of the husband, again a factor duly considered and provided for by the Court in themaintenance suit. In these circumstances, argues the learned senior counsel for the husband, this Court should at least modify the impugned order of the Family Court. Counsel emphasized that the Court in themaintenance suit made an order after the directions of the Family Court and the later order should prevailand bind the parties, rather than the faulty anderroneous determination of the Family Court in the impugned order.

11. Per contra, counsel for the wife submitted that the husband has suppressed his true income andearnings. It was argued in this context that the husband is the sole heir to a vast construction and real estate business, controlled by his family. He has thousands of shares of different companies. The husband's family, it is claimed, also has floated various companies in the capacity of an HUF. It is submitted that the husband maintains a car provided by the company for which he works. He had offered a sum of Rs. 50,000/- to the respondent which was declined by her. The affidavit filed by the wife disclosed that the husband is salaried director and earns Rs. 50,000/- per month and he has offered the same amount to his wife and his child. Hence the Family Court has correctly held that that the true income of the husband has not surfaced andefforts have been made to hide the truth.

12. In response, the husband submits that he is nominal shareholder in M/s. Ahluwalia Contracts (India) Ltd,and his affidavit dated 23.02.2012 shows that he owns a large number of shares in different companies, which shows that he is has a considerable amount of income. Also, the Court is cognizant of the fact that the husband has not the filed the Income Tax Return for year 2011-2012. It was submitted in this context that the Ahluwalia Group of Companies has considerable turnover, in excess of Rs. 1000 crores, and

that it has built several prestigious educational institutions, residential complexes, hospitals, industrial estates, five-star anddeluxe five-star hotels. The husband's father, it was argued, heads and controls the group. The resources, financial clout and wealth of the husband and his family is unimaginable, in the argument advanced by the learned counsel for the wife. The Family Court naturally took note of all these, and the well-known fact that when matrimonial differences surface, husbands tend to suppress their real income and even resort to asset transfers to avoid payment of legitimate dues to their wives.

13. In her application, the wife clearly specifies the kind of lifestyle and status which she enjoyed during her stay with the husband. She had a supervisor, cook, three helpers, two maids, one gardener, four drivers, one plumber and 24 hours security guards with Group-4 Security gunman at her command. The house was equipped with various electronic gadgets, and she also mentioned the lifestyle to which her daughter was used to such as small swimming pool and swings installed in the house. To sum up, their house contained all five-star facilities.

14. This Court has had the benefit of considering the Family Court records which were requisitioned for the hearing of the present appeal.

15. The Court, in considering an application for interimmaintenance has to take into consideration the financial status of the parties, the earnings and the earning capacity of both the spouses. While grantingmaintenance, the spouse claiming maintenanceshould as far as possible be kept in the same status which he or she enjoyed while being in the matrimonial life with the other spouse. Also the family status is another aspect to be considered.

16. In this case, the Family Court has while deciding the application under Section 24 has taken into consideration various factors pertaining to the matrimonial life of the parties, particularly their lifestyle, financial status, etc. This is in line with the decision in Vinny Parmvir Parmar v. Parmvir Parmar, (2011) 7 Scale 741, where the Supreme Court held that the quantum of maintenance inter alia depends on the status of the husband. There, the Court recalled the considerations as follows:

"12……. The Court has to consider the status of the parties, their respective needs, the capacity of the husband to pay, having regard to reasonable expenses for his own maintenance and others whom he is obliged to maintain under the law and statute. The courts also have to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and mode of life she was used to live when she lived with her husband. At the same time, the amount so fixed cannot be excessive or affect the living condition of the other party……..."

Equally, in Jasbir Kaur Sehgal v. District Judge, Dehradun, (1997) 7 SCC 7, the Supreme Court held that there can be no set formula laid down for fixing the amount of maintenance. Rather, it depends on the facts and circumstance of each case. Thus, the Court must consider the status of the parties, their respective needs and the capacity of the husband to pay having regard to his reasonable expenses for his ownmaintenance. Accordingly, the amount ofmaintenance should be such that the wife is able to live in "reasonable comfort" considering her status andlifestyle she had while living with her husband and she does not feel handicapped during the prosecution of her case. This Court also recollects the decision in Sh. Bharat Hedge v. Smt. Saroj Hegde, 140 (2007) DLT 16, which outlined the following relevant considerations to be taken into account, at the time of assessingmaintenance claims: Status of the parties, reasonable wants of the claimant, the independent income andproperty of the claimant, the number of persons, the non-applicant has to maintain, the amount should aid the applicant to live in a similar lifestyle as he/she enjoyed in matrimonial home, non-applicant's liabilities, if any, provisions for food, clothing, shelter, education, medical attendance and treatment etc. of the applicant, and the payment capacity of non-applicant. Equally, and as it often the case, some guesswork is not ruled while estimating the income of the non-applicants when all the sources or correct sources are not disclosed. Moreover, the Court recognizes that it must also consider the amount required by the non-applicant to defray the cost

of litigation, and the amount awarded under Section 125 of the Code of Criminal Procedure, 1973, if any, which is adjustable against the amount awarded under Section 24, HMA.

17. The husband alleges that the wife's application formaintenance was not supported by any affidavit as per the requirements of Rule 16 of the Delhi High Court Rules, framed under the HMA. That rule states that every application for maintenance pendente lite,permanent alimony and maintenance or for custody, maintenance and education expenses of minor children shall be supported by an affidavit andshall state the average monthly income of the petitionerand the respondent, the sources of their income, particulars of other movable and immovable property owned by them jointly or severally, the details of their liabilities, if any, along with the number of their dependents, if any, and the name and ages such of such defendents. The wife's application and the affidavit, as well as the materials relied on during the course of the hearing in the Family Court, in the opinion of the Court, disclosed sufficient and substantial compliance with the underlying requirements of Rule 16.

18. Further, the Family Court went through, and closely considered, the documents that clearly substantiated that the husband was working as a director/promoter in several companies. Indeed, the husband does not deny ownership of substantial shareholding (to the extent of thousands of shares) in different group companies promoted by his father or other members of his family, nor the fact that he has a car provided by the company he works for. He has also submitted that he has offered a sum of Rs. 50,000/- to the wife which was declined by her, and the affidavit filed by him discloses that he is salaried director and earns Rs. 50,000/- per monthand he has offered the same amount to his wife andhis child. The Family Court, in our opinion, not unreasonably held that the true income of the appellant did not surface and efforts were made to hide the true income. The husband has submitted that he is a nominal share-holder in M/s Ahluwalia Contracts (India) Limited. He filed the affidavit dated 30.02.2012and also various certificates of different companies stating that he was only a nominee director of those companies without any remuneration. The affidavit dated 23.02.2012 shows that the husband owns a large number of shares in different companies and despite the fact that is not drawing any remuneration, this factum of ownership in itself demonstrates that he has a considerable amount of income.

19. The next submission is the effect of the offer of the wife, in CS (OS) 1990/2011 claiming maintenance at Rs. 75,000/- and whether the Trial Court erred in overlooking the order made on 20.12.2012 in that suit. The wife had sought for Rs. 5,00,000/- as interimmaintenance with effect from March, 2008 with escalation of 15% per annum and residence for the plaintiff or in lieu thereof a sum of Rs. 2,50,000/- per month towards rent. The learned Single Judge directed for monthly maintenance of Rs. 75,000/-. Therefore, this submission is not merited.

20. The next submission by the appellant is that the wife's conduct in refusing to accept amounts offered by him at various stages was overlooked. It is a relevant fact that should have received due consideration by the Court. In Smt. Indira Gagele v. Shailendra Kumar Gagele, AIR 1992 MP 72, it was held that though there was no specific provision in Section 24 of the HMA relating to the issuance of such direction in fixing the point of time from which date maintenance pendentelite be made operative i.e either from the date of application, from the date of order or from the date of institution of the suit, this issue is left to the discretion of the Court. Therefore, normally the point of time granting maintenance pendente lite would be from the date of application. But, if specific claim is made in the application, then the order may be made operative in consonance with the prayer made in the application i.e either from the institution of the suit in favour of the plaintiff or first appearance made by the parties. Therefore, Courts have the discretion of granting themaintenance from the date of filing the applicationand this contention of the husband has no merit. Indeed, there is no error of law in the view taken by the Trial Court in this regard, directing payment of themaintenance amounts from the date of the application.

21. As to the other ground that the wife was receiving Rs. 30,000/- every 15 days, and that this should have been considered (but was not considered) by the Trial Court, this Court notices that the argument is

fallacious, because this aspect was duly considered by the Family Court. The amount given to the wife is meager and she is entitled to the amount to aid her to live in a lifestyle similar to that enjoyed in her matrimonial home. Also, the husband has not shown his true income and hence the wife is entitled to a much higher maintenanceconsidering the status of his family. Likewise, the submission that the wife did not aver the kind of lifestyle she led to persuade the Court to grant themaintenance it ultimately did is unmerited. In fact the parties had a love marriage and were living separately after marriage before the husband's parents decided to bring the parties to their house purely for their loveand affection for their son and his family. Such being the undisputed fact, there cannot be two opinions that the lifestyle that the wife and the child were used to living was of a very affluent section of the society. This wife has mentioned in her application the kind of lifestyle and status which she enjoyed during her stay with the husband. The wife has also mentioned the kind of lifestyle she and her daughter were used to during her marriage. The husband's is a big business familyand was ranked 167 in Super Rich list in 2010, andfurther she mentioned that she had a supervisor, cook, 3 helpers, two maids, one gardener, four drivers, one plumber and 24 hours security guards with Group 4 Security gun-man at her command. The house was equipped with various electronic gadgets. She has also mentioned the lifestyle to which her daughter was used to such as small swimming pool and swings installed in the house. To sum up their house contained all five-star facilities.

22. The submission of the husband that this Court should accept the determination for interimmaintenance in the maintenance suit is no doubt attractive. By that order, the Court directed the husband to pay Rs. 75,000/- per month as maintenance. However, the Court had, at the same time, directed that the wife and child should be provided with a chauffeur-driven car, as well as provided a quantity of petrol and their health care needs be provided by the husband. Having regard to the overall conspectus of circumstances, this Court is of the opinion that the determination of Rs. 1,25,000/- as maintenance by the Trial Court in this case does not suffer any infirmity. It is also a settled proposition that the highest amount determined as maintenance should be paid by the spouse required to do so.

23. This Court affirms the Family court's direction to paymaintenance amount at Rs. 1,25,000/- per month andRs. 1,00,000/- as litigation expenses. The appeal is hereby dismissed. The costs of this appeal are hereby quantified at Rs. 55,000/-; they shall be borne by the appellant/husband. The Trial Court will ensure compliance with the present order. Appeal is consequently dismissed along with pending application but subject to the above directions.

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# NARINDER PAL KAUR CHAWLA VERSUS MANJEET SINGH CHAWLA

**Delhi High Court**

**Bench : Hon'ble Mr. Justice A.K. Sikri and Hon'ble Mr. Justice Aruna Suresh**

*Narinder Pal Kaur Chawla … Appellant;*
*Versus*
*Manjeet Singh Chawla … Respondent.*

**RFA No. 575 of 2005**

**Decided on September 20, 2007**

- **The husband is contesting the maintenanceproceeding both on the ground of competence of the present wife to claimmaintenance and the quantum.**
- **The question that arises for consideration, in these circumstances, is as to whether the respondent can take advantage of his own wrong by not disclosing to the appellant the factum of his first marriage; marrying the appellant and then maintaining the relationship of husband and wife for a long period of 14 years.**
- **We are of the opinion that the Legislature never intended that a woman like the appellant, in which position she is placed, be not treated as the 'wife' of the respondent at least for the purposes of Section 18 of the Act and be deprived of her right to seek maintenance.**
- **For all these reasons, we allow this appeal, set aside the impugned judgment and remand the case back to the learned trial Court to decide the claim of the appellant on merits. With the setting aside of the impugned judgment, the interim order ofmaintenance, as enhanced by the Supreme Court, shall stand revived. The appellant shall be paid arrears of interim maintenance for the intervening period. Such arrears shall be paid to the appellant within a period of two months from today and interim maintenance for future period shall be paid by 7th of each month.**

The Judgment of the Court was delivered by

**Hon'ble Mr. Justice A.K. Sikri:—** The appellant herein is duped by the respondent. The respondent, who was already married to one: Amarjeet Kaur suppressing this marriage andpretending that he was still a bachelor, married the appellant on 11.12.1977, according to Sikh rites andceremonies at Jalandhar. Both of them lived as husbandand wife for number of years at the matrimonial house, i.e A-447, Defence Colony, New Delhi. Two daughters were born out of this wedlock, on 18.2.1981and 31.5.83 respectively. According to the appellant, she decided to complete her B.A Degree, which she had left incomplete earlier before marriage. Therefore, she picked up her studies again. In April 1991, she went to Paghwara, Punjab, to take the exams. On 13.6.1991 when she returned, her mother-in-law did not allow her to go inside the house. She was, thus, deserted by the respondent. At that time she came to know that the respondent was already married to Smt. Amarjeet Kaur.

2. The appellant did not swallow this insult to her. She filed a criminal case against the respondent for committing bigamy (in this case the respondent has been convicted). She alls o filed a petition underSections 18 and 20 of the Hindu Adoption andMaintenance Act (in short the 'Act') claiming recovery of maintenance and right of residence from the respondent. She claimed decree of maintenance

at the rate of Rs. 12,000/- per month plus rent of residenceand also prayed for necessary charge on the matrimonial house A-447, Defence Colony for securing the right of maintenance.

The petition was filed as an indigent person under Order 33 Rule 1, CPC, which was allowed.

3. This petition was originally filed in this Court. On 28.8.1997, order was passed directing the respondent to pay interim maintenance of Rs. 5,000/- to the petitioner. Vide order dated 2.3.2000, the Court ordered for payment of a further sum of Rs. 10,000/- to the appellant by way of interim maintenance. Thereafter,vide order dated 28.4.2000 further maintenance of Rs. 5,000/- was allowed. Application for interimmaintenance was ultimately decided by the Court videorder dated 11.1.2002 granting interim maintenanceof Rs. 400/- per month. The quantum was challenged by the appellant by filing appeal before the Division Bench, which enhanced the maintenance to Rs. 700/- from 1.8.2003 vide orders dated 25.7.2002 On further appeal to the Supreme Court, this interimmaintenance was enhanced to Rs. 1,500/- per month with effect from May 2004 till the disposal of the suit,vide order dated 21.4.2004

4. On enhancement of the pecuniary jurisdiction of the District Courts, the petition was transferred to the District Court on 27.11.2003 The respondent did not file the written statement and ultimately vide order dated 11.10.2004 the right of the respondent to file the written statement was struck off. The appellant appeared in the witness-box and submitted her affidavit by way of evidence (Ex. PW 1/1). She also proved various other documents showing financial status of the respondent as well as the appellant's mother-in-law. The respondent did not lead any evidence.

5. The learned trial Court, however, has dismissed the petition of the petitioner vide impugned order dated 13.7.2005 This petition is not dismissed on merits but on the ground that such a petition filed by the appellant under Section 18 of the Act claiming maintenancefrom the respondent is not maintainable as the appellant is not a legally wedded "wife" of the respondent. This finding is arrived at by the learned trial Court on the premise that since the respondent was already married to one Amarjeet Kaur, his second marriage with the appellant was clearly void and of no legal effect. It is held that under Section 18 of the Act, petition can be filed by a legally wedded wife and not by a person who is not lawfully married and for this conclusion the learned trial Court has drawn the support from the judgment of the Supreme Court in the case of Savitaben Somabhai Bhatiya v. State of Gujarat,(2005) 3 SCC 636 : AIR 2005 SC 2141, and of this Court in the case of Ms. Suresh Khullar v. Vijay Khullar, II (2002) DMC 131. Challenging this judgment, present appeal is filed.

6. The appellant argued the appeal herself whereas Mr. Ranjit Singh, Advocate, appeared for the respondent. Learned Counsel for the respondent relied upon the reasoning given by the trial Court in dismissing the petition of the appellant herein. His submission was that since the appellant was not legally wedded wife, she could not file petition under Section 18 of the Act, as held by the Supreme Court in Savitaben Somabhai Bhatiya (supra).

7. The appellant, on the other hand, submitted that it is the respondent who suppressed the factum of first marriage and on his representation that he was a bachelor, the appellant and the appellant married the respondent on 11.12.1977 They lived as man and wife for 14 years before the appellant was denied entry into the house and was deserted by the respondent on 14.4.1991 In such circumstances, it was not open to the respondent to take advantage of his own wrong anddeny maintenance to the appellant, who was not a "concubine" of the respondent, who lived with him by marrying him.

8. We have given deep thoughts to the respective contentions of the parties and have also gone through the record. The admitted position, which has emerged on the record of this case, may be taken note of as that will have important bearing on the outcome of the case:

   (a) the respondent did not file any written statement to the petition for maintenance filed by the appellant and the right of the respondent to file the written statement was struck off. The appellant examined herself as PW-1 and proved various documents. The respondent has not led any

evidence. Therefore, the material, which has come on record as proved by the appellant, remains unchallenged, there being no evidence in rebuttal by the respondent.

(b) the parties had married on 11.12.1977 according to Sikh rites and ceremonies. They lived together till 14.4.1991, i.e for almost 14 years. During this period, two daughters were born out of the said wedlock.

(c) As per the testimony of the appellant, at the time of marriage the respondent had pretended that he was a bachelor. The appellant, therefore, had no knowledge that the respondent was already married. Not only that, for a long period of 14 years when the parties lived as husband andwife in the matrimonial house at Defence Colony, the first wife had not surfaced nor was there any interference in the matrimonial life of the parties.

(d) In the petition filed by the appellant tinderSections 18 and 20 of the Act, interim orders were initially passed directing the respondent to pay particular amount as maintenance. Thereafter, interim maintenance was fixed at Rs. 400/- per month by the Single Judge of this Court vide order dated 11.1.2002 The Division Bench enhanced that maintenance to Rs. 700/- from 1.8.2003 by orders dated 25.7.2002 This was further enhanced to Rs. 1500/- per month with effect from May, 2004 by the Hon'ble Supreme Court. Order dated 21.4.2004 passed by the Supreme Court fixing maintenance isNarinder Pal Kaur Chawla v. Manjeet Singh Chawla, (2004) 9 SCC 617 and reads as under:

"1. Leave granted.

2. Heard the petitioner in person and learned Counsel appearing for the respondent. We have also perused the counter affidavits andrejoinders along with the written submissions filed by the parties.

3. The present appeal arises out of an interim order dated 11.1.2002 passed by the learned Single Judge of the High Court of Delhi in the course of proceedings Instituted by the present appellant claiming to be the second wife of the respondent for grant ofmaintenance to her under Section 18 read with Section 20 of the Hindu Adoption andMaintenance Act [for short the Act], The learned Single Judge on the original side of the High Court in the pending proceeding under the Act has by order dated 11.1.2002 granted an interim maintenance of Rs. 400/- per month to the wife.

4. The wife appealed to the Division Bench of the High Court. By order dated 25.7.2003 which is the subject matter of this appeal, the interim maintenance has been increased to Rs. 700/- per month. Not satisfied with the increase. In the amount of interimmaintenance granted by the Division Bench, the wife has approached this Court seeking farther enhancement of rate of interimmaintenance.

5. By this appeal, Interim maintenance @ Rs. 12,000/- per month has been claimed on the ground that the respondent/husband has taken voluntary retirement from the Bank's services and has received substantial amount of retiral benefits. It is stated that he is possessed of valuable properties andassets which are sufficient to pay higher amount of maintenance to the wife to enable her to maintain a reasonable standard of living to which the parties are accustomed.

6. The husband is contesting the maintenanceproceeding both on the ground of competence of the present wife to claimmaintenance and the quantum.

7. Normally, this Court would not have entertained this appeal as it is directed against an order fixing only interimmaintenance pending adjudication of claim of maintenance by the wife under the Act: On the prima facie evidence with regard to the social and financial

status of the parties, this Court finds that interim maintenance of Rs. 700/- per month fixed by the Division Bench of the High Court is extremely low. Therefore, after notice issuing on the Special Leave Petition, this appeal is entertained.

8. Before the High Court. It appears that at one stage, reconciliation efforts were made in which the husband had agreed to provide second floor of the accommodation owned by him for separate residence of the wife with Rs. 1,500/- per month as permanentalimony to her during her life. Efforts of reconciliation, however, failed as at a later stage, the wife backed out. The copies of orders passed by the Division Bench of High Court on 13.2.2003 and 17.2.2003, in the course of reconciliation proceedings, have been produced by the parties in this appeal.

9. As the legal right of the second wife to claimmaintenance 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 andcontentions of the parties. For the purpose of fixing appropriate amount of interimmaintenance, we may assume that the financial position of husband is such that he can easily pay a sum of Rs. 1,500/- per month as interim maintenance without disturbing the right of separate residence provided to the wife at the second floor of the husband's premises.

10. The appeal, therefore, is partly allowed by increasing the amount of interimmaintenance to Rs. 1,500/- per month which shall be payable at the above rate from the month of May, 2004 until decision of the main case pending under the Act on the original side of the High Court. It is made clear that the High Court shall decide the main case on merits uninfluenced by orders passed for fixing interim maintenance.

11. In the circumstances, there shall be no order as to costs in this appeal."

9. The question that arises for consideration, in these circumstances, is as to whether the respondent can take advantage of his own wrong by not disclosing to the appellant the factum of his first marriage; marrying the appellant and then maintaining the relationship of husband and wife for a long period of 14 years. The position, which has emerged on record and noted above, further discloses that during all this period when the appellant and the respondent were cohabiting as husband and wife, first wife of the respondent was nowhere on the scene. The respondent was away from her during this period and, therefore, the appellant remained totally oblivious about the said relationship. Both the parties, thus, lived as validly married couple for all these years and to the world at large the appellant was known as the lawfully wedded wife of the respondent. She took the responsibility of running the family as a housewife, taking care of the respondent as her husband and also bore two female children from him whom she nourished and brought up. She took the responsibility of marrying them as well, though this happened after the respondent withdrew from the appellant's company..

10. In these circumstances, we are of the opinion that the Legislature never intended that a woman like the appellant, in which position she is placed, be not treated as the 'wife' of the respondent at least for the purposes of Section 18 of the Act and be deprived of her right to seek maintenance. We are conscious of the judgment of the Supreme Court in the case of Savitaben Somabhai Bhatiya (supra). However, that was a case where the second wife was claiming maintenanceunder Section 125, Cr.P.C While holding that the expression 'wife' contained therein refers only to legally wedded wife, the Court observed in para-8 of the judgment as under:

"8. There may be substance in the plea of learned Counsel for the appellant that law operates harshly against the woman who unwittingly gets into relationship with a married man and Section 125 of the Code does not give protection to such woman. This may be an inadequacy in law, which only the legislature can undo. But as the position in law stands presently there is no escape from the

conclusion that the expression 'wife' as per Section125 of the Code refers to only legally married wife."

11. It is, thus, clear that the expression 'wife' was construed only in the context of Section 125, Cr.P.C The Court did not discuss the interpretation of Section18 of the Act. Rather, following observations contained in this very judgment encourage us to embark on the interpretation of Section 18 of the Act on the basis of the language used in the said provision:

"10. There is no inconsistency between Section 125 of the Code and the provisions in the Hindu Adoption and Maintenance Act, 1956 (in short the 'Adoption Act')"

12. Other judgments where such a view is taken also relate to the interpretation of Section 125, Cr.P.C It would be apt to take note of the language of Section125, Cr.P.C at this stage itself, so that were are able to contrast the same with Section 18 of the Act. Section125, Cr.P.C reads as under:

"125. Order for maintenance of wives, childrenand 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 not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time-to-time direct:

Provided that the Magistrate may order the father of a minor female child referred to in Clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

Explanation—For the purposes of this Chapter—

(a) 'minor' means a person who, under the provisions of the Indian Majority Act, 1875 is deemed to have attained his majority;

(b) 'wife' includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried."

13. Relevant portion of Section 18 of the Act, which entitles a Hindu wife to claim maintenance and also residence is couched in the following language:

"18. Maintenance of wife

(1) Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime.

(2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim tomaintenance—

(a) .....

(b) ……..:……

(c) ……

(d) If he has any other wife living;

(e) If he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere."

14. Sub-section (2) of Section 18 of the Act entitles a Hindu wife to claim maintenance against her husband even if he has other wife living. This gives an impression that even a second wife may have right to claim maintenance. It is more so when, 'Hindu wife' has not been defined under the Act. In the absence of any such definition given in the Act, we have to interpret the expression in the spirit in which it appears in the statute. This is more so when as per the provision ofSection 4 of the Act, no external aid (from other statutes) is to be brought to define Hindu wife. Section4 clearly gives overriding effect to this Act.

15. This Act was brought into force in the year 1956. As on that date Hindu Marriage Act, 1955 was already in force, which contains provision like Section 5 regarding void marriages. If "second wife", though her marriage is void under the Hindu Marriage Act, was to be deniedmaintenance, then the Legislature would not have included provision like Clause (d) in Sub-section (2) ofSection 18 of the Act or would have clarified that this clause was added only to take care of those second marriages performed before the Hindu Marriage Act, 1995 was enacted when polygamy was permissible for male Hindus.

16. Clause (e) of Sub-section (2) of Section 18 of the Act, which uses the expression 'concubine' would also lend colour to the expression 'Hindu wife' inasmuch as the Legislature has carved out a distinction between 'second wife' and 'concubine'. 'Concubine' has been defined in various dictionaries as under:

"Oxford Dictionary of Difficult Words-2002 defines—

Concubine: A woman who lives with a man but has lower status than his wife or wives. Black's Law Dictionary, 7th Edn. Defines Concubine: A woman who cohabits with a man to whom she is not married."

17. Thus, Section 18 of the Act uses the expression 'Hindu wife', 'wife' and 'concubine' and 'Hindu wife'and 'wife' are definitely be on a high pedestal then 'concubine'. Very recently, this Bench has decided RFA No. 350/2007 entitled Suresh Kullar v. Sh. Vijay Kumar Khullar. In our judgment rendered on 27.8.2007 in the said case where also we were interpreting the same provision of the Act, we dilated this principle in the following' manner:

"18. It is trite that while interpreting the statute, Courts not only may take into consideration the purpose for which the same has been enacted, but also the mischief it seeks to suppress (See Sneh Enterprises v. Commissioner of Customs, 2006 (8) JT 587). We may also, with advantage apply the maxim construction ut res magis valeat quam pereat, namely, where alternative constructions are possible the Court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than the one which would put hindrances in its way. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation we should avoid a construction which would reduce the legislation to futility andshould rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result [See Nokes v. Doncaster Amalgamation Collieries Ltd., 1940 AC 1014 (Maxwell pg. 45)]. Where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, fiction or confusion into the working of the system [Shannon Realties Ltd. v. Ville de St. Michel, (1924) A.C 185 (Maxwell pg. 45)]. We hasten to add that this interpretation we are giving only in deciding the question of entitlement of the appellant to claim maintenance from the respondent underSection 18 of the Act."

18. We had also taken support from the provisions of Protection of Women from Domestic Violence Act. In a case like this, if the interpretation we are suggesting is not given, it would amount to giving premium to the respondent for defrauding the appellant. Therefore, we feel that in a case like this, the appellant, at least for claiming maintenance under Section 18 of the Act, be treated as legally wedded wife. Even when two interpretations are possible, one which would advance the purpose for which the Act was enacted should be preferred than the other, which may frustrate the purpose.

19. At this stage, it would be of interest to refer to a judgment of the Supreme Court in the case of Reema Aggarwal v. Anupam, (2004) 3 SCC 199 : AIR 2004 SC 1418. That was a case of dowry death where the respondent was prosecuted under Section 498A andSection 304B of the Indian Penal Code. The plea taken by the respondent in that case was that it was his second marriage with the deceased and being an invalid marriage, demand of dowry in respect of that marriage was not legally recognisable and, therefore, he could not be prosecuted under Section 498A andSection 304B, as he was not the 'husband' of the deceased whereas the said provisions make 'husband' liable for the offence. The Court, though held that demand of dowry in respect of an invalid marriage would not be legally recognisable, it was of the opinion that the purpose for which Sections 498A and 304B, IPC and Section 113B of the Evidence Act were introduced could not be ignored. It also noted that 'husband' was not specifically defined to include a person, who contacts marriage ostensibly and cohabit with such woman in purported exercise of his role andstatus as husband, would be treated as husband andcould be prosecuted under the said provisions. The Apex Court pressed into service "mischief" rule andpurposive interpretation to hold that for the purpose ofSections 498A and 304B, IPC, a person, who enters into second marriage, which may not be a legal marriage, would be treated as 'husband' and could be prosecuted. This eloquent message that nobody gets undue benefit of his such dubious actions is expressed by the highest Court of the land (speaking through Hon'ble Mr. Justice Arijit Pasayat) in the following forceful words:

> "18. The concept of 'dowry' is intermittently linked with a marriage and the provisions of the Dowry Act apply in relation to marriages. If the legality of the marriage itself is an issue further legislation problems do arise. If the validity of the marriage itself is under legal scrutiny,. the demand of dowry in respect of an invalid marriage would be legally not recognizable. Even then the purpose for whichSections 498A and 304B, IPC and Section 113B of the Indian Evidence Act, 1872 (for short the 'Evidence Act') were introduced cannot be lost sight of. Legislations enacted with some policy to curband alleviate some public evil rampant in societyand effectuate a definite public purpose or benefit positively requires to be interpreted with certain element of realism too and not merely pedantically or hypertechnically. The obvious objective was to prevent harassment to a woman who enters into a marital relationship with a person and later on, becomes a victim of the greed for money. Can a person who enters into a marital arrangement be allowed to take a shelter behind a smokescreen to contend that since there was no valid marriage the question of dowry does not arise? Such legalistic niceties would destroy the purpose of the provisions. Such hairsplitting legalistic approach would encourage harassment to a woman over demand of money.
>
> The nomenclature 'dowry' does not have any magic charm written over it. It is just a label given to demand of money in relation to marital relationship. The legislative intent is clear from the fact that it is not only the husband but also his relations who are covered by Section 498A. Legislature has taken care of children born from invalid marriages: Section 16 of the Marriage Act deals with legitimacy of children of void and voidable marriages. Can it be said that Legislature which was conscious of the social stigma attached to children of void and voidable marriages closed eyes to plight of a woman who unknowingly or unconscious of the legal consequences entered into the marital relationship. If such restricted meaning is given, it would not further the legislative intent. On the contrary, it would be against the concern shown by the Legislature for avoiding harassment to a woman over demand of money in relation to marriages. The first exception to Section494 has also some relevance. According to it, the offence of bigamy will not apply to

"any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction". It would be appropriate to construe the expression 'husband' to cover a person who enters into marital relationship and under the colour of such proclaimed or feigned status of husband subjects the woman concerned to cruelty or coerce her in any manner or for any of the purposes enumerated in the relevant provisions—Sections 304B/498A, whatever be the legitimacy of the marriage itself for the limited purpose of Sections 498A and 304B, IPC. Such an interpretation, known and recognized as purposive construction has to come into play in a case of this nature. The absence of a definition of 'husband' to specifically include such persons who contract marriages ostensibly and cohabitate with such woman, in the purported exercise of his roleand status as 'husband' is no ground to exclude them from the purview of Sections 304B or 498A, IPC, viewed in the context of the very object andaim of the legislations introducing those provisions."

20. When, to advance the purpose for whichSections 498A and 304B, IPC were introduced by the Legislature in the Indian Penal Code, the Court can read a male entering into second matrimonial alliance, as 'husband', why for the purpose of grantingmaintenance to a woman under Section 18 of the Act, second wife be not treated as 'Hindu wife' in the absence of definition 'Hindu wife' specifically excluding second wife, more so when interpretation of Section18 of the Act, which we have suggested above, is a possible interpretation.

21. There is yet another reason to allow this appeal. Even if it is presumed that the appellant could not be treated as 'Hindu wife' since she is not legally wedded wife of the respondent (though we have not accepted this contention in view of our discussion above), such a wife is entitled to lump sum amount in the form of damages or otherwise. In this context, we may take shelter under the following observations of the Supreme Court in the case Rameshchandra Rampratapji Daga v. Rameshwari Rameshchandra Daga, (2005) 2 SCC 33:

"20. It is well known and recognized legal position that customary Hindu Law like Mohammedan Law permitted bigamous marriages which were prevalent in all Hindu families and more so in royal Hindu families. It is only after the Hindu Law was codified by enactments including the present Act that bar against bigamous marriages was created bySection 5(i) of the Act. Keeping into consideration the present state of the statutory Hindu Law, a bigamous marriage may be declared illegal being in contravention of the provisions of the Act but it cannot be said to be immoral so as to deny even the right of alimony or maintenance to a spouse financially weak and economically dependent. It is with the purpose of not rendering a financially dependent spouse destitute that Section 25enables the Court to award maintenance at the time of passing any type of decree resulting in breach in marriage relationship."

22. Giving jurisprudential exposition to the 'right ofmaintenance' to a wife from her husband, the Bombay High Court in the case of Rajeshbai v. Shantabai, AIR 1982 Bom. 231, went to the extent of holding that right to claim maintenance was not limited by the statutory provisions like Hindu Adoption and Maintenance Act but could arise under the general principles of law regarding the maintenance and the Court would be in a position to grant the same. For this purpose, the Court drew distinction between English Law and Hindu Law on the premise that in English Law, marriage was a matter of contract, whereas under the Hindu system it is sacrosanct. From this detailed judgment, we extract some of the paras, which may be useful for our purposes:

"34. However, that in my view. Can not be the end result of such cases where the finding is recorded by the competent Court that the marriage is void de jure Firstly, the provisions of the Hindu Adoptionsand Maintenance Act. 1956 are not the provisions which can be treated to be exhaustive of matters for awarding maintenance. To the extent the provisions are made there, the same would apply or be operative, but there would arise cases where the matter may arise under the general

principles of law regarding the maintenance and the Court would be in a position to grant the same.

35. The measures for maintenance by themselves are secular and social in character. Those aim at avoiding immorality and destitution. Maintenancefor juridical purposes has its own pragmatics having relation to the need and necessity to make provisions for securing reasonable bio-economic as well as bio-cultural requirements for persons, such as shelter, food, garment and health. In the tenets of Hindu Shastric law, two principles subserve this need to provide reliefs of maintenance and those emanated firstly from social ethics and secondly because of personal economics. The persons related to each other and dependent, as such, could look for such relief by reason of law both on the moraland secular grounds, Subject to conditions, it was a personal obligation and where there was estate. The rights in maintenance could be worked against the estate, nay, was a charge upon. It the moral of pious obligations mostly arose as personal liabilities, while those against property could be classed as economic of secular ones.

36. The principles of Hindu Personal Law have developed in an evolutionary way out of concern for all those subject to it so as to make fair provision against the destitution. There is clear evidence to indicate that the law of maintenance stems out of the secular desire and so as to achieve the social objectives for making bare minimum provision to sustain the members of relatively smaller social groups. Organically and originally the law itself is irreligious. Its fountain spring is humanistic. In its operational field all through it lays down the permissible categories under its benefaction, which are so entitled either because of the tenets supported by clear public policy by because of the need to subserve the social and individual morality measured for maintenance.

37. Further, it must be kept in view that the institution of property amongst the Hindus is a fine admixture of rights and duties, obligations andliabilities. In fact, it is an intermixture of corpus that is the right or entitlement to it, a Hindu may possess the property and yet is would be limited by moraland civic obligation. One of such recognised obligations. One of such recognised obligations inscribed into the property of a Hindu was that ofmaintenance of dependents. There is no reason to hold that by codification of the laws, this basic concept for providing a sort of social security andhaving general insurance in favour of dependents has been completely taken away or abrogated by passing of the Hindu Adoptions and MaintenanceAct, 1956, Necessity to provide even now may arise out of the premises of that Act and will have to be so worked out.

38. On parity of the principle that prevailed with this Court in Govindrao v. Anandibai, AIR 1976 Bom 433, it can be said that even after the Court rendered a decree of nullity under Section 11 of the Hindu Marriage Act. The wife related by such marriage was treated to be entitled under Section 25 of that Act to possess a right by have alimony and maintenance. Thus it is obvious that had the matter arisen during the lifetime of Sadashiv between Sadashiv andRajeshbai and the matter would have been underSection 11, Rajeshbai would have been entitled to rely on Section 25 of the Hindu Marriage Act so as to claim the relief of maintenance. I do not think that only by reason of the fact that the proceedings are after the death of Sadashiv, there should be any change in the principle. If Section 25, as has been found by the above decision conferred a right that right could be worked out even in collateral proceedings if it be correct that the declaration of nullity for such a marriage could be rendered in such proceedings. Therefore, it will have to be found that Rajeshbai is entitled to rely on the principles ofSection 25 of the Hindu Marriage Act and to invoke the powers of the Court for making provisions for just and fair maintenance.

39. Even apart from Section 25 of the Hindu Marriage Act. 1 would think that in such matter the Court possesses the inherent power to make such order in matters or maintenance as may be necessary so as to meet the ends of justice. The principles underlying Section 151, of the Civil P.C Are no more in doubt. Where the need and the the circumstances to do justice require, the power

to actex debito justitiae exists and can be invoked. That power as is observed by the Supreme Court inManoharlal v. Seth Hiralal, AIR 1962 SC 527, is not conferred on the Court but is inherent in the Court "by virtue of its duty to do justice between the parties before it". The power will not be exercised when there is ??? express prohibition enacted by any statute nor would it be terms of the Code. It would always be exercise undoubtedly and unfailingly to reach out a just and fair dispensation of justice to the parties before the Court.

40. When Laws' terms are inadequate and lead to loose ends in unfair tracts, the Court can rely on its inherent power to do justice, With changing complexity of human relations and times, everything cannot be provided by enacted statutesand unfailing as well as just results can be left to be worked out by the Courts possessing such power. This power has been exercised so as to grantmaintenance pendente lite in partition suits. (SecSushilabai v. Ramcharan, 1976 Mah LJ 82). Along with this is the holding of the principles enunciated by this Court that under Section 25 of the Hindu Marriage Act, the wife whose marriage is void would be entitled as of right to the relief of permanentmaintenance once the marriage is annulled by a decree of nullity under Section 11. There is no reason to deny similar relier on pari materia principle, though strictly the decree is not passed having reference to Section 11 of the Hindu Marriage Act. The right recognised by Section 25of the Hindu Marriage Act can clearly be worked out in any civil proceeding subject to consideration of facts and circumstances so as to meet ends of justice by resort to the inherent powers conferred upon the Courts by Section 151 of the Civil P.C The statutory references do not indicate that there is any prohibition or any specific provision in this regard. On the other hand, the principle is statutorily reconginsed that upon a decree being passed for nullifying the marriage as void de jure, the Court is possessed with ample power to make orders as toalimony and maintenance. What could, therefore, be available in special proceedings cannot be said to be not available when the same issue is involved collaterally in competent civil proceedings. Strictly, the statutory entitlement of the Court may not apply but having the recognised right andnecessity to enforce it, the Court can, in exercise of its inherent powers reach out justice by giving remedial and such salutary reliefs. Justice after all is another name of fairness. It cannot be blind to the facts in a given case and should reach out in its mercy those results which would be necessary to avoid ruinous consequences like economic or moral destitution. Ultimately, having based the relief onSection 151 of the C.P.C with the aid of inherent powers and drawing upon the principles underlyingSection 25 of the Hindu Marriage Act, it is implicit that before maintenance is granted, the need to grant such must exist as well as the grantee must fulfill the ordinary conditions like that of chastity, not being married to any other person and further of not being in a position to maintain herself."

23. The appellant herein had claimed right to residence as well, which aspect has also not been dealt with by the learned trial Court.

24. For all these reasons, we allow this appeal, set aside the impugned judgment and remand the case back to the learned trial Court to decide the claim of the appellant on merits. With the setting aside of the impugned judgment, the interim order ofmaintenance, as enhanced by the Supreme Court, shall stand revived. The appellant shall be paid arrears of interim maintenance for the intervening period. Such arrears shall be paid to the appellant within a period of two months from today and interim maintenance for future period shall be paid by 7th of each month.

25. The appellant shall also be entitled to costs in this appeal.

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# SHABANA VERSUS SHAHID BEG

**Delhi High Court**

**Bench : Hon'ble Mr. Justice Ashutosh Kumar**

*Shabana ..... Petitioner*
*Versus*
*Shahid Beg ..... Respondent*

**CRL. REV.P.380/2016**

**Decided on August 9, 2017, [Reserved on: 07.07.2017]**

Advocates who appeared in this case:

For the Petitioner: Mr. Dalip Singh with Mr. Nakul Barsoya and Mr. Rohit Chaprana.

For the Respondent: Mr. Rama Shankar with Mr. Feroz Ahmad and Mr. Saurabh.

- **The petitioner/wife had filed a complaint before the Metropolitan Magistrate, Mahila Court-01, Central, Delhi under Section 12 of TheProtection of Women from Domestic ViolenceAct, 2005 which was registered as CC No. 291/6/08 seeking protection order under Section 18; residence order under Section 19; monetary relief under Section 20 and compensation order under Section 22 of the Act.**
- **The petitioner was married to the respondent on 07.08.2005 in accordance with Muslim custom. A child was born on 20.04.2006 It has been submitted on behalf of the petitioner that despite good amount ofmoney having been spent in the marriage, she was not treated well and was subjected to cruelty and harassment.**
- **The provisions of the Act are for the benefit ofpersons in distress as well as for vindication of the rights of the aggrieved person which is guaranteed under Articles 14, 15 & 21 of the Constitution of India and for providing civil remedies for the purposes ofprotecting women from being victims of domesticviolence and to prevent the occurrence of suchdomestic violence in society.**
- **The Court dealing with a complaint under Section 12 of the Act is not competent to decide the validity of any marriage between the parties, which could only be done by a competent Court in an appropriate proceeding by or between the parties and in compliance with other requirements of law.**
- **The case of the petitioner is that she was betrothed to one Noor Mohd while she was only 14 years of age and the marriage between her and Noor Mohd was never consummated as there was no rukhsati. Assuming but not admitting this fact to be incorrect, what cannot be doubted is that the petitioner had lived with the respondent and was subjected todomestic violence. The Appellate Court seems to have misdirected himself in taking it upon himself to decide whether a valid marriage existed between the petitioner and the respondent.**
- **Since the Trial Court assessed the income of the respondent between Rs. 30,000/- to Rs. 35,000/- per month, the original order is modified to the extent that the respondent would be liable to pay Rs. 12,500/- per month to the respondent towards her and her daughter's maintenance and alternative accommodation from the month of August, 2017. The respondent shall now be required to pay an amount ofRs. 10,000/- to the respondent from the date of filingof the complaint till the month of July,**

**2017 and Rs. 12,500/- per month from August, 2017 till the attainment of majority of the daughter of the petitioner.**

The Judgment of the Court was delivered by

**Hon'ble Mr. Justice Ashutosh Kumar :—** The petitioner/wife had filed a complaint before the Metropolitan Magistrate, Mahila Court-01, Central, Delhi under Section 12 of TheProtection of Women from Domestic ViolenceAct, 2005 (hereinafter referred to as "Act") which was registered as CC No. 291/6/08 seeking protection order under Section 18; residence order under Section 19; monetary relief under Section 20 and compensation order under Section 22 of the Act.

2. The learned Magistrate vide order dated 13.07.2015 directed that the petitioner be paid an amount of Rs. 10,000/- per month towards her and her minor daughter's maintenance and for her alternative accommodation from the date of the judgment. It was specified that any amount paid to the petitioner in other proceedings would be adjusted. The respondent was directed to clear the arrears of maintenance within three months and to pay the maintenance of Rs. 10,000/- by 10th day of every month of English calendar. The respondent was also restrained fromcausing any harassment or cruelty to the petitionerfrom the date of the order.

3. As against the aforesaid order passed by the learned Mahila Court, both, the petitioner and the respondent preferred respective appeals vide CA No. 8/2015 and 5/2016. Both the appeals were heard together and vide order dated 22.02.2016, the appealof the petitioner was dismissed but the appeal of the respondent was partly allowed to the extent that the monthly allowance to be paid by him was reduced to Rs. 5000/- per month towards the maintenance of the minor daughter of the petitioner and nothing to her, payable from the date of filing of the complaint till the date of attainment of majority of the child.

4. The petitioner has challenged both the orders by the Courts below by the present petition.

5. The petitioner was married to the respondent on 07.08.2005 in accordance with Muslim custom. A child was born on 20.04.2006 It has been submitted on behalf of the petitioner that despite good amount ofmoney having been spent in the marriage, she was not treated well and was subjected to cruelty and harassment. The paternity of the child was also doubted by the respondent. Because of such cruel behavior meted out to the petitioner, a complaint was made but ultimately, settlement was arrived at whereupon the petitioner along with her child went to her parental home. Later, the petitioner was asked to move in a separate accommodation in Trilok Puri which was purchased by the respondent for an amount of Rs. 5,22,000/-. Out of the aforesaid amount, only Rs. 3,70,000/- was paid by the respondent and his family members whereas the balance amount was paid by the petitioner and her mother. Both, the petitioner and the respondent lived in the aforesaid accommodation at Trilok Puri for some time. The aforesaid accommodation was later sold out and the spouses shifted to a rented accommodation. Later, the petitioner was refused to be kept in the new flat which was purchased. The petitioner, as alleged, has been living with her mother since 14.10.2008 Hence the complaint.

6. The learned Mahila Court after taking into account the evidence brought before her, assessed the incomeof the respondent at Rs. 30,000/- to Rs. 35,000/- and directed for payment of Rs. 10,000/- per month towards maintenance and accommodation of the petitioner and her daughter.

7. The Appellate Court though accepted, in principle, the assessment of the income of the respondent and the requirement of the respondent to maintain the daughter born out of the wedlock but refused to enhance the maintenance as was claimed by the petitioner; rather declined to grant any maintenance to the petitioner on the ground that she was earlier married to one Noor Mohd, which fact was never disclosed and that there was nothing on record to suggest that the aforesaid earlier marriage of the petitioner had been dissolved. As such, the Appellate Court directed the respondent to pay only an amountof Rs. 5000/- towards the maintenance of the daughter of the petitioner i.e Rs. 5000/- per monthfrom the date of the filing of the complaint.

8. The only reason assigned by the Appellate Court for not granting maintenance to the petitioner is that the petitioner had married one Noor Mohd. Prior to her marriage with the respondent.

9. The provisions of the Act are for the benefit ofpersons in distress as well as for vindication of the rights of the aggrieved person which is guaranteed under Articles 14, 15 & 21 of the Constitution of India and for providing civil remedies for the purposes ofprotecting women from being victims of domesticviolence and to prevent the occurrence of suchdomestic violence in society.

10. Section 2(a) of the Protection of Womanfrom Domestic Violence Act, 2005 defines aggrieved person as follows:—

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

11. From the aforesaid definition, it is very clear that apart from the woman who is in a domesticrelationship with the respondent, a woman who has been in domestic relation, if is subjected to domesticviolence, would also come under the category of "aggrieved person".

12. Similarly, domestic relationship has been defined under Section 2(f) which means relationship between two persons who live or have, at any point oftime, 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 joint family. Section 2(s) defines a shared household. From a bare readingof the aforesaid three definitions under the Act, there could be no two opinions about the fact that the petitioner is an aggrieved person who has been in adomestic relationship with the respondent and had a shared household.

13. The incidences of domestic violence have been enumerated in Section 3 of the Act which defines domestic violence and it includes physical, verbal, emotional and economic abuse. From the evidence on record, there is no dispute about the petitioner having been subjected to domesticviolence. It would then make no difference, so far as maintenance is concerned, if the petitioner was earlier married to somebody else and the same fact was not brought on record.

14. The Court dealing with a complaint under Section 12 of the Act is not competent to decide the validity of any marriage between the parties, which could only be done by a competent Court in an appropriate proceeding by or between the parties and in compliance with other requirements of law.

15. It was thus not proper for the Appellate Court to have reversed the order of the Trial Court awarding maintenance to the petitioner and her daughter. The Appellate Court also does not seem to have taken into account that there were ample evidences to show that the petitioner had a domestic relationship with the respondent and lived in the shared household where she was subjected to domestic violence. The Appellate Court, perhaps, erred in focusing itself on the validity of the marriage of the petitioner with the respondent.

16. The case of the petitioner is that she was betrothed to one Noor Mohd while she was only 14 years of age and the marriage between her and Noor Mohd was never consummated as there was no rukhsati. Assuming but not admitting this fact to be incorrect, what cannot be doubted is that the petitioner had lived with the respondent and was subjected todomestic violence. The Appellate Court seems to have misdirected himself in taking it upon himself to decide whether a valid marriage existed between the petitioner and the respondent.

17. Thus the appellate order dated 22.02.2016 is set aside.

18. The order of the learned Magistrate stands restored on the setting aside of the Appellate order.

19. Since the Trial Court assessed the income of the respondent between Rs. 30,000/- to Rs. 35,000/- per month, the original order is modified to the extent that the respondent would be liable to pay Rs. 12,500/-

per month to the respondent towards her and her daughter's maintenance and alternative accommodation from the month of August, 2017. The respondent shall now be required to pay an amount ofRs. 10,000/- to the respondent from the date of filingof the complaint till the month of July, 2017 and Rs. 12,500/- per month from August, 2017 till the attainment of majority of the daughter of the petitioner.

20. The revision petition is disposed of accordingly.

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# KUSUM SHARMA VERSUS MAHINDER KUMAR SHARMA

**Delhi High Court**

**Bench : Hon'ble Mr. Justice J.R Midha**

*Kusum Sharma ..... Appellant*
*Mr. Sunil Mittal, Senior Advocate as amicus curiae with Ms. Seema Seth, Advocate*
*Ms. Anu Narula, Advocate as amicus curiae.*
*Versus*
*Mahinder Kumar Sharma ..... Respondent*

**FAO 369/1996**

**Decided on December 6, 2017**

**Section 24 of the Hindu Marriage Act empowers the Court to award maintenancependente lite and litigation expenses to a party who has no independent income sufficient for his/her support in proceedings pending under the Hindu Marriage Act, 1955, having regard to the income of the parties. The Proviso to Section 24 provides that application underSection 24 shall be disposed of within 60 days of the date of service of notice on the opposite party.**

- **If the disposal of maintenance application is taking time and the delay is causing hardship, ad-interim maintenance be granted to the claimant spouse on the basis of admitted income of the respondent.**
- **In respect of the claims of permanent alimonyunder Section 25 of the Hindu Marriage Act, the Court may direct the parties to file affidavits of their assets, income and expenditure, if the same has not already been filed by the parties.**
- **The aforesaid directions/guidelines be followed in all matrimonial cases including cases under Hindu Marriage Act, 1955, Protection of Women from Domestic Violence Act, 2005, Section 125 Cr.P.C, Hindu Adoption and Maintenance Act, 1956, Special Marriage Act, 1954, Indian Divorce Act, 1869, Guardians and Wards Act, 1890 and Hindu Minority and Guardianship Act.**

**ORDER**

Hon'ble Mr. Justice J.R. Midha :—

Section 24 of the Hindu Marriage Act empowers the Court to award maintenancependente lite and litigation expenses to a party who has no independent income sufficient for his/her support in proceedings pending under the Hindu Marriage Act, 1955, having regard to the income of the parties. The Proviso to Section 24 provides that application underSection 24 shall be disposed of within 60 days of the date of service of notice on the opposite party.

2. Vide judgment dated 14th January, 2015, this Court laid down the guidelines for expeditious hearing and disposal of maintenance applications underSection 24 of Hindu Marriage Act. This Court considered the Best International Practices with respect of the mandatory filing of an affidavit of assets, income and expenditure by both the parties in matrimonial disputes. This Court formulated an affidavit of assets, income and expenditure to be filed by both the parties at the very threshold of the litigation. This Court sought the response of the Courts below on the working of the guidelines and further suggestions. On 29th May, 2017, the guidelines were partly modified. Further suggestions have been received from the

learned amicus curiae as well as the Family Court which warrant further modification of the guidelines dated 14thJanuary, 2015 and 29th May, 2017.

3. Mr. Sunil Mittal, learned amicus curiae submits that the affidavit of assets, income and expenditure of the parties be taken after completion of the pleadings, in the maintenance application. It is submitted that the filing of the affidavit along with the petition gives undue advantage to the respondent. It is further submitted that the substantive pleadings get delayed due to the time taken in collecting the documents and filing of the affidavits. Learned amicus curia seeks clarification that the format of the affidavit of assets, income and expenditure has to be used by the Courts as guidelines to determine the income of the parties. It is further suggested that in appropriate cases, the Family Courts should have discretion to dispense with the affidavit or modify the information required from the parties in the affidavit. It is submitted that the litigants belonging to the lowest strata of the society find it difficult to file the affidavit. It is further submitted that the affidavit of assets, income and expenditure may not be necessary in some cases, such as cases where the respondent agrees to pay the maintenance without contesting the application for maintenance or where parties belong to the lowest strata of the society. Reference is made toSection 9 and 10 of the Family Courts Act, 1984 andSection 28(2) of the Protection of Women form Domestic Violence Act, 2005 which empowers the Courts to formulate such procedure as it deems fit.

4. Ms. Reena Singh Nag, Addl. Principal Judge, Family Court (West) has suggested that instead of the filing of the affidavit along with the petition and the written statement, it would be appropriate to direct both the parties to simultaneously file their affidavits, after the completion of the pleadings, in the maintenanceapplication. It is further suggested that the party seeking maintenance be directed to give the particulars of his/her savings bank account in themaintenance application itself so that the opposite party can be directed to deposit/transfer themaintenance amount directly in that savings bank account.

5. Ms. Anu Narula, learned amicus curiae submits that it is the duty of the Court to make an endeavour to bring reconciliation between the parties in the first instance before proceeding to grant any relief to the parties in matrimonial matters. Reference is made to Order XXXIIA Rule 3 of the Code of Civil Procedure, 1908; Section 9 of the Family Courts Act, 1984;Section 23(2) of the Hindu Marriage Act, 1955 andSection 34(2) of the Special Marriage Act, 1955. It is submitted that reconciliation efforts be directed to be taken up by the Courts immediately after the filing of the affidavit of assets, income and expenditure by the parties but before commencement of the hearing on the maintenance application.

6. On careful consideration of the suggestions of the Family Courts and the learned amicus curiae, this Court is of the view that the affidavit of assets, income and expenditure should be filed simultaneously by both the parties, after completion of pleadings in themaintenance application, to avoid any undue advantage to the party who files his/her affidavit of assets, income and expenditure later. The simultaneous filing of the affidavit after the completion of the pleadings in the maintenance application would also give reasonable time to the parties to prepare their affidavits and compile the relevant documents and would avoid the delays.

7. The judgments dated 14th January, 2015 and 29thMay, 2017 are modified to the following extent:

8. Paras 19.2, 19.4, 19.5 and 19.6 of the judgment dated 14th January, 2015 are recalled. After completion of the pleadings in the maintenance application, both the parties shall simultaneously file their affidavits of assets, income and expenditure. It is clarified that the filing of the affidavit of assets, income and expenditure shall not be mandatory to be filed along with the petition and the written statement, as directed earlier. After the completion of the pleadings, in themaintenance application, the Court shall fix the date for reconciliation and the parties shall simultaneously file their affidavits before the Family Court at the commencement of the reconciliation. In the event of the failure of the reconciliation efforts, the Court shall grant time to the parties to respond to the affidavits of the opposite parties and fix the case for hearing on themaintenance application.

9. Paras 19.21 and 19.22 of the judgment dated 14thJanuary, 2015 are clarified to the extent that the orders dated 18th September, 2014, 14th January, 2015 and the judgement dated 29th May, 2017 as well as this order are guidelines for the Courts below to determine the true income of the parties and the Courts are at liberty to determine the nature and extent of information/documents necessary and shall pass appropriate directions as may be considered necessary to do complete justice between the parties. It is clarified that in appropriate cases such as the cases belonging to the lowest strata of the society or case of a litigant who is a permanently disabled/paralytic, the Court may, for the reasons to be recorded, dispense with or modify the information required from the parties.

10. Para 24 of the order dated 14th January, 2015 is clarified to the extent that the directions with respect to the filing of the affidavit have been issued to ensure that the maintenance orders are passed expeditiously without any delay. Reference is made to Section 24 of the Hindu Marriage Act which prescribes a time limit of 60 days for passing of the maintenance order. The Courts shall endeavour to expedite the hearing and disposal of the maintenance application and directions have been issued by this Court to ensure that the true income of the parties is determined expeditiously and the maintenance orders are passed without any undue delay.

11. The direction contained in para 6 of the judgement dated 29th May, 2017 is recalled and, therefore, the summons issued to the respondent shall not contain the endorsement mentioned therein.

12. The directions contained in para 19.9 and 19.10 are recalled and are substituted with the directions that the Courts shall direct the parties to file the affidavits of their assets, income and expenditure while adjudicating the claims under Sections 25 of the Hindu Marriage Act.

13. The direction contained in para 19.5 is modified and substituted with the direction that if the affidavit is not accompanied with all the relevant documents, then the Court shall take the affidavit on record and grant reasonable time to the parties to remove the defects/deficiencies.

14. The modified directions and the modified format of the affidavit of assets, income and expenditure are annexed to this order. The modified directions be implemented w.e.f 1st January, 2018.

15. Copy of this order be sent to the Registrar General of this Court who shall circulate it to all the District Judges and Family Courts. The Registrar General shall ensure that the modified directions along withAnnexure A1 i.e the modified format of affidavit of assets, income and expenditure and its Hindi translation are uploaded on the website of District Courts/Family Courts and are also displayed on their Notice Board by 21st December, 2017. The Family Courts shall display on their Notice Board by 21stDecember, 2017 that the affidavit of assets, income and expenditure is not mandatory to be filed along with petition or written statement. The Courts shall immediately remove the endorsement directed to be incorporated on the summons vide judgement dated 29th May, 2017.

16. Learned amicus curiae submits that the matter be kept pending for seeking modified feedback/comments of the Family Courts after implementation of the modified directions/guidelines.

17. The Courts below dealing with the cases shall send their response to the implementation of the modified directions/guidelines. The suggestions for further improving the system are also invited from the Courts below.

18. List on 12th February, 2018.

19. This Court appreciates the assistance rendered by Mr. Sunil Mittal, Senior Advocate and Ms. Anu Narula, Advocate as amici curiae. The Court also appreciates the suggestions of Ms. Reena Singh Nag, Addl. Principal Judge, Family Court (West) in this matter.

20. Copy of this order be given dasti under the signature of the Court Master to learned amici curiae.

**MODIFIED DIRECTIONS DATED 6TH DECEMBER, 2017**

21. The affidavit of assets, income and expenditure of both the parties is useful to determine the income of the parties in all matrimonial cases. Applying the principles laid down in Section 10(3) of the Family Courts Act, 1984 read with Section 165 of the Indian Evidence Act, relating to the duty of the Court to ascertain the truth and Section 106 of the Indian Evidence Act relating to the duty of the parties to disclose their income, this Court has formulated the format of the affidavit of assets, income and expenditure attached hereto as 'Annexure A1'. The documents required to be filed along with the affidavit are prescribed in the format of the affidavit.

22. The affidavit of assets, income and expenditure is to be treated as guidelines to determine the true income of the parties. The Courts is at liberty to determine the nature and extent of information/documents necessary and shall direct the parties to disclose such relevant information and documents to determine their true income. The Courts are at liberty to pass appropriate directions as may be considered necessary to do complete justice between the parties and in appropriate cases, such as the cases belonging to the lowest strata of the society or case of a litigant who is a permanently disabled/paralytic, the Court may, for reasons to be recorded, dispense with the requirement of the filing of the affidavit or modify the information required.

23. While formulating the affidavit - Annexure A1, this Court considered Best International Practisesmentioned in para 18 of the judgement dated 14thJanuary, 2015. However, this Court has only incorporated important questions and documents though many more questions and documents were considered, which would have complicated the affidavit and caused inconvenience to the litigants. The Courts are at liberty to consider Best International Practisesmentioned in para 18 of the judgement dated 14thJanuary, 2015 as the guidelines for seeking relevant information and documents.

24. Upon completion of the pleadings in themaintenance application, the Court shall fix the date for reconciliation and direct the parties to file their affidavits of their assets, income and expenditure simultaneously at the commencement of the reconciliation. It is clarified that the filing of the affidavit of assets, income and expenditure is no more mandatory to be filed along with the petition and the written statement, as directed earlier. The Court shall also direct the party seeking maintenance to produce the passbook of his/her savings bank account in whichmaintenance can be deposited/transferred.

25. The Court shall simultaneously take on record the affidavit of assets, income and expenditure of both the parties. If the affidavit of a party is not accompanied with all the relevant documents, the Court may take the affidavit on record and grant reasonable time to file the relevant documents.

26. In the event of the failure of the reconciliation efforts, the Court shall grant time to the parties to respond to the affidavit of the opposite party and list the case for hearing on the maintenance application.

27. In pending cases of maintenance, the Court may direct the parties to file the affidavit of their assets, income and expenditure, if the parties have not already disclosed their true income.

28. If a party makes concealment or false statement in his/her affidavit, the opposite party shall disclose the particulars of the same in his/her response to the affidavit along with the material to show concealment or false statement. The aggrieved party may seek permission of the Court to serve interrogatories and seek production of relevant documents from the opposite party under Order XI of the Code of Civil Procedure.

29. The Court shall ensure that the filing of the affidavits by the parties is not reduced to a mere ritual or a formality. Whenever the opposite party discloses sufficient material to show concealment or false statement in the affidavit, the Court may consider examining the deponent of the affidavit under Section165 of the Evidence Act to elicit the truth. The principles relating to the scope and powers of the Court underSection 165 of the Evidence Act have been summarized in Ved Prakash Kharbanda v. Vimal Bindal, (2013) 198 DLT 555 which may be referred to. In appropriate cases, the Court may direct a party

to file an additional affidavit relating to his assets, income and expenditure at the time of marriage and/or one year before separation and/or at the time of separation.

30. If the statements made in affidavit of assets, income and expenditure are found to be incorrect, the Court shall consider its effect while fixing themaintenance. However, an action under Section 340Cr.P.C is ordinarily not warranted in matrimonial litigation till the decision of the main petition.

31. At the time of issuing notice the maintenanceapplication, the Court shall consider directing the petitioner to deposit such sum, as the Court may consider appropriate for payment to the respondent towards interim litigation/part litigation expenses. However, in cases such as divorce petition by the wife who unable to support herself and is claimingmaintenance from the respondent husband, it may not be appropriate to direct the petitioner-wife to pay the litigation expenses to the respondent-husband.

32. The interim litigation expenses directed by the Court at the stage of issuing notice, does not preclude the respondent from seeking further litigation expenses incurred by the respondent at a later stage. The Court shall consider the respondent's claim for litigation expenses and pass an appropriate order on the merits of each case.

33. If the disposal of maintenance application is taking time and the delay is causing hardship, ad-interim maintenance be granted to the claimant spouse on the basis of admitted income of the respondent.

34. In respect of the claims of permanent alimonyunder Section 25 of the Hindu Marriage Act, the Court may direct the parties to file affidavits of their assets, income and expenditure, if the same has not already been filed by the parties.

35. The aforesaid directions/guidelines be followed in all matrimonial cases including cases under Hindu Marriage Act, 1955, Protection of Women from Domestic Violence Act, 2005, Section 125 Cr.P.C, Hindu Adoption and Maintenance Act, 1956, Special Marriage Act, 1954, Indian Divorce Act, 1869, Guardians and Wards Act, 1890 and Hindu Minority and Guardianship Act, 1956.

## ANNEXURE-A1
## (FORMAT OF AFFIDAVIT OF ASSETS, INCOME AND EXPENDITURE TO BE FILED BY THE BOTH PARTIES)
## AFFIDAVIT

I ....., son of/wife of ....., aged about ..... years, resident of .. ....., do hereby solemnly declare and affirm as under:

### PART-I
### PERSONAL INFORMATION RELATING TO THE DEPONENT

| S. No. | Description | Particulars |
|---|---|---|
| 1. | Name | |
| 2. | Age | |
| 3. | Residential Address | |
| 4. | E-mail Address | |
| 5. | Date of marriage | |
| 6. | Date of separation | |
| 7. | Educational qualifications | |
| 8. | Professional qualifications | |
| 9. | Occupation | |
| 10. | Monthly income (as mentioned at serial No. 45) | |

| | | |
|---|---|---|
| 11. | Monthly expenditure (as mentioned at serial No. 60) | |
| 12. | Whether you are assessed to Income Tax? | |
| 13. | Whether you have sufficient income to support yourself? | |
| 14. | If not, whether you have claimed maintenancefrom your spouse? If so, how much? | |
| 15. | Whether you are staying at matrimonial home? | |
| 16. | If not staying at matrimonial home, relationship and income of the person with whom you are staying. | |
| 17. | Members of the family:<br>(a) Dependent<br>(b) Non-dependent | |
| 18. | Whether your spouse has claimedmaintenance from you? If so, how much? | |
| 19. | Whether you have voluntarily paid or willing to paymaintenance to your spouse? If so, how much? | |
| 20. | Whether you are willing to pay litigation expenses to your spouse? If so, how much? | |
| 21. | Particulars of pending litigation between the parties | |
| 22. | Whether anymaintenance order has been passed by any Court? If so, give particulars and attach copy of the order? | |
| 23. | Whether themaintenance is being paid in terms of the aforesaid order? If so, file the statement ofmaintenance paid upto date | |
| 24. | Expenses incurred on this litigation | |
| 25. | Particulars of the bank account with name and address of the bank for the purpose of payment from or receipt ofmaintenance, as the case may be | |
| 26. | Name of your counsel and his/her mobile number and e-mail address | |

**PART-II**
**RELEVANT INFORMATION RELATING TO THE SPOUSE**

| | | |
|---|---|---|
| 27. | Educational and professional qualifications of your spouse | |
| 28. | Whether your spouse was/is earning? If so, give particulars of the occupation and income of your spouse. | |
| 29. | Whether your spouse is staying at matrimonial home. If not, whether he/she is staying at his/her own accommodation or at a rented accommodation? If staying at a rented accommodation, what is the rent being paid by him/her? | |
| 30. | Particulars of the assets and liabilities of your spouse | |
| 31. | Do you have any documents relating to the income, assets and expenditure of your spouse? If so, give the particulars and attach copies thereof? | |

**PART-III**
**RELEVANT INFORMATION RELATING TO THE CHILDREN**

| | | |
|---|---|---|
| 32. | Children from the marriage with their name and age | |
| 33. | Who has the custody of the minor children | |
| 34. | Name and address of school(s) where the children are studying | |
| 35. | Who is bearing the expenditure of Children's education | |

| | | |
|---|---|---|
| 36. | How much expenditure has been incurred on the children'smaintenance and children's education from the date of separation till now? | |
| 37. | If the children are in custody of your spouse, whether you have voluntarily paid or willing to pay the expenses for the children'smaintenance and education? If so, how much? | |
| 38. | **Details of expenditure on children** | **Amount (in Rs.)** |
| | (i) School/College fees | |
| | (ii) Crech/Day Care/After school care | |
| | (iii) Books/Stationery | |
| | (iv) Private Tuitions | |
| | (v) Pocket Money/Allowances | |
| | (vi) Sports | |
| | (vii) Outings/summer camps/vacations | |
| | (viii) Entertainment | |
| | (ix) Others | |
| 39. | TOTAL EXPENDITURE | |
| | (Give monthly expenditure) | |

PART-IV

STATEMENT OF INCOME

| S.No | Description | Particulars |
|---|---|---|
| 40. | In case of salaried persons:<br>(i) Designation<br>(ii) Name and address of the employer<br>(iii) Date of employment<br>(iv) Gross Income including the salary, D.A, commissions/incentives, bonus, perks etc.<br>(v) Perquisites and other benefits provided by the employer including accommodation, cars/other automotive, sweeper, gardener, watchman or personal attendant, gas, electricity, water, interest free or concessional loans, holiday expenses, free or concessional travel, free meals, free education, gifts, vouchers, etc. credit card expenses, club expenses, use of movable assets by employees, transfer of assets to employees, value of any other benefit/amenity/service/ privilege and the value of such perquisites and benefits<br>(vi) Deductions from the gross income<br>(vii) Income Tax paid<br>(viii) Net income<br>(ix) Value of stock option benefits if provided by the employer<br>(x) Pension and retirement benefits payable at the time of retirement | |

| | | |
|---|---|---|
| 41. | In case of self-employed persons:<br>(i) Nature of business/profession<br>(ii) Whether the business/profession is carried on as an individual, sole proprietorship concern, partnership concern, company or association of persons, HUF, joint family business or in any other form. Give particulars of your share in the business/profession. In case of partnership, specify the share in the profit/ losses of the partnership<br>(iii) Number of employees<br>(iv) Annual turnover/gross receipts<br>(v) Gross Profit<br>(vi) Net Income<br>(vii) Income Tax<br>(viii) Details and value of benefits in kind, perks or other remuneration e.g provision of car, payment of accommodation etc.<br>(ix) Amount of regular monthly withdrawal or drawings | |
| 42. | In case the business/profession is carried on as a Partnership Firm/Company:<br>(i) Registered/Corporate Office of the firm/company<br>(ii) Information and particulars with regard to your shareholding, involvement in the affairs and management of the firm/company<br>(iii) Director's/Partner's remuneration:—<br>(a) Salary<br>(b) Interest<br>(c) Rent<br>(d) Commission<br>(e) Others<br>(iv) List of all the bank accounts of the firm/company<br>(v) Location of the statutory records and books of account of the firm/company<br>(vi) List of immovable assets, land and building etc. of the firm/company.<br>(vii) Number of workmen/employees<br>(viii) Current value of your business interest(s)<br>(ix) Current value of your business assets<br>(x) List of directorships held, sitting fees, commission or any other remuneration<br>(xi) Net worth of the company in which you are Director along with the number of shares held in the Company | |
| 43. | Income from Other Sources:<br>(i) Agricultural Income<br>(ii) Rent<br>(iii) Interest on bank deposits and FDRs<br>(iv) Interest on investments including deposits, NSC, IVP, KVP, Post Office schemes, PPF, loans etc.<br>(v) Dividends<br>(vi) Mutual Funds<br>(vii) Annuities<br>(viii) Lease of machinery, plant or furniture<br>(ix) Sale of movable/immovable assets<br>(x) Gifts | |
| 44. | Any other income not covered above | |
| 45. | TOTAL INCOME (Give monthly income) | |

## PART V
## STATEMENT OF EXPENDITURE

| S. No. | Description | | Amount (in Rs.) |
|---|---|---|---|
| 46. | **Housing** | (i) Monthly rent | |
| | | (ii) Mortgage payment(s) | |
| | | (iii) Repairs &Maintenance | |
| | | (iv) Property tax | |
| 47. | **Household expenditure** | (i) Groceries/Food items/Personal care/clothing | |
| | | (ii) Water | |
| | | (iii) Electricity | |
| | | (iv) Gas | |
| | | (v) Telephone/Mobile | |
| | | (vi) TV Cable/Set-top Box charges & Internet services | |
| | | (vii) Maintenance, replacement and repair of household items, appliances and kitchenware. | |
| | | (viii) Telephone | |
| | | (ix) Domestic full time/part time helper(s) | |
| | | (x) Others (specify) | |
| 48. | **Maintenanceof Dependents** | (i) Parents | |
| | | (ii) Children (as mentioned at serial No. 39) | |
| | | (iii) Others | |
| 49. | **Transport** | (i) Private Transport | |
| | | (a) Driver(s) | |
| | | (b) Fuel | |
| | | (c) Repair/Maintenance | |
| | | (d) Insurance | |
| | | (e) Loan repayment | |
| | | (ii) Public Transport | |
| | | (a) Bus | |
| | | (b) Taxi | |
| | | (c) Metro | |
| | | (d) Auto | |
| 50. | **Medical expenditure** | (i) Doctor's Charges | |
| | | (ii) Medication | |
| | | (iii) Hospital | |
| | | (iv) Other medical expenditure | |
| | | (v) Others (specify) | |
| 51. | **Insurance** | (i) Life | |
| | | (ii) Annuity | |

| | | | |
|---|---|---|---|
| | | (iii) Householders | |
| | | (iv) Medi-Claim | |
| 52. | **Entertainment and recreation** | (i) Club | |
| | | (ii) Health Club | |
| | | (iii) Gym | |
| 53. | **Holiday and vacations** | | |
| 54. | **Gifts** | | |
| 55. | **Legal/litigation expenses** | | |
| 56. | **Discharge of Liabilities** | (i) Credit card(s) payment | |
| | | (ii) Hire purchase/lease | |
| | | (iii) Repayment of Loans | |
| | | (a) House loan | |
| | | (b) Car loan | |
| | | (c) Personal loan | |
| | | (d) Business loan | |
| | | (e) Any other loan | |
| | | (iv) Name of the lenders | |
| | | (v) Mode of repayment | |
| | | (vi) Installment amount | |
| | | (vii) Other personal liabilities | |
| 57. | **Miscellaneous** | (i) Newspapers, magazines, books | |
| | | (ii) Religious contributions/Charities | |
| | | (iii) Others (specify) | |
| 58. | **Pocket Money/Allowance** | | |
| 59. | **Other expenditure (Not specified above)** | | |
| 60. | **TOTAL EXPENDITURE (Give monthly expenditure)** | | |

## PART-VI
## STATEMENT OF ASSETS

| S. No. | Assets | List of Assets | | | |
|---|---|---|---|---|---|
| | | At the time of marriage | At the time of Separation | Present | Present Estimated Market Value |

| | | | | | |
|---|---|---|---|---|---|
| 61. | Real Estate Including<br>(i) Land<br>(ii) Built up properties<br>(iii) Lease hold properties<br>(iv) Agricultural land<br>(v) Investment in real estate such as booking of plots, flats and other immovable properties in your name or in joint names.<br>(vi) Other properties<br>Note 1.:- List your interest in properties, including lease hold interest and mortgages, whether or not you are registered as owner.<br>Note 2.:-Provide legal descriptions and indicate estimated market value of your interest without deducting encumbrances or costs of disposition. (Record encumbrancesunderdebts.) | | | | |
| 62. | Joint Properties<br>(i) Properties presented at or about the time of marriage, which belong jointly to both the husband and wife. Give the status of their possession.<br>(ii) Other joint properties of the parties. Give the status of their possession.<br>(iii) Whether any litigation pending with respect to the joint property? If so, give particulars. | | | | |
| 63. | Liquid Assets:<br>(i) Details of all bank accounts including Current, Savings and Demat Accounts in your name, or joint name and balance in the said account | **Account Number** | | **Name of Bank Current Balance** | **Current Balance** |
| | | (i) | | | |
| | | (ii) | | | |
| | | (iii) | | | |
| | | (iv) | | | |
| | (ii) Cash in Hand | | | | |

| | | | |
|---|---|---|---|
| 64. | Investments<br>(i) Details of all invest hold or, in which interest and their current value<br>a) FDRs, NSC, IVP, Office schemes, PP etc.<br>b) Deposits with Government and Non-Government entities<br>c) Stocks, shares, debentures, bonds, units and mutual funds, etc.<br>d) Life and endowment policies and surrender value<br>e) Loan given to friends, relatives and others<br>f) Other investments not covered by above items | **Particulars** | **Current Value** |
| 65. | Pensions and Retirement Savings Plan<br>Indicate name of institution where accounts are held, name and address of pension plan and pension details. | **Particulars** | **Maturity amount** |
| 66. | Corporate/Business Interests<br>List any interest you hold, directly or indirectly, in any corporation, unincorporated business, partnership, trust, joint venture and Association of Persons, Society etc. | **Particulars** | **Current value** |
| 67. | Movable Assets<br>(i) Motor Vehicles (List cars, motorcycles, scooters etc. along with their brand and registration number)<br>(ii) Livestock<br>(iii) Mobile phone(s)<br>(iv) Computer/Laptop<br>(v) Other electronic gadgets including I-pad etc.<br>(vi) TV, Fridge, Air Conditioner, Microwave, Washing machine, etc.<br>(vii) Other household and kitchen appliances<br>(viii) Quantity of gold, silver and diamond jewellery<br>(ix) Quantity of Silver Utensils | **Particulars** | **Maturity amount** |
| 68. | Intangible properties<br>Including patents, trademark, copyright design and goodwill and their value | | |

| | | | |
|---|---|---|---|
| 69. | About disposal of properties<br>Particulars of properties (movable as well as immovable) sold/agreed to be sold between the date of marriage till the date of filing of this affidavit and the sale consideration received from the purchaser | **Particulars** | **Present Estimated market value** |
| | | | |
| 70. | Others<br>List anything else of value that you own, including precious metals, collections, works of art, jewellery or household items of high value. Include location of safety deposit lockers. | **Particulars** | **Estimated current value** |
| | | | |

## PART-VII
## STATEMENT OF LIABILITIES

| S. No. | Description | Particulars of Debts | Current Value |
|---|---|---|---|
| 71. | Secured debt(s)<br>List all mortgages, loans, and any other debts secured against an asset | | |
| 72. | Unsecured Debt(s)<br>List all bank loans, personal loans, credits, overdrafts, credit cards and any other debts | | |
| 73 | Other<br>List any other debts, including obligations that are relevant to a claim | | |

## PART-VIII
## GENERAL INFORMATION RELATING TO THE STATUS, STANDARD OF LIVING AND LIFESTYLE

| S. No. | Description | Particulars |
|---|---|---|
| 74. | Particulars of residential accommodation where your are presently staying (in sq. feet) | |
| 75. | Who is the owner of the residential accommodation? In case of rented accommodation, specify the monthly rent | |
| 76. | Number of part-time/full time domestic helpers and their wages | |
| 77. | Average monthly withdrawal from bank(s) | |
| 78. | Mode of travel in city/outside city | |
| 79. | Membership of clubs/health clubs/gyms, societies and other associations. Specify the membership fee and subscription | |
| 80. | Particulars of credit/debit card(s), its limit and usage | |
| 81. | Particulars of frequent flier cards | |
| 82. | Frequency of foreign travel, business as well as personal | |
| 83. | Category of hotels ordinarily used for stay, official as well as personal | |

| | | |
|---|---|---|
| 84. | Category of hospitals opted for medical treatment including type of rooms | |
| 85. | Brand of vehicle, mobile and wrist watch, pen, sunglasses, wallet/bags. | |
| 86. | Expenditure ordinarily incurred on family functions including birthday of the children | |
| 87. | Expenditure ordinarily incurred on festivals | |
| 88. | Expenditure incurred on marriage of family members | |
| 89. | Status of the deponent and his/her family:<br>-High<br>-Upper Middle<br>-Middle<br>-Lower Middle<br>-Low<br>-Below poverty line | |

## PART-IX
## DOCUMENTS RELATING TO ASSETS, INCOME AND EXPENDITURE

| PART A<br>DOCUMENTS RELATING TO PERSONAL INFORMATION | | |
|---|---|---|
| **S. No.** | **Description** | |
| 1. | Ration Card | |
| 2. | Voter ID Card | |
| 3. | Aadhar Card | |
| 4. | Driving Licence | |
| 5. | PAN Card | |
| 6. | Passport | |

| PART B<br>DOCUMENTS RELATING TO INCOME, ASSETS AND LIABILITIES | | | | |
|---|---|---|---|---|
| **S. No.** | **Description** | **Please Tick** | | |
| | | **Attached** | **Not Applicable** | **To follow** |
| 7. | Statement of Account of all bank accounts including current, savings and Demat accounts for last 3 years | | | |
| 8. | Income Tax Return(s) along with Statement of Income and Annexures for last 3 years | | | |
| 9. | In case of Salaried Persons<br>(i) Appointment letter along with salary structure at time of appointment.<br>(ii) Last Salary Slip<br>(iii) Forms 16, 16A, 12BA & 26AS<br>(iv) Cost to Company Certificate and CIBIL Certificate, wherever applicable<br>(v) Copies of TDS certificates | | | |

| | | | | |
|---|---|---|---|---|
| 10. | In case of self-employed persons<br>(i) Balance Sheet and Profit & Loss Account<br>(ii) Balance Sheet and Profit & Loss Account of the proprietorship firm, if the business is carried on in the name of a sole proprietorship concern<br>(iii) Balance Sheet and Profit & Loss Account of the partnership firm, if the deponent is a partner in a firm along with the Schedule showing the distribution of partners' remuneration and share of profits/losses of the partnership firm and the copy of the partnership deed<br>(iv) Balance Sheet and Profit & Loss Account of the Company in which the deponent is a Director<br>(v) Balance Sheet and Profit & Loss Account of the Association of Persons, HUF, Joint Family business or trust in which the deponent has share<br>(vi) Copy of account of the deponent in the books of the business<br>(vii) Copies of TDS certificates | | | |
| 11. | In case of Income from other sources:<br>(i) Lease Deed(s)/Rent Agreement(s)/Licence Agreement(s) in respect of the rental income<br>(ii) Interest Certificate in respect of the interest income on deposits and investments<br>(iii) Dividend Certificates in respect of dividend income<br>(iv) Demat holding Statement<br>(v) Sale Deed(s)/transfer documents in respect of the profit on sale of property/properties | | | |
| 12. | Other relevant documents relating to Income/Assets | | | |
| 13. | Other relevant documents relating to liabilities | | | |

| PART C<br>DOCUMENTS RELATING TO EXPENDITURE | | | | |
|---|---|---|---|---|
| 14. | (i) Documents relating to the expenditure on education of children including tuition fees<br>(ii) Rent andmaintenancereceipts<br>(iii) Electricity, water, security and gas bills<br>(iv) Documents relating to the salary paid to the employees including domestic helper(s)<br>(v) Documents relating to expenditure on conveyance<br>(vi) Debit and Credit Card statements of all cards<br>(vii) Frequent Flier's Card statements<br>(viii) Mobile and landline phone bills<br>(ix) Internet and TV cable/Set-Top Box bills<br>(x) Documents relating to the repayment of the loans<br>(xi) PPF, EPF and other superannuation fund receipts<br>(xii) Receipts of premium of insurance policies<br>(xiii) Receipts of payments in respect of mutual funds<br>(xiv) Documents relating to payment of interest on bank and other loans<br>(xv) Documents relating to the payment of taxes, including Income Tax and Property Tax<br>(xvi) Other relevant documents relating to Expenditure | | | |

**Declaration:**

1. I solemnly declare and affirm that I have made full and accurate voluntary disclosure of my income, expenditure, assets and liabilities from all sources. I further declare and affirm that I have no assets, income, expenditure and liabilities other than set out in this affidavit.

2. I undertake to inform this Court immediately upon any material change in my employment, assets, income, expenditure or any other information included in this affidavit.

3. I understand that any false statement made in this affidavit may constitute an offence underSection 199 read with Sections 191 and 193 of the Indian Penal Code punishable with imprisonment upto seven years and fine, andSection 209 of Indian Penal Code punishable with imprisonment upto two years and fine. I have read and understood Sections 191, 193, 199 and 209 of the Indian Penal Code.

DEPONENT

**Verification:**

Verified at ..... on this ..... day of ..... that the contents of the above affidavit relating to my assets, income and expenditure are true to my knowledge, no part of it is false and nothing material has been concealed therefrom, whereas the contents of the above affidavit relating to the assets, income and expenditure of my spouse are based on information believed to be true. I further verify that the copies of the documents filed along with the affidavit are true copies of the originals.

DEPONENT

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# MR NOEL LEWIS PINTO VERSUS MRS SHALET D SOUZA

**Karnataka High Court**

**Bench : Hon'ble Mr. Justice S.Abdul Nazeer and Hon'ble Mr. Justice K.S.Mudagal**

*Mr Noel Lewis Pinto*
*Versus*
*Mrs Shalet D Souza*

**MISCELLANEOUS FIRST APPEAL No.7237/2015(FC)**

**Decided on 30 January, 2017**

- **This appeal is filed under Section 19(1) of Family Court Act and R/W under Section 55 of the Indian Divorce Act, 1869, against the judgment and decree dated 10.4.2015 passed in M.C.No.178/2013 on the file of Principal Judge, Family Court, Dakshina Kannada, Mangalore allowed the petiton filed under Section 10(1)(ix) and (x) and 10(2) of the Divorce Act for dissolution of marriage.**
- **There is no dispute that the marriage of the petitioner with the respondent was solemnized on 19.11.1990**
- **The petitioner claimed alimony of Rs.15,000/- per month and litigation expenses of Rs.20,000/- by filing an interim application under Section 36 of the Indian Divorce Act.**
- **So far as the fortune of the petitioner is concerned, the respondent has not placed any material on record to show that she owns any property. The evidence on record shows that she herself was more qualified than the respondent and on her marriage with this person, the only fortune she acquired is the misfortune of humiliation, cruelty and baseless and uncharitable allegations.**
- **So far as the ground of ill health of the respondent, the records produced by him at Ex.R.7 show that the alleged ailment was a renal calculi in March 2012 and surgery for hernia during the same month. There is nothing to show that the said ailments have caused any total functional disability to the respondent.**
- **The respondent has a house to live but, the petitioner and her daughter, do not have their own shelter to live. Taking into consideration all these aspects, the trial Court has awarded alimony of Rs.7,50,000/-. Therefore, the order of alimony is based on the sound appreciation of law and evidence and does not call for any interference by this Court. Hence, the appeal fails and dismissed accordingly.**

**Hon'ble Mr. Justice K.S. Mudagal** delivered the following:

## JUDGMENT

This is the husband's appeal under Section 19 of the Family Courts Act challenging the judgment and decree dated 10.04.2015 passed by the Family Court, Dakshina Kannada, Mangalore in M.C.No.178/2013. By the impugned judgment and decree the trial Court has allowed the petition of the present respondent under Section 10(1)(ix) and (x) and 10(2) of Indian Divorce Act for dissolution of marriage, rejected the counter claim of the appellant for restitution of conjugal rights and awarded permanent alimony of Rs.7,50,000/- and litigation expenses of Rs.10,000/-.

2. The appellant is the respondent before the trial Court. The respondent filed the petition against the appellant under Section 19 of the Family Courts Act for a decree of dissolution of marriage, costs etc initially before the Senior Civil Judge, Mangalore, D.K. in M.C.No.73/2012. The said petition was returned for presentation before the proper Court and ultimately, was presented before the Family Court, Mangalore, D.K. and registered in M.C.No.178/2013. For the purpose of convenience the parties will be referred to hereafter with their ranks before the trial Court.

3. There is no dispute that the marriage of the petitioner with the respondent was solemnized on 19.11.1990 at the Guardian Angel church, Mangalore and subsequently the same was registered with the Christian Marriage Registrar on 21.07.2009. Out of the said wedlock, the couple have a girl child by name Sherlie. The petitioner sought a decree of dissolution of marriage alleging that

   (i) the respondent married her misrepresenting that he is a Polytechnic diploma holder and on the basis of such qualification has a good job at Abu Dabi and later, it was revealed that he was only a 10th standard drop out and doing a mean manual job;

   (ii) respondent was a lazy wayward person without any commitment to the job or the family & failed and neglected to maintain her and her child;

   (iii) he is addicted to alcohol and watching pornography and perverted sexual behavior and when she couldn't appease his unnatural lust he used to assault her violently;

   (iv) he is guilty of bestiality;

   (v) Such conduct of the respondent has made it harmful to her to live with him;

   (vi) He has deserted her and her child since February 2009

4. The petitioner claimed alimony of Rs.15,000/- per month and litigation expenses of Rs.20,000/- by filing an interim application under Section 36 of the Indian Divorce Act.

5. The respondent contested the petition denying all the allegations. As against that he imputed infidelity to the petitioner and contended that she herself has deserted him. Further, he filed counter claim for restitution of conjugal rights. He denied the claim for alimony on the ground that wife herself is employed and earning Rs.20,000/- per month and he is working as a mean labour and suffering health setback.

6. Before the trial Court on behalf of the petitioner PWs 1 to 5 are examined and Exs.P.1 to P.35 are marked. On behalf of the respondent, RWs 1 to 5 are examined and Ex.R.1 to R.18 are marked. After hearing the parties, the trial Court allowed the petition holding that all the grounds urged by the petitioner are proved. Further, the trial Court granted permanent alimony of Rs.7,50,000/- and dismissed the counter claim of the respondent for restitution of conjugal rights.

7. Though the appeal is filed challenging the entire judgment and decree, during hearing the counsel for the appellant restricted the claim in the appeal memo only to the extent of grant of alimony. Having regard to that, the only question that arises for the consideration of this Court is, "Whether the order of the trial Court granting alimony of Rs.7,50,000/- suffers any infirmity warranting the interference of this Court?"

8. While granting the decree for dissolution of marriage, Section 37 of the Indian Divorce Act empowers the District Court to grant alimony to the wife in a gross sum or in an annual sum. While granting such alimony, the Court is required to take into consideration the fortune of the wife, the ability of the husband and conduct of the parties to arrive at a reasonable sum of alimony.

9. The petitioner claimed that though the respondent was working all along, he did not take care of herself and her daughter and he was spending all his income for boozing and he was not interested to work regularly. She further claims that she worked in a private firm for livelihood and off late she gave up that employment due to her ill health therefore, she needs maintenance for herself and her daughter. She

contended that her brother purchased a house at Konaje in the name of the respondent and he is deriving rental income from the said house.

10. On the other hand, the respondent contended that he is working as a labour and the petitioner herself is working with Supreme Bajaj and earning salary of Rs.20,000/- per month therefore, she is not entitled for alimony.

11. Learned counsel for the respondent vehemently argued that the petitioner herself contends that the respondent was a lazy person, wayward and spent all his money on alcohol and therefore, having regard that the trial Court has committed error in awarding alimony of Rs.7,50,000/-. He further argued that the respondent is suffering from several ailments and therefore, the order of alimony is acting oppressively against him.

12. So far as the financial standing of the parties, though the petitioner alleged that the respondent is a wayward and spend thrift but there is no dispute that the petitioner has not inherited any property from her parents or from any other source. Though she has admitted that she was working in Supreme Bajaj, she contended that she has resigned the said post in September '13 due to her ill health.

13. As on the date of her evidence, she was 45 years old and presently, she is about 48 years old. To substantiate her contention that she has resigned her job, she examined PW 5 - Yogesh - the Deputy Sales Manager of Supreme Bajaj. Ex.P.34 is the certificate issued by the manager of the said Company stating that she worked as Executive Accounts from 1.10.2010 to 1.10.2012 and she has not worked since 30.09.2012. PW5 is an independent witness and nothing worth is elicited in his cross examination to impeach his evidence or the document - Ex.P.34.

14. At one breath, the respondent states that he was only a plumbing labour and his income was far low as compared to the income of the petitioner. At the next breath, when she says that the house property in Konaje was acquired out of the contribution of her brother, the respondent asserts that he has acquired that property out of his own earnings. If that evidence of RW1 is to be accepted, then his contention that he is penniless cannot be accepted. The respondent cannot be permitted to blow hot and cold together.

15. RW1 has admitted that he has let out one portion of the said property, which is yielding rent. Further, RW1 in his cross examination at page 25 admits that he purchased 5 cents of Government land at Konaje from one Manujunath under a sale deed - the certified copy of which is at Ex.P.20.

    Ex.P.20 shows that the said site is purchased for Rs.40,000/- on 01.03.2000. In his cross examination at page 29, RW1 admits that he is working as a painting labourer. At page 32 of his cross examination, he states that he does not know if the petitioner has left her job with Supreme Bajaj with effect from 31.10.2012. But he does not deny that suggestion.

16. RW1 in his cross examination at page 26 states that his wife is always telling truth before him. In the light of such clear admission, there is no reason to disbelieve the evidence of PW1 that she has resigned the job due to her health condition and she has no income of her own. According to RW1 himself, his daughter requires Rs.5000/- per month for educational expenses. Therefore, it is clear that the petitioner is presently unemployed and she has the burden of maintaining herself and her daughter. This is all about the financial status of the parties.

17. So far as the conduct of the parties for consideration in granting alimony, the trial Court has recorded the finding that the respondent is guilty of desertion, cruelty, rape, sodomy and bestiality. Since the respondent restricted his appeal only to the relief of alimony, those findings still operate against him. Apart from that, the respondent imputed infedility to the petitioner and produced Ex.R.4 - an abnoxious email contending that that is the screen shot of the chatting between the petitioner and one Melwynmonteiro. Though he did that, he himself admitted in his cross examination at page 26 in unequivocal terms as follows:

"According to me my wife is not at all having any affair with any one. According to me till this day my wife is loyal and having very good character. According to me, my wife is obedient to me. My wife is always telling truth before me. According to me between myself and my wife, no quarrel took place at any point of time. According to me as my wife bears good character and obedient that is the reason it is my wish that she should come and join with me".

18. In the light of such clear admission, the allegations of the respondent that wife is living in adultery is totally malicious and uncharitable. The respondent did not even take pain of proving Ex.R.4. According to RW.1's deposition at page 22 paragraph 4 the said email was handed over to one Mani Mascarenhas. The said Manie Mascarenhas is not examined. A searching examination of the said email shows that it was generated on the account of one Manie Mascarenhas<itsmanie@gmailcom. Therefore, it is clear that the said email is created on the email account of Mani Mascarenhas. This conduct of the respondent is highly contemptuous and offensive against a lady too who is aged around 45 years and who lived with him in the matrimonial relationship for about 23 years.

19. So far as the fortune of the petitioner is concerned, the respondent has not placed any material on record to show that she owns any property. The evidence on record shows that she herself was more qualified than the respondent and on her marriage with this person, the only fortune she acquired is the misfortune of humiliation, cruelty and baseless and uncharitable allegations.

20. So far as the ground of ill health of the respondent, the records produced by him at Ex.R.7 show that the alleged ailment was a renal calculi in March 2012 and surgery for hernia during the same month. There is nothing to show that the said ailments have caused any total functional disability to the respondent.

21. The respondent has a house to live but, the petitioner and her daughter, do not have their own shelter to live. Taking into consideration all these aspects, the trial Court has awarded alimony of Rs.7,50,000/-. Therefore, the order of alimony is based on the sound appreciation of law and evidence and does not call for any interference by this Court. Hence, the appeal fails and dismissed accordingly. No order as to costs.

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# MR CHANDRASHEKAR R SHET VERSUS MRS CHANDRAKALA C SHET @ KAVERI

**Karnataka High Court**

**Bench : Hon'ble Mr. Justice H.G. Ramesh**

*Mr Chandrashekar R Shet*
*Versus*
*Mrs Chandrakala C Shet @ Kaveri*

**RPFC.NO.144/2012**

**Decided on 14 June, 2013**

- **By the impugned judgment, the Family Court has awarded a maintenance of Rs.5,000/- to the respondent-wife.**
- **Petitioner urged three contentions, namely, that the petitioner had paid a permanent alimony of Rs.60,000/- and had returned some jewellery at the time of divorce and therefore, the respondent is not entitled for any maintenance**
- **From the evidence of the respondent it is very clear that he has got sufficient money and income. In this case there is no clear evidence as to what is the income of the respondent. In the absence of clear picture about the economic condition of the respondent, the court has to do some guess work and to take the judicial notice of the cost of living and prices of essential commodities. Keeping in mind all these aspects and also position, status and income of the respondent in my considred view, the petitioner is entitled for maintenance of RPFC.NO.144/2012 Rs.5,000/- per month from respondent from the date of this petition throughout her life. In my opinion, the respondent will not be put to any hardship if he is ordered to pay the maintenance allowance as stated above**

**ORDER**

**Hon'ble Mr. Justice H.G. Ramesh,(Oral):**

This Revision Petition by the husband is directed against the Judgment dated 29-8-2012 passed by the Family Court, Mangalore in Crl.M.C.No.202/2011. By the impugned judgment, the Family Court has awarded a maintenance of Rs.5,000/- to the respondent-wife.

2. I have heard the learned counsel appearing for the petitioner and perused the impugned judgment.

3. Learned counsel appearing for the petitioner urged three contentions, namely, that the petitioner had paid a permanent alimony of Rs.60,000/- and had returned some jewellery at the time of divorce and therefore, the respondent is not entitled for any maintenance. Nextly, RPFC.NO.144/2012 as the respondent is a divorcee, she is not entitled for any maintenance. Thirdly, he contended that the maintenance awarded is excessive and hence it requires to be appropriately reduced. The first two contentions are considered by the Family Court at paras 20 & 21 which read as under:-

> "20. Even if it is assumed that the respondent has paid Rs.60,000/- to the petitioner towards permanent alimony, it is negligible amount and the petitioner has no means to maintain herself and she is more than 55 years old, the respondent is liable to pay maintenance. In the decision reported in 1995 (3) Crimes 558, (Ramasami vs. Rukmani and another) the Hon'ble Madras High Court

has held that an agreement executed between the wife and husband accepting a lumpsum amount towards future maintenance must be equitable and to serve the purpose for which it was executed. The maintenance of Rs.60,000/- agreed to be paid to the wife at the time of the decree of RPFC.NO.144/2012 divorce by mutual consent and subsequent payment of the said amount by the respondent-husband to the petitioner-wife in the year 1990 may not be sufficient for her maintenance even for a few years, therefore, the wife is entitled to invoke Section 125 of Cr.P.C. The lumpsum payment by the husband to his wife towards the maintenance of herself and her child cannot be illusory but to meet the real needs of the wife towards her maintenance. It is needless to say that the paltry sum of Rs.60,000/- will not be sufficient for her till her life time when especially she happens to be a young woman in the late twenties.

21. The Hon'ble Supreme Court in the decision reported in 1995(3) Crimes 524 (Smt.Vanamala v. H.M.Ranganatha Bhatta) has held that a wife who obtains a divorce by mutual consent and has not remarried cannot be denied maintenance by virtue of Section 125 (4) of Cr.P.C. The expression living separately by mutual consent' in Section RPFC.NO.144/2012 125(4) Cr.P.C. does not cover cases of those living separately due to divorce. Looked from any angle the petitioner is entitled to claim maintenance from the respondent."

(Underlining supplied) I find no legal infirmity in the reasoning of the Family Court in rejecting the first two contentions. The learned counsel relied on a Judgment of this Court in Malayaiah vs. G.S.Vasantha Lakshmi And Others (1997 Crl..Lj 163) which is of no assistance to him as the question raised is answered against the petitioner by the Supreme court in Smt. Vanamala referred to by the Family Court. Regarding the last contention that the maintenance awarded is excessive, it is relevant to refer to para-25 of the impugned judgment:

"25. The respondent (RW-1) in his evidence has deposed that now he cannot earn much from driver work. Except this evidence he has not stated anything about his avocation and income. The respondent RPFC.NO.144/2012 (RW-1) in his cross-examination has clearly admitted that he worked in Kuwait for about 20 years as a car driver and that he returned from Kuwait permanently to India in the year 2006 and that now he is having Tata Sumo Vehicle and that he is running it for hire. He has further admitted that the has received a sum of rupees 20 lakhs from his mother's property i.e. from the sale of his mother's property. The respondent ought to have placed records to show what is his income.

26. From the evidence of the respondent it is very clear that he has got sufficient money and income. In this case there is no clear evidence as to what is the income of the respondent. In the absence of clear picture about the economic condition of the respondent, the court has to do some guess work and to take the judicial notice of the cost of living and prices of essential commodities. Keeping in mind all these aspects and also position, status and income of the respondent in my considred view, the petitioner is entitled for maintenance of RPFC.NO.144/2012 Rs.5,000/- per month from respondent from the date of this petition throughout her life. In my opinion, the respondent will not be put to any hardship if he is ordered to pay the maintenance allowance as stated above. Hence, Point No.3 is answered accordingly."

(Underlining supplied) As could be seen from the above, the petitioner in his cross-examination has admitted that he was in Kuwait for about 20 years as a car driver and presently he is having a Tata Sumo vehicle and is running it for hire.

Further he had received Rs.20,00,000/- from the sale of his mother's property. On the facts of the case, the maintenance awarded at Rs.5,000/- per month cannot be said to be excessive to warrant any interference. The Petition is devoid of merit and is accordingly dismissed.

Revision petition dismissed.

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# DIVYA RAMESH VERSUS N.S.KIRAN/SHESHADRI K NITTUR

**Karnataka High Court**

*Divya Ramesh*
*Versus*
*N.S.Kiran/Sheshadri K Nittur*

**Bench : Hon'ble Mr. Justice S. Abdul Nazeer and Hon'ble Mrs Justice K.S. Mudagal**

**M.F.A No.3933/2012 (FC)**

**Decided on 14 February, 2017**

- **respondent's own evidence shows that he was aware of the departure of his wife with child to Bangalore and still he filed a complaint alleging that his wife had abducted the child. It goes to show that even after the knowledge of the filing of the present petition, he filed a divorce petition which is at Ex.P.1 before the New Jersey Court alleging that the wife had abducted the child and left the country. Ex.P.1 shows that he has made a false declaration to the effect that the matter in controversy is not the subject of any pending matter in any Court or of any pending arbitration proceeding though he was aware that the pendency of present petition.**
- **Facts, there is no reason to disbelieve the case of the petitioner that when she was alone with her tender aged daughter without any support in an alien country, the respondent who was supposed to be the only supporter for them to reap the benefits of a divorce at a cheaper cost in a foreign country, subjected her to financial distress and helplessness. That goes to show that he tried to held her captive to achieve such divorce. The above said facts and circumstances go to show that the petitioner's apprehension that continuing with the respondent in the matrimonial home was not safe to her is reasonable one.**
- **The respondent himself claims that he has filed a child abduction complaint against the petitioner thereby putting her to the threat of being arrested if she lands in America. All the above facts go to show that the respondent to bring her to his terms for divorce in New Jersey Court which confers him financial advantage deprived her of her sustenance by canceling her add-on card and not providing the maintenance for herself and her child in the foreign country.**
- **Having regard to the up-bringing, level of sensitivity, educational, family and cultural background,financial position and social status of the petitioner, such conduct amounts to cruelty. That cannot be called as mere abusing, shouting or nagging or a normal wear and tear of a marital life. When he tried to snatch means of sustenance of the petitioner, that amounts to depriving her of her right to life which amounts to violation of human rights. Therefore, this Court finds that the approach of the trial Court in appreciating the evidence with reference to Section 13(1)(ia) of the Act is incorrect.**

## JUDGMENT

By the impugned judgment and decree, the trial Court has dismissed the petition of the appellant/petitioner under Section 13(1)(ia) of the Hindu Marriage Act (hereinafter referred to as the 'Act' for short) and partly allowed the application of the petitioner for alimony awarding Rs.10.00 lakhs as lumpsum maintenance including educational expenses to her child Tara.K.Nittur.

2. The appellant filed M.C.729/09 against the respondent for decree of dissolution of their marriage on the ground of cruelty and she claimed permanent alimony of Rs.50.00 lakhs and a two Bedroom residential accommodation in Basavanagudi, Bangalore for herself and her daughter Tara K Nittur.

3. For the purpose of convenience, the parties will be referred to hereafter with their ranks before the trial Court.

4. Some of the undisputed facts of this case are as follows:

   That the marriage of the petitioner with the respondent was solemnized on 14.11.2003 at Sundar Mahal Marriage Hall in Girinagar, Bangalore. The parties are governed by Hindu Law. Out of the said wedlock, a girl by name Tara is born on 20.12.2007. Prior to the marriage, the petitioner was working in Life Insurance Corporation of India as a Higher Grade Assistant and she was a National Level Badminton Player. She was conferred with Ekalaya Sports Award by the Government of Karnataka. At the time of the marriage, the respondent was working at New Jersey, USA as software engineer and continued to work so. After the marriage, the petitioner gave up her employment and joined the respondent at New Jersey on 30.12.2003. At that time, she was still pursuing her last year LLB course. She came back to India for attending her exams and again joined the respondent at New Jersey. There were disturbances in the marriage. Therefore, during their visit to India, the parties underwent counseling with Dr.Ahalya Raghuram at NIMHANS, Bangalore. During her stay in USA, the petitioner pursued her Para Legal Studies and for some time worked as Legal Assistant. Differences amongst the couple reached peak and ultimately, the petitioner returned to India on 24.02.2009.

5. Thereafter, petitioner filed M.C.No.729/09 before the trial Court for dissolution of marriage. She also filed applications under Sections 25 and 26 of the Hindu Marriage Act claiming permanent alimony of Rs.50.00 lakhs and a two bed room residential accommodation in Basavanagudi for stay of herself and her daughter and Rs.50.00 lakhs for the maintenance of her child. The trial Court dismissed the said petition and awarded only Rs.10.00 lakhs towards the maintenance of the daughter.

6. Then the petitioner took up the matter before this Court in the above appeal. This Court by Judgment dated 12.11.2013 allowed the appeal holding that the trial Court has not considered each and every act of cruelty alleged independently and even the maintenance awarded is inadequate and remanded the matter for fresh consideration.

7. The petitioner challenged the said judgment before the Hon'ble Apex Court in C.A.No.14164/15.

   The Hon'ble Apex Court vide judgment dated 18.10.2016 set-aside the order of this Court and remanded the matter to this Court to decide the entitlement of the appellant for divorce under Section 13(1)(ia) of the Act on merits and the question of alimony, if divorce is to be granted. The Hon'ble Apex Court further held that this Court will decide the quantum of maintenance that would be appropriate for the daughter.

8. The petitioner in her petition, alleged the following acts of cruelty:

   (1) Soon after the marriage, the respondent and his parents abused her and her parents expressing their dissatisfaction that the performance of the marriage was not befitting their stature and therefore, the respondent is entitled to treat the petitioner as maid servant at home;

   (2) The respondent was abusing her and her parents in foul language;

   (3) For all minor things, the respondent was pressurizing her to apologize and pressurized her to resign her employment;

   (4) During their stay in America the respondent used to be always angry at her for no reasons;

   (5) He was discriminating between his parents and her parents and relatives in showing the courtesies;

(6) The respondent was not allowed to visit her parents house and whenever she had to visit, that would have been only after an issue;

(7) The respondent did not care for the maintenance of herself and her child;

(8) He was not allowing her to draw money from her Savings Bank Account;

(9) He forced her to issue authorization letter in favour of his father for operating her bank account;

(10) During her pregnancy, he did not speak to her and he was not accompanying her to consult the Doctor;

(11) He did not arrange for the visit of her parents to New Jersey for her prenatal and postnatal care and only after the intervention of his sister, he arranged the VISA for them but, still did not arrange for their air fare;

(12) He used to come home late and was not attending to baby's needs etc;

(13) He was not talking to the petitioner's parents during their stay of 5 months in New Jersey;

(14) He did not arrange for the baby's care and did not share the baby's day care expenses;

(15) He cancelled the petitioner's add-on-card;

(16) She developed High Blood Pressure during pregnancy due to the ill treatment of the respondent and ultimately, not being able to withstand the cruelty, when she sought to return to India, he imposed a condition that only on she facilitating him for a decree for divorce by mutual consent in New Jersey Court, she will be allowed to go to India;

(17) Despite she intimating him of her departure from New Jersey to India, he filed a police complaint in USA alleging that she has abducted the child which resulted in Interpol people interrupting her journey in Frankfurt Airport; (15) To defame her, he spread rumors among friends and relatives that she is in search by the Interpol as child abductor and will be sent to jail soon.

9. The respondent contested the petition denying all the allegations and as against that he contended that the petitioner was arrogant towards his parents and did not discharge the duty of a wife and mother and he took all care of her. Before the trial Court, the petitioner got herself examined as PW1 and got marked Ex.P.1 to P.12. The respondent got examined himself as RW1 and got marked Ex.R.1 to R.39.

10. The trial Court after hearing both the parties, dismissed the petition for divorce holding that

(a) except the oral evidence of the petitioner, she did not produce any material to show that she developed High Blood Pressure due to the alleged harassment of the respondent and she has not filed any police complaint against the respondent and his parents in respect of alleged demand for gifts and humiliation;

(b) that the petitioner has not accounted each single incident of cruelty specifically and non-payment of day care expenses for the child does not amount to cruelty as the petitioner was also employed;

(c) that if the respondent intended to abuse her economically, he would not have paid air fare for the petitioner's travel for the purpose of her law examinations and the fees for her Para Legal course training and he would not have allowed her to work;

(d) that the husband has already obtained a decree in the New Jersey Court and petitioner admits the service of notice in that case and does not claim that the said decree is obtained by fraud.

Therefore, in view of that decree, she is again not entitled for a decree of divorce.

11. The petitioner herself argued the matter before this Court reiterating the grounds of appeal. In support of her arguments, she relied upon the following judgments:

(1) Y.NARASIMHA RAO & ORS. Vs Y.VENKATA LAKSHMI & ANR. ((1991)3 SCC 451)(1991(2) SCR 821)

(2) V.BHAGAT vs MRS. D.BHAGAT (AIR 1994 SC 710)

Regarding grant of alimony, she relied upon the following judgments:

(1) SUNITHA KACHWAHA & ORS. VS ANIL KACHWAHA (AIR 2015 SC 554)

(2) VINNY PARMVIR PARMAR vs PARMVIR PARMAR (AIR 2011 SCC 2748)

12. The respondents counsel supporting the findings of the trial Court argued that there is already a decree of the foreign Court, therefore, the trial Court is justified in rejecting the petition. He further argued that the conduct of the petitioner shows that the fight was always over financial matters and that shows that the petitioner always wanted only money instead of joining the husband. He further argued that the cruelty alleged are only the normal wear and tear of the family life and the petitioner failed to bring her case within the purview of Section 13(1)(ia) of the Act.

13. In support of his contention, he relied upon the following judgments:

(1) GURBUX SINGH vs HARMINDER KAUR ((2010)14 SCC 301)

(2) K.SRINIVAS RAO vs D A DEEPA ((2013)5 SCC 226)

(3) SUMAN KAPUR vs SUDHIR KAPUR ((2009)1 SCC 422)

(5) RAMCHANDER vs ANANTA ((2015)11 SCC 539)

(5) SAMAR GHOSH vs JAYA GHOSH ((2007)4 SCC 511)

14. To find out whether there is cruelty and whether the appreciation of the evidence by the trial Court is sustainable or not, the scope and ambit of the cruelty under Section 13(1)(ia) of the Act has to be considered. The Hon'ble Supreme Court in the Judgment in SAMAR GHOSH's case (supra) has held that it is impossible to give the definition of mental cruelty having regard to the complex nature of the human behaviour and it depends upon the up-bringing level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system. It is further held that there cannot be any straight jacket formula or fixed parameters for determining mental cruelty in matrimonial matters and that has to be seen in the context of the time and the aforesaid other relevant factors and peculiar facts and circumstances of each case. However, the Hon'ble Apex Court listed the following as some instances of cruelty as illustrations and though not exhaustive as under:

(i) On consideration of the complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make it possible for the parties to live with each other, could come within the broad parameters of mental cruelty.

(ii) On a comprehensive appraisal of the entire matrimonial life of the parties, if 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; but 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 the other for a long time, may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behavior of one spouse actually affecting the physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness, causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness which cause unhappiness and dissatisfaction and emotional upset, but may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day-to-day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behavior of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly, if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such as 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 cased 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 situation, it may lead to mental cruelty.

15. Though the parties have relied upon several decisions, in the opinion of this Court, the above Judgment had laid the guidelines very elaborately on the point of 'cruelty'. As already pointed out, it is an undisputed fact that the petitioner at an early age was a sports celebrity and was employed. Her first allegation is that she was forced to resign and the respondent and her father-in-law took over her financial affairs and was forced to execute an authorization letter in favour of the father of the respondent to operate her account.

16. RW1 in his cross examination at page 11 paragraph 2 admits that the petitioner was a 3rd rank National Badminton Champion and the holder of Ekalaya award. He admits that she traveled to several countries representing India in the Badminton matches. This shows her sound social, economical and professional family background. He admits that the petitioner had nobody except him in New Jersey when she joined him there. At page 10 paragraph 2 of his cross-examination he states that there was no mutual trust between him and the petitioner in the financial matters. Therefore, they were subjected to counseling.

17. At page 20 paragraph 3 of his cross examination, the respondent admits that after marriage the petitioner executed General Power of Attorney in favour of his father before she left for America to look after her bank affairs. He admits that his father has collected the proceeds of her LIC policy. He admits that he had not paid the premium of those policies. Though, it is contended that the father of the respondent drew the amount from the accounts of the petitioner and collected her policy amount to acquire a BDA site

under sports quota in the name of the petitioner, admittedly, no site is acquired in her name in the sports quota. The respondent has not produced any material to show that the amount so collected by the father of the respondent is refunded to the petitioner.

18. Though it is contended that the petitioner herself executed the power of attorney/authorization letter to enable the father-in-law to apply for the site etc., the respondent does not examine his father before the Court. Nothing worthwhile is elicited in the cross examination of the petitioner to show that she has voluntarily executed those documents. If the execution of the authority letter was for the purpose of attending the transactions for acquiring the BDA site or for any other convenience, she could have as well executed such authority letter in favour of her parents. It is not the case of the respondent that he or his father asked the petitioner to execute such authorization letter/power of attorney in favour of her father.

19. When suggested in his cross examination, that his father compelled her to sign the SBI mandate form, RW1 pleads ignorance. It is hard to believe that he does not know what transpired between his wife and his father. He does not choose to examine his father though all along it is his case that that the petitioner was arrogant, disrespectful and indifferent towards his parents.

20. Without appreciating these facts and the circumstances, the trial Court says that the petitioner's case of cruelty in connection with demand for money has to be disbelieved because she has not filed the complaint against the husband and the parents-in-law which is erroneous.

21. It is the case of the petitioner that to make her helpless in an alien country, to pressurize her for a consent divorce as it would work out cheaper to the respondent to get such a remedy, he cancelled the add- on card to deprive her of her basic necessities. RW1 admits that after a reconciliation meeting in his sister's house, he agreed to give the petitioner 400 dollars per month for her expenses. That shows, he had stopped giving her any money.

22. RW1 at page 15 of his cross examination states that he cancelled the add-on card because he lost his card. He had not adduced any evidence to show that he had lost his credit card therefore, he cancelled the add-on card. He admits that the petitioner felt bad when her credit card was cancelled.

    If at all, he had lost his credit card, he should have acquired another credit card and on acquiring such credit card, he should have secured an add-on card for the petitioner. Contrary to that, the respondent at his cross examination at page 15 admits that he did not make any attempt to renew the add-on card of the petitioner or secure a new credit card for her.

23. Ex.P.4 is admittedly the mail sent by the respondent to the petitioner. In Ex.P.4, his statement regarding cancellation of the add-on card is as follows:

    "After all these incidents I came to the realization of the criminal mentality of you and your father which is why I cancelled the credit card. But now I think that the decision I made was the correct decision".

    The above statement clearly shows that the respondent has deliberately cancelled the add-on card of the petitioner and now comes up with a false plea before this Court that he had lost his credit card, therefore the add-on card had to be cancelled. That shows that the respondent is capable of taking false pleas knowing them to be false and deposes to the falsehood before the Court though he is an engineer himself and aware of the consequence of giving false evidence. If he can do that with the Court, one can imagine how would be his conduct with a helpless woman with a child in an alien country to bring her to his terms.

24. His other contention is that the wife was crazy and always shopping and merry making. Therefore, leaving the child at a very tender age, she joined the employment.

25. Firstly, the above discussed evidence shows that respondent deprived the wife and daughter of required support. Secondly, it is the case of the petitioner that the respondent thought of acquiring a house in Amercia and therefore, planned that both of them could work and earn money. That is why, he put her

for the paralegal course study. The respondent in his cross-examination at page 11-12 admits to the said fact in the following manner:

26. The respondent in his cross-examination at page 13 admits that the petitioner was attending to her employment leaving the child in the nearest day care centre and she was remitting the fee of the said day care centre. He even goes to the extent of saying that he does not know how much amount she was paying. He admits that he had not made any other arrangement to take care of the child during the absence of the petitioner to attend to her work. He himself admits that for her job in Nelson, Fromer & Crocco Law Firm, the petitioner was getting only 30 dollars per day.

27. RW1 admits that after she coming over to US till she joined the Jakie Biddle Attorney Company, she was not having any income of her own and she was depending upon him. He admits that to patch up the differences, there was a meeting in the house of his sister and there it was decided to bear 400 dollars per month for her personal expenses. RW1 in his cross examination at page 30 admits that after the marriage, while flying to USA, he had not given her any money. When it was suggested to him that her monthly salary was only Rs.8000/- and after defraying her personal expenses, she was getting only Rs.2000/- as surplus money, he pleads his ignorance for that.

28. RW1 in his cross examination says that there was a breakdown of marriage between him and the petitioner even before the petitioner returned to India. He claims that he intended to seek the dissolution of the marriage in the American Courts and he had no intention to get the dissolution of marriage by mutual consent. He clearly says that by that time he had already consulted one American lawyer and one Indian lawyer and had taken their consent. He admits that his Advocates had advised him that it is easy to get the divorce by mutual consent and if he alone files the petition for divorce and if the wife resists, then he has to spend lot of money. He admits that since their marriage was only 5 years old, if the divorce takes place as per the American law, at the most he had to pay only 2½ years maintenance. Though he denies that for that benefit he was eager to take the divorce in American Court. This conduct of the husband amply shows that he maneuvered to take an exparte divorce in American Court.

29. RW1 in his evidence has clearly admitted that after the petitioner filing the present petition in India, she informed him about the same over the mail and despite that, he filed another petition before the Court in New Jersey for dissolution. Ex.P.3 is admittedly the mail sent by the respondent on 04.02.2009 in which the respondent has stated that he has consulted the lawyers and as per the opinion of the New Jersey lawyer, taking divorce by mutual consent in New Jersey takes 3-4 months time and since 5 years time is short-lived marriage he has to give 2 years or maximum 2½ years alimony and in that connection, he consulted his friend Deepak also. It is the contention of the petitioner that the said Deepak was also a wife tormentor and he was booked in a criminal case for physical violence against his wife. RW1 in his cross examination has admitted that after the said Deepak was released from the police custody, the respondent brought him to his house and gave him shelter in his house.

30. The respondent's own evidence shows that he was aware of the departure of his wife with child to Bangalore and still he filed a complaint alleging that his wife had abducted the child. It goes to show that even after the knowledge of the filing of the present petition, he filed a divorce petition which is at Ex.P.1 before the New Jersey Court alleging that the wife had abducted the child and left the country. Ex.P.1 shows that he has made a false declaration to the effect that the matter in controversy is not the subject of any pending matter in any Court or of any pending arbitration proceeding though he was aware that the pendency of present petition.

31. Having regard to all these facts, there is no reason to disbelieve the case of the petitioner that when she was alone with her tender aged daughter without any support in an alien country, the respondent who was supposed to be the only supporter for them to reap the benefits of a divorce at a cheaper cost in a foreign country, subjected her to financial distress and helplessness. That goes to show that he tried to held her captive to achieve such divorce. The above said facts and circumstances go to show that the

petitioner's apprehension that continuing with the respondent in the matrimonial home was not safe to her is reasonable one.

32. It is also to be noted that in Ex.P.1 the divorce petition filed before the New Jersey Court wherein the respondent has declared that there has been no previous proceeding between him and the respondent respecting the marriage or its dissolution, which is again a false declaration. He has boldly stated in his declaration that he is aware that if any of the statements made are willfully false, he is subject to punishment. Ex.P.2 - the mail sent by the petitioner to the respondent on 26.03.2009 which is admitted by RW1 shows that the respondent was aware of the pendency of the above said matrimonial proceedings before the Family Court at Bangalore. Despite that, on 4.8.2009 as found in Ex.P.1, has made such false declaration.

33. Ex.R.39 is the judgment of divorce passed by the New Jersey Court on 21.8.2010 in favour of the respondent. Clause 3 of the said judgment reads as follows:

"That the order to Show Cause under Docket No.FA-13-1285-09 on April 8, 2009 remains in effect. Once the Courts in India have ruled on the Defendant's request for a divorce in India, the plaintiff may return to this Court for further relief, if appropriate".

That itself goes to show that the judgment under Ex.R.39 is subject to the result of the Judgment in this case. Still the respondent claims that since already there is a divorce of the foreign Court, the petition is not maintainable and trial Court accepts the said contention.

34. A reading of Section 13 CPC shows that a foreign Judgment shall be conclusive subject to the exceptions mentioned hereunder:

(a) .....

(b) .....

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of (India) in cases in which such law in applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice.

In this case there is no dispute that when the notice of the divorce petition filed by the respondent in New Jersey Court the petitioner sent a communication to the said Court saying that she is not going to participate in those proceedings as she has filed the above petition in this case. She did not contest the said matter. The Hon'ble Apex Court in Y.NARASIMHA RAO & ORS. Vs Y.VENKATA LAKSHMI & ORS. ((1991)3 SCC 451) has laid down the following principles to recognize the foreign matrimonial judgment in this country as follows:

"Para 20: From the aforesaid discussion, the following rule can be deduced for recognisizing a foreign matrimonial judgment in this Country. The Jursidiction assumed by the Foreign Court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married.

The exceptions to this rule may be as follows:

(i) where the matrimonial action is filed in the forum where the respondent is domicile or habitually and permanently resides and the relief is granted on a ground available in matrimonial law under which the parties are married;

(ii) where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests the claim which is based on a ground available under the matrimonial law under which the parties are married;

(iii) where the respondent consents to the grant of relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties".

As discussed above, the petitioner has not contested the divorce petition of the respondent in the foreign Court and he has obtained the said divorce decree by suppressing the fact of pendency of the wife's petition for divorce and giving a false declaration that no such case is pending in any Court.

Therefore, the said Judgment cannot be recognized. Therefore, the trial Court committed error in dismissing the petition on the ground that the husband has already obtained a divorce decree from the New Jersey Court.

35. The respondent himself claims that he has filed a child abduction complaint against the petitioner thereby putting her to the threat of being arrested if she lands in America. All the above facts go to show that the respondent to bring her to his terms for divorce in New Jersey Court which confers him financial advantage deprived her of her sustenance by canceling her add-on card and not providing the maintenance for herself and her child in the foreign country. Further, even on petitioner managing to return to India, implicated her in a criminal case and exparte divorce case. Once he divorces her, her dependent VISA loses validity and she becomes unlawful immigrant which would have entailed serving consequences.

36. The respondent in his written statement at para 10 gives the list of amount spent on the gifts given to the wife and the child, amount spent on their honeymoon etc. In his affidavit at paragraph 24 filed in lieu of his chief-examination, he says that he has already invested over 17 lakhs towards the petitioner and gives the break-up of the said investment which includes again the sarees purchased for the wife, honeymoon trip and gifts made, jewelleries purchased for his wife and the child, when treating the wife as an investment, that itself is in a very bad taste let alone other contents of the affidavit and that amounts to cruelty.

37. Having regard to the up-bringing, level of sensitivity, educational, family and cultural background, financial position and social status of the petitioner, such conduct amounts to cruelty. That cannot be called as mere abusing, shouting or nagging or a normal wear and tear of a marital life. When he tried to snatch means of sustenance of the petitioner, that amounts to depriving her of her right to life which amounts to violation of human rights. Therefore, this Court finds that the approach of the trial Court in appreciating the evidence with reference to Section 13(1)(ia) of the Act is incorrect.

38. Insofar as the alimony is concerned, indisputably the petitioner and her daughter have no source of their own income. The Trial Court says that the petitioner is a law graduate and was employed, she is capable of earning, therefore rejects maintenance. Hon'ble Supreme Court in SUNITA KACHWAHA & ORS. vs ANIL KACHWAHA (2015(3) SCC Criminal 589) in a similar case has held as follows:

"Merely because the appellant/wife is a qualified post graduate, it would not be sufficient to hold that she is in a position to maintain herself. Merely because the wife was earning something, it would not be a ground to reject her claim for maintenance" (emphasis supplied).

39. Having regard to that, the said approach of the trial court in rejecting the alimony to the wife is totally unsustainable.

40. RW1 in his cross examination at page 16 paragraph 2 admits that his annual income in the year 2010 was USD 1,12,000/- which comes to Rs.76,16,000/-. Further, he admits in his own cross examination that he owns 50x80' BDA site in Vishveshwaraiah Layout. He admits that their house is renovated. He admits that the petitioner is suffering from High Blood Pressure.

41. Having regard to the aforesaid facts and judgment in SUNITA KACHWAHA's case he is supposed to give maintenance befitting his lifestyle or stature. At the time of giving evidence RW1 was 37 years of age. It is not his case that he is facing problems in his career.

42. In a similar question which was under consideration in VINNY PARMAVIR PARMAR vs PARMAVIR PARMAR (AIR 2011 SC 2748), the Hon'ble Supreme Court awarded monthly maintenance of Rs.40,000/- to the wife lifelong. In the alternate, the husband was directed to deposit Rs.40,00,000/- in the name of the wife as final settlement. In fact, in the said case the husband had remarried with a child and had parents also and had to look after all of them.

43. Having regard to these facts and the Judgment in VINNY PARMAVIR PARMAR's case referred to supra, rejection of alimony to the wife and the grant of alimony of Rs.10.00 lakhs in lumpsum to the daughter, is wholly unjust and unsustainable in law. The daughter has to be educated and married. Wife has no source of income of her own. Having regard to the aforesaid facts and circumstances and the Judgment in Vinni Parmvir Parmar's case, it is just and appropriate to award permanent alimony of Rs.50,00,000/- (Rupees Fifty Lakhs Only) to the petitioner and Rs.50,00,000/- (Rupees Fifty Lakhs Only) towards maintenance to her daughter Tara Nittur. Section 25 of Hindu Marriage Act speakes of alimony in terms of "such sum". Therefore, the claim of the petitioner in terms of a building for her accommodation cannot be considered.

44. In the result the appeal is partly allowed with costs. The Judgment and decree of the trial Court is hereby set-aside. The petition of the appellant under Section 13(1)(i)(a) of The Hindu Marriage Act is hereby allowed. The marriage of the appellant/petitioner and the respondent dated 14.11.2003 is hereby dissolved. The respondent is directed to pay permanent alimony @ Rs.50,00,000/- to the petitioner and maintenance of Rs.50,00,000/- to the daughter Tara Nittur. The said amount shall be deposited before this Court within six weeks from the date of this order failing which there shall be charge on the immovable properties of the respondent to secure the said amount.

    On depositing the amount as aforesaid the maintenance awarded to the child Tara Nittur, shall be kept in fixed deposit in any nationalized bank till she attains majority with liberty to the petitioner to draw the interest accrued on the said amount periodically.

Draw decree accordingly.

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# DR. GLADSTONE VERSUS GEETHA GLADSTONE

**Kerala High Court**

**Bench : Hon'ble Mr. Justice J.B Koshy and Hon'ble Mr. Justice K. Padmanabhan Nair**

*Dr. Gladstone*
*Versus*
*Geetha Gladstone*

**MFA. No. 578 of 1997**

**Decided on June 15, 2002**

- **Defendant on the file of the Family Court, Thiruvananthapuram filed this appeal challenging the judgment passed by the court below awarding an amount of Rs. 1,500/- to the first plaintiff and Rs. 2,756/- to minor second plaintiff per mensem as maintenance with effect from 14.8.1993.**
- **The appellant married the first respondent on 12.8.1982 as per the customary rites. The second respondent is their daughter.**
- **The appellant contended that the suit is not maintainable. The marriage and status of the respondents are admitted. It is admitted that the appellant and the first respondent lived together till 12.1.1992.**
- **It is true that apart from the provisions contained in Section 125 of the Code of Criminal Procedure there is no specific statutory provision which creates an obligation on a Nadar Christian to maintain his wife and child. In Indian Divorce Act there are provisions which enables the Court to award maintenance to the wife and children. But, those provisions can be invoked only in a suit filed for judicial separation or divorce. Every Indian citizen is bound to maintain his wife and children. That is a tradition of the society. The liability of a Christian to maintain his wife came up for consideration before the Travancore-Cochin High Court in Cheriya Varkery v. Ouseph Thresia (AIR 1955 Travancore-Cochin 255). The Court observed thus:—**

  **"In matters not governed by statute or custormary law, it is the principles of 'justice, equity and good conscience' that should apply, and it is supposed that those principles are to be found in the Common Law of England. Under that law the Obligation of the husband to maintain his wife is not a mere moral obligation but is a legal obligation which could be enforced in law although not by direct action by the wife. Therefore according to the personal law of the Christians in the Travancore-Cochin State, the husband has a legal obligation to maintain his wife. The wife is entitled to claim separate maintenance only if there is justifiable cause for her refusal to live with him. The question whether the wife has justifiable cause for refusing to live with her husband will depend upon the facts of each case. Desertion by the husband and habitual cruelty are recognised as justifiable causes"**

  **So, we are not in agreement with the contention raised by the counsel for the appellant that in the absence of a statutory provision when a Christian wife or child claims maintenance Court can award only mamimum of Rs. 500/- each to the wife and child per mensem. We hold that the Court has got a discretion to fix the quantum and should award a reasonable amount as maintenance to the wife and child who has no sufficient means to maintain themselves. While fixing the quantum, the Court shall take into account the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future; the financial**

**obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future; the standard of living enjoyed by the parties to the marriage and conduct of the parties; and any other matter which in the circumstances of the case the Court may considers it relevant.**

The Judgment of the Court was delivered by

**Hon'ble Mr. Justice K. Padmanabhan Nair :—**

Defendant in O.S 308 of 1995 on the file of the Family Court, Thiruvananthapuram filed this appeal challenging the judgment passed by the court below awarding an amount of Rs. 1,500/- to the first plaintiff and Rs. 2,756/- to minor second plaintiff per mensem as maintenance with effect from 14.8.1993

2. The appellant married the first respondent on 12.8.1982 as per the customary rites. The second respondent is their daughter. At the time of marriage, the appellant was practising as Physician in a private nursing home. In the year 1986 he was appointed as Assistant Surgeon, E.S.I Hospital, Chavara, Puthentura. From the year 1989 onwards, the plaintiffs and defendant started residing at their house at Kumarapuram near Medical College. The appellant got admission for Master of Surgery in Medical College, Thiruvananthapuram in 1992. According to the respondents, on 14.8.1993, the appellant defendant deserted them and started residing in the hostel attached to the Medical College and thereafter he is not maintaining them. It is also alleged that subsequently the appellant developed illicit intimacy with a staff nurse, by name "Chandrika", working in the Medical College and is now residing with her. It is admitted that the appellant deposited an amount of Rs. 2,34,000/- in the joint names of the appellant and first responded authorising the first respondent to withdraw the monthly interest amounting to Rs. 2,600/-. According to the first respondent, she was forced to withdrew the amount of Rs. 2,34,000/- deposited in the joint names of the appellant and first respondent to re-pay the bebts due from the appellant to her brother and sister. It is averred that the appellant is getting more than Rs. 40,000/- per mensem from different sources. The first respondent claimed Rs. 3,000/- as monthly maintenance for herself and Rs. 6,750/- to the minor second respondent. It is also alleged that since the appellant deserted the respondents on 14.8.1993, he is liable to pay maintenance from that date onwards. So, they had claimed an amount of Rs. 2,24,250/- as past maintenance and Rs. 3,000/- to the first respondent and Rs. 6,750/- to the second respondent as future maintenance.

3. The appellant contended that the suit is not maintainable. The marriage and status of the respondents are admitted. It is admitted that the appellant and the first respondent lived together till 12.1.1992 It was also contended that on 1.12.1992 the 1st respondent prevented the appellant from entering to the house. According to the appellant, the 1st respondent treated him with cruelty and drove him out of the matrimonial home. It was contended that because of the insistence of the first respondent the appellant sold away all his properties and deposited an amount of Rs. 2,34,000/- in National Service Scheme at Medical College Post Office in the joint account of both the appellant and first respondent and the first respondent was drawing an amount of Rs. 2,600/- per mensem as interest. It was contended that after the filing of the suit the first respondent had withdrawn the amount and she is in possession of the same. It was also contended that the appellant had deposited another sum of Rs. 1,00,000/- in the bank in the name of the first respondent on 23.12.1992 and that amount was also withdrawn by the first respondent. It was contended that when the appellant got admission for the Post Graduate Course he shifted the residence to the hostel for the convenience of study. It Was contended that during that time he used to visit the respondents. The averment that he is living with Chandrika is denied. The contention that he borrowed amounts from the brother and sister of the first respondent was denied. It was contended that the first respondent is getting income from various sources. The averment that he is getting more than Rs. 40,000/- per mensem is denied. The quantum of maintenance claimed is also denied.

4. The Familiy Court decreed the suit in part. The husband-defendant has filed this appeal challenging that part of the judgment awarding maintenance.

5. The learned counsel appearing for the appellant has contended that the parties are Nadar Christians and apart from the provisions contained in Section 125 of the code of Criminal Procedure, there is no statutory provision which creates an obligation on a Nadar Christian to pay maintenance to his wife and children. It is also contended that there is no customary law or practice which entitles the wife belonging to the abovesaid community to claim maintenance from her husband and hence the suit itself is not maintainable. It is contended that under Section 125 of the Code of Criminal Procedure, a person is liable to pay Rs. 500/- each to the wife and child and even if it is found that under the customary law also a person is liable to pay maintenance to wife and child, his liability is limited to pay that amount only which is necessary to meet the bare necessities and not the amounts claimed by the wife according to her whims and fancies.

6. Firstly we shall consider the contention of the appellant that a person belonging to Nadar Christian community has no obligation to maintain his wife and child except in accordance with the provisions contained in Section 125 of the Code of Criminal Procedure as there is no specific statutory provision which creates an obligation on the part of the husband. It is true that apart from the provisions contained in Section 125 of the Code of Criminal Procedure there is no specific statutory provision which creates an obligation on a Nadar Christian to maintain his wife and child. In Indian Divorce Act there are provisions which enables the Court to award maintenance to the wife and children. But, those provisions can be invoked only in a suit filed for judicial separation or divorce. Every Indian citizen is bound to maintain his wife and children. That is a tradition of the society. The liability of a Christian to maintain his wife came up for consideration before the Travancore-Cochin High Court in Cheriya Varkery v. Ouseph Thresia (AIR 1955 Travancore-Cochin 255). The Court observed thus:—

"In matters not governed by statute or custormary law, it is the principles of 'justice, equity and good conscience' that should apply, and it is supposed that those principles are to be found in the Common Law of England. Under that law the Obligation of the husband to maintain his wife is not a mere moral obligation but is a legal obligation which could be enforced in law although not by direct action by the wife. Therefore according to the personal law of the Christians in the Travancore-Cochin State, the husband has a legal obligation to maintain his wife. The wife is entitled to claim separate maintenance only if there is justifiable cause for her refusal to live with him. The question whether the wife has justifiable cause for refusing to live with her husband will depend upon the facts of each case. Desertion by the husband and habitual cruelty are recognised as justifiable causes"

7. A similar matter again came up for consideration before this Court in Scariah Varghese v. Marykutty (1991 (2) KLT 71) and a learned Single Judge of this Court following the principle laid down in Cheriya Varkey's case (supra) found that that a Christian father has ant obligation to maintain his children and wife eventhough there is no statutory provision. In Chacko v. Annamma (1993 (1) KLT 675) a Division Bench of this Court again considered the obligation of a Christian husband to maintain his wife and found that a Christian husband is liable to maintain his wife. It was held as follows:—

"We feel that we are not bound to hold that a Christain husband has no legal liability to maintain the wife. Criminal Law of the country and the personal law of Indians of other community make it plainly clear that the husband has got a liability to maintain the wife in certain circumstances. This obligation created by the criminal law is certainly applicable to a Christian husband also. The husband is liable to pay maintenance if conditions which would compel the wife to live separately"

8. A similar matter was again considered by another Division Bench of this Court in Joy v. Usha (I.L.R 1996 (2) Kerala 580). It was held as follows:—

"Maintenance for judicial purposes has its own pragmatics having relation to the need and necessity to make provisions for securing reasonable bioeconomic as well as biocultural requirements for persons such as shelter, food, garment and health. The need to provide reliefs of maintenance emanate from social ethics and personal economics and this need is sought for both on the moral and secular grounds.

Maintenance is a personal obligation and where there is estate, the rights in maintenance could be worked against the estate and there can be charge upon it".

9. We do not find any reason to differ from the consistent view taken by this court hitherto regarding the liability of a Christian to maintain his wife and children. So, there is no merit in the contention raised by the appellant that in view of absence of any statutory provision a suit claiming maintenance by a Christian lady and the chind against a Nadar Christian is not maintainable. So, we hold that the suit is maintainble.

10. Now we shall consider whether the respondents had established any justifiable cause for living separately from the appellant because it is a well accepted principle of law that the wife is entitled to claim separate maintenance only if there is justifiable cause for refusal to live with him. In Cheriya Varkey's case (supra), it was held that desertion by the husband and habitual cruelty are recognised as justifiable causes. The fact that the appellant and respondents are living separately is established in this case. According to the respondents, the appellant deserted them on 14.8.1993 and thereafter he has developed illicit intimacy with Chandrika, who is a Staff Nurse attached to the Medical College Hospital. The case of the appellant was that the first respondent wife treated him with cruelty and finally drove him out of the matrimonial home. So, the question to be considered is how far the respondents are justified in living separately.

11. The marriage between the appellant and first respondent was solemnised in the year 1982. At that time, the appellant was having private practise and he was running a private hospital. In the year 1986 he was apponted as Assistant Surgeon in the E.S.I Hospital, Chavara, Puthenthura. It is admitted by P.W 1 that from the year 1989 onwards they were living together in the house belonging to them at Kumarapuram near Medical College, Thiruvananthapuram. It is admitted by P.W 1 herself that after starting their residence at Kumarapuram, the life was smooth for some time and thereafter quarrels took place between herself and her husband. She had admitted:—

12. It is also admitted by her that the appellant got admission for Post Graduate course in the year 1992 and after one year, he started residing in the hostel attached to the Medical College stating that this is necessary for his studies. The respondents relied on Exhibit A1 to prove that the appellant deserted the matrimonial home on 14.8.1993 It is true that the appellant denied the hand writing and signature contained in Exhibit A1. But, it is seen that it was written on an O.P Tictet, a stationery paper of the Medical College Hospital, Thiruvananthapuram. Even though the appellant as D.W 1 had denied the handwriting in Exhibit A1 he had admitted that he left the matrimonial home. According to him if he continued to reside in that house, he would have died. At page 31 of the original deposition, the appellant as D.W 1 had deposed as follows:—

13. So, it is argued that the admission made by the appellant himself shows that he left the matrimonial home on the date of Exhibit A1 and deserted the respondents from that date onwards. Exibit A1 was dated 14.8.1993 It is admitted by the 15 respondent that on that date the appellant shifted his residence to the Collegel Hostel. It is admitted by her that thereafter she used to visit the apellant in the hostel daily. It is also admitted by her that the P.G Course was over only during November, 1994. It is admitted by P.W 1 that even while residing in the hostel the appellant used to come to the house. She deposed that

14. The evidence addcued by the respondents themselves shows that the appellant had deposited an amount of Rs. 2,34,000/- in the joint names of himself and the 1st respondent during February and April, 1994. The first respondent was authorised to withdraw the monthly interest amounting to Rs. 2,600/-. The specific case put forward by the respondents is that while the appellant was studying the P.G Course, he had no income of his own and she gave an amount of Rs. 75,000/- for purchase of books and payment of fee, etc. The evidence adduced by the appellant shows that he took a building on rent during 1986 at Chavara when he was appointed in the E.S.I hospital there and he is still residing in that house. The appellant as D.W 1 had deposed that eventhough from 1989 he resided with the respondents near Medical College, Thiruvananthapuram, he used to go to Chavara and reside in that house also. After completing

the P.G Course, the appellant went to Chavara and is residing there. In view of the fact that appellant had deposited an amount of Rs. 2,34,000/- during February and April, 1994 in the joint account and allowed the first respondent to withdraw the monthly interest, it cannot be said that he wilfully refused to maintain the respondents while he was studying for P.G Course. According to the appellant, the first respondent treated him with cruelty, manhandled him and on many occasions was locked him inside the room. He had also got a case that there was no regular sexual intercourse between himself and his wife. But, those allegations are not proved. So, the evidence adduced in this case establishes that the appellant deserted the respondents and left the matrimonial home from December, 1994 and refused to maintain the respondents thereafter.

15. The first respondent has got a case that after deserting her, the appellant developed illicit intimacy with one Chandrika and he is residing with her from 1994 onwards and in that relationship, a child is also bom to them. To prove those facts, the respondents relied on Exhibit A2 and Exhibit XI. According to the the appellant, Exhibit A2 letter was not written by him. The Court below found that Exhibit A2 was written by him on the ground that the appellant refused to give his specimen handwriting. The counsel appearing for the appellant has contended that the execution of Exhibit A2 was not properly proved and the reason stated by the learned Judge for relying on Exhibit XI are illegal. The Court below relied on Exhibit A2 finding that an adverse inference has to be drawn against the appellant. The court below has stated that the appellant refused to give his specimen handwriting. On 25.5.1996, the appellant was examined. The learned Judge had passed an order directing the appellant to give his specimen handwriting. The learned judge had stated that the appellant though agreed to give specimen handwriting, left the Court without giving specimen handwriting. The appellant did not file any review petition in the Court below or filed any petition before this Court to take his specimen handwriting. So, it cannot be said that the Court below was not justified in drawing as adverse inference.

16. The counsel appearing for the appellant attacked Exhibit XI. Exhibit XI is the case sheet of one Chandrika, who was working as Staff Nurse in the Medical College Hospital. It shows that she was admitted in the S.A.T Hospital on 15.2.1996 In the antenatal chart the address of her husband is stated as "C/o. Dr. Gladston, Ananthi Bhavan, Kannimelchery, Kavanadu (PO), Kollam Dist". In the letter pad of Dr. Valsamma Chacko who attended the patient the name of husband of the patient was written as "W/o. Dr. Gladstan, ESI Hospital, Kottayam". In the Summary Sheet the address is given as "C/o. Dr. Gladstan (H), Kdarakuzhy veedu, Kovilloor, Kudappanamoodu P.O Neyyattinkara". The appellant had denied of having any connection with Chandrika. To prove the identity of the persons mentioned in Exhibit XI, P.W 4 was examined. But, she had admitted that she had not treated the patient eventhough the patient was admitted in her unit. She admitted that the delivery was attended by DR. Valsamma Chacko and she does not know either Chandrika or Dr. Gladstaon mentioned in Exhibit XI. In chief examination itself she had deposed "Dr. Gladston ". Exhibit XI shows that it was Dr. Valsamma Chacko who was consulted by the patient in Exhibit XI. She was not examined in this case. The specific case put forward by the appellant is that from 1992 onwards he is permanently residing at "Alathur House, Karithar, Chavara Bridge P.O Kollam". In the plaint also the address of the appellant was stated as "the house of Elizebeth Joseph, Puthenthura, Chavara, Kollara District". So, it cannot be conclusively held that it was the appellant who is described as the husband of the patient in Exhibit XI, But, according to us for the purpose of deciding the issues involved in this case, it is not necessary to decide whether the appellant is living in adultery. The question to be decided is whether the respondents are justified in living separately. Exhibit A2 is letter received by the first respondent through post. The appellant has no case that it was fabricated by the 1st respondent to create evidence in this case. During the cross examination of P.W 1 the suggestion put to her was to the effect that the statement in Exhibit A2 that the appellant had underwent a Registered Marriage was not true and was written only to create fear in her mind. In Exhibit XI atleast in one place the name of the husband of the patient is stated as Dr. Gladston, working at the E.S.I Hospital, Kottayam. The fact that the appellant was working as a Doctor in E.S.I Hospital, Kottayam is admitted by him in

para 22 of his written satement filed on 2.12.1995 Exhibit XI shows that Smt. Chandrika was examined by the Doctor on 19.11.1995 and she was admitted in the hospital on 24.11.1995 also. So, it cannot be said that the case put forward by the first respondent that the appellant is leading an adulterous life with one Chandrika is baseless and unfounded. It is true that the first respondent did not examine Dr. Valsamma Chacko. But, nothing prevented the appellant also from examining Dr. Valsamma Chacko to establish that he was not the person who took the patient referred to in Exhibit XI to DR. Valsamma Chacko. So, the evidence adduced in this case clearly establishes that the responents were justified in living separately from the appellant. In view of the fact that it was the appellant who deserted the respondents and there are justifiable causes for separate residence of the respondents, they are entitled to claim separate maintenance from the appellant.

17. Now we shall consider the quantum of maintenance awarded. The quantum of maintenance awarded is seriously disputed by the appellant. It is argued that since there is no statutory provision as to how the quantum is to be fixed, the Court below ought to have adopted the provisions contained in Section 125 Cr. P.C while fixing the quantum of maintenance. It is argued that a perusal of the various heads under which maintenance was made by the Court below will show that many of the claims are according to the whims and fancies of the wife. It is true that the quantum of maintenance to be awarded in a suit for maintenace is question of fact. But, the same must be made in accordance with some principles and the same cannot be fixed according to the whims and fancies of the Court awarding the same.

18. The English Ecclesiastical Court has laid down a principle of one-third of the income of the husband for awarding maintenance to the wife. The husband will be ordered to pay to his wife such sum by way of alimony as to bring her income upto one-third of the parties joint income. The English Law Courts enforced the duty of a husband to support and maintain his wife. The wife was entitled to pledge her husband's credit for what is necessary to maintain her in health. In Cheriya Varkey's case (supra) the Travancore-Cochin Court had discussed the law on the point and stated as follows:—

(12) This is what Blackstone says on the subject:

"The husband is bound to provide his wife with necessaries by law, as much as himself; and if she contracts debts for them, he is obliged to pay them, unless he supplies her with necessaries himself". (Commentaries on the Laws of England, 4th Edition, volume I, Page 416).

(13) Reference may also be made to Halsbury's Laws of England, Page 608, where the learned author says:

"It is the duty of a husband to maintain his wife according to his means of supporting her. If he fails to perform this duty, she has implied authority to pledge his credit for necessaries suitable to his station in life and this authority is not affected by his unsoundness of mind. If the husband deserts his wife or is quilty of misconduct justifying her in leaving him and living apart, and she is without means of support, her implied authority to pledge his credit for necessaries becomes an authority of necessity, which cannot be revoked by the husband".

19. In the foot-note the learned author refers to 'New Monckton Collieries Ltd. v. Keeling', 1911 AC 648 (H), wherein it was held that there is no presumption of law that a wife is dependent upon her husband's earning merely because of his legal obligation to maintain her.

20. The right of the wife to pledge the credit of the husband for purchasing necessaries was discussed by the Court of Exchequer in 'Read v. Legard', (1851) 155 ER 698 (I), Pollock, C.B expounded the law thus;

"The true principle seems to be that, when a man marries he contracts an obligation to support his wife, and, in point of law, he gives her authority to pledge his credit for her support, if circumstances render it necessary, she herself not being in fault."

Alderson, B., said:

"By the marriage contract entered into when the defendant was sane, the parties contraced a relation which gave the wife certain rights which the law recognises. It is only necessary for us to say that one of them is, that the wife is entitled to be supported, according to the estate and condition of her husband."

21. Specific provisions are made in Matrimonial Causes Act, 1878, Married Women (Maintenance) Act, 1886, etc. Which were replaced by Summary Jurisdiction (Married Women) Act of 1895. A discretion was given to the Court to award the amount which it consider as reasonable having regard to the means of both husband and wife. At present provisions are also made in Domestic Proceeding and Magistrates' Courts Act, 1895. In that Act, no limit is fixed as to the quantum for periodical maintenance. But, the Act itself provides the matters which are to be taken into account while fixing the quantum. It includes the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the forceable future, the financial obligations and responsibilities of the spouses, the age of the parties, the standard of living before the break-down of the marriage, etc.

22. So far as the Hindus of our country is concerned, at present Section 18 of the Hindu Adoption and Maintenance Act contains the necessary provisions. In that Section no particular ceiling is fixed; but Section inter-alia provides the matters to be taken into account by the Court while fixing the quantum. Section 25 of the Hindu Mrriage Act deals with permanent alimony to be ordered to be paid to the wife in the proceedings for divorce and judicial separation.

23. Section 36 of the Indian Divorce Act deals with alimony pendents lite payable to Christian wife. The proviso to Section 36 state that interim alimony pending suit shall not exceed one-fifth of the husband's average net income for three years immediately preceding the date of the order. Section 36 of the Special Mrriages Act also deals with alimony pendente lite. It gives the Court discretion to award interim maintenance having regard to the husband's income which the Court considers it as reasonable.

24. Regarding the permanent alimony no limit is prescribed for the quantum. Under Section 37 of the Special Marriage Act, the Court is given discretionary power to fix reasonable maintenance. Various other Indian Statutes contain provision for payment of permanent alimony and maintenance also. Section 25 of the Hindu Marriage Act provides for permanent alimony and maintenance. Section 25(1) reads as follows:—

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

25. Section 37 of the Special Marriages Act deals with permanent alimony and maintenance. That provision is almost identical to Section 25 of the Hindu Marriage Act. Section 37 of the Indian Divorce Act deals with permanent alimony and maintenance payable to a Christian wife. Section 37 also does not fix any limit. A perusal of the various provisions containing Indian matrimonial statues show that the Court is given the discretion to fix a reasonable amount which it considers necessary for the maintenance of wife and children. No hard and fast rule or strainght jacket formula can be made in fixing that quantum. But, a perusal of relevant Sections of the various matrimonial statutes shows that the basis for awarding permanent alimony and maintenance is that the applicant has no sufficent means to maintain herself. The Court shall fix quantum taking into account the following facts also:—

"(i) income and other property of the parties;

(ii) conduct of the applicant and non-applicant, and

(iii) any particular or special circumstances".

26. So, we are not in agreement with the contention raised by the counsel for the appellant that in the absence of a statutory provision when a Christian wife or child claims maintenance Court can award only mamimum of Rs. 500/- each to the wife and child per mensem. We hold that the Court has got a discretion to fix the quantum and should award a reasonable amount as maintenance to the wife and child who has no sufficient means to maintain themselves. While fixing the quantum, the Court shall take into account the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future; the financial obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future; the standard of living enjoyed by the parties to the marriage and conduct of the parties; and any other matter which in the circumstances of the case the Court may considers it relevant.

27. Now we shall proceed to consider how for the amount awarded is reasonable. It is an admitted fact that the appellant deposited Rs. 2,34,000/- in the joint names of himself and first respondent in Post Office Savings Bank at the Post Office at Medical College Hospital, Thiruvananthapuram. The first respondent was drawing an amount of Rs. 2,600/- per mensem as interest. According to the first respondent, the appellant borrowed an amount of Rs. 1,00,000/- each from her brother and sister and when they insisted for repayment of the amount, she withdrew the amount of Rs. 2,34,000/- and paid off the debts. The amount was withdrawn after the institution of the suit. It is true that there was no legal or moral obligation on the first respondent to repay the debt incurred by her husband. The amount was stated to have been borrowed by the appellant for renovating the building in which the respondents are residing. It is also true that the appellant being a government employee P.Ws 2 and 3 could have very well proceeded against the appellant for realisation of the debts, if any, due to them, But, their evidence proves that the 1st respondent withdrew the amount kept in Post Office deposits and gave the amounts to them. So, that amount is not available now and respondents are not getting Rs. 2,600/- per mensem. But in Exhibit A16 dated 3.1.1994 the 1st respondent had admitted that she was getting an amount of Rs. 1,500/- as monthly income. P.W 1 had admitted that that satement is true. It is to be noted that according to the respondents during that period the appellant had no income of his own and the first respondent was supporting him. The Court below has not considered this aspect at all. The learned Judge had found that the first respondent is entitled to get maintenance at the rate of Rs. 1,500/- per mensem. The only reason stated by the Court below for awarding that amount is that being a wife of a Surgeon having lucrative practice and being a member of a rich family, considering the present day cost of living the quantum of maintenance due to the first respondent is fixed as Rs. 1,500/-. The appellant has produced a document before this Court to prove that he was getting a salary of Rs. 8,190/- as on 5.8.1997 So, considering the income of the appellant and 1st respondent, we are of the view that an amount of Rs. 1,000/- (Rupees one thousand only) per mensem is sufficient for the maintenance of the first respondent.

28. Now we shall consider the maintenance awarded to the second respondent. The respondents had claimed an amount of Rs. 6,750/- for her maintenance. The Court Below awarded Rs. 2,756/- Eventhougth various amounts were claimed by the respondents, the Court below did not award the entire amount. The operative portion of the order reads as follows:—

"Towards tution fee, I fix an amount of Rs. 256/- pm, for her food she is awarded Rs. 600/- pm. For her music teacher she has to pay Rs. 500/-. For school expenses an average of Rs. 400/- pm including bus fare medical expenses is allowed. For tuition and other extra curricular activities dance etc an amount of Rs. 1000/- pm is awarded. For her dress and extra nourishment I award an amount of Rs. 400/- pm. Thus the total amount comes to Rs. 2,756/-"

29. If the entire amount stated in this portion were awarded, the total amount would come to Rs. 3,156/- (Rs. 256 + 600 + 500 + 400 + 1000 + 400). An amount of Rs. 400/- is not seen added to the total amount calculated in the order. A reading of the order shows that the Court below fixed an amount of Rs. 256/-

for tuition and Rs. 500/- for music tuition. She was awarded an amount of Rs. 600/- per mensem for food, Rs. 400/- per mensem of school expenses and another Rs. 1,000/- for tuition and other extra curricular activities and another Rs. 400/- for dress and extra nourishment. We are of the view that an amount of Rs. 600/- for food and Rs. 1,400/- for tuition, school expenses including bus fare, medical expenses, and extra nourishment are sufficient for the 2nd respondent. So, we hold that the total monthly maintenance the second respondent is eligible to get is Rs. 2,000/- (Rs. 600 + 1,400). So, while confirming the liability of the appellant to pay maintenance to the respondents, the quantum of monthly maintenance awarded is reduced to Rs. 1,000/- to the first respondent and Rs. 2,000/- to the Second respondent. The appellant is liable to pay the arrears from 1.12.1994 onwards.

30. In the result, the appeal is allowed in part. The finding of the Court below that the appellant is liable to pay maintenance separately to respondents 1 and 2 is confirmed. But, the quantum of monthly maintenance awarded by the Court below is reduced and fixed as Rs. 1,000/- (Rupees one thousand only) for the first respondent and Rs. 2,000/- (Rupees two thousand only) to the Second respondent. Since the first respondent was drawing an amount of Rs. 2,600/- till 13.7.1995, the appellant is liable to pay the balance of Rs. 400/- (Rupees four hundred only) alone from 1.12.1994 till 13.7.1995 to the 2nd respondent. Thereafter he is liable to pay Rs. 1000/- to the 1st respondent and Rs. 2,000/- to the 2nd respondent. The 1st respondent is authorised to collect the amount awarded to the 2nd respondent. The parties are directed to suffer their costs throughout.

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# K.SUNIL BABU VERSUS MARIYA V. JOY

**Kerala High Court**

*K.Sunil Babu*
*Versus*
*Mariya V. Joy*

**Bench : Hon'ble Mr. Justice Antony Dominic & Hon'ble Mr. Justice P. D. Rajan**

**OP (FC).No. 1675 of 2013 (R)**

**Monday, the 10th day of June 2013/20th Jyaishta 1935**

- **The Family Court held that the child was not entitled for alimony pendente lite in a petition filed under section 36 of the Act. Proceeding further the Family Court upheld the entitlement of the wife for alimony and directed the husband to pay Rs.5,000/- per month from the date of service of notice on him. He was also ordered to pay Rs.10,000/- towards litigation expenses.**
- **Challenging order, the wife has filed O.P. (FC) No.1699/2013 for enhancement of the alimony awarded to her and also for payment for the maintenance to the child. The husband has filed O.P. No.1675/2013 seeking to challenge order granting alimony and litigation expenses.**
- **Language of section 36 of the Act would show that only the wife is entitled to claim alimony, which expression is understood as an allowance paid to a woman by her husband. However, while providing so, the Legislature did not employ any clause narrowing down the scope of the section and indicating that a claim under section 36 of the Act can only be for the benefit of the wife alone. In other words, words of the statute does not prevent a wife from including her claim for alimony amount required for maintaining the child also.**
- **The financial capacity of the father to maintain the child has not been disputed by the him. In such circumstances and also having regard to all the circumstances, we are inclined to think that it would be only reasonable that the father should pay an amount of Rs.2,500/- per month towards the expenses maintenance of the child.**
- **Family Court ordered payment from the date of service of notice on the husband and the counsel for the husband contended that the payment should have been from the date of the order. Having considered this contention, we are of the view that fixation of the date from which payment is to be made is entirely within the discretion of the Family Court and we do not see any perversity in its exercise. In such circumstances, we are not inclined to modify that direction also.**

## JUDGMENT

**Hon'ble Mr. Justice Antony Dominic**

Petitioner in O.P.(FC) No.1675/2013 is the husband and the petitioner in O.P.(FC) No.1699 is the wife. Both of them are challenging the order of the Family Court, Thrissur in I.A. No.1798/2012 in O.P. No.880/211. For convenience, we shall refer to the parties as husband and wife and refer to the facts pleaded and documents produced in O.P. No.1699/2013 filed by the wife.

2. O.P. No.880/2011 was filed by the husband seeking a decree for the dissolution of the marriage on the ground that the wife is suffering from unsoundness of mind of incurable nature. In that O.P. the wife filed I.A.No.1798/2012, a copy of which is produced as Ext.P1, under section 36 of the Indian Divorce Act,

1869 (hereinafter referred to as 'Act' for short) claiming alimony of Rs.10,000/- for herself and Rs.7,500/- for the male child. Further she also claimed Rs.25,000/- towards litigation expenses. According to the wife, her husband is the owner of a restaurant and an auditorium at Cheruthuruthy. It is also stated that his father is a Doctor who has established a full-fledged hospital at Cheruthuruthy and that he is helping his father. According to the wife, husband has a monthly income of Rs.75,000/-.

3. Ext.P2 is the counter statement filed by the husband where he denied the claims of the wife and also disputed his liability to pay alimony and the litigation expenses. On Ext.P1 application, the Family Court passed Ext.P3 order and directed payment at the rate of Rs.2,500/- per month to the child and declined the claim of the wife for alimony and litigation expenses. That order was challenged by both sides in O.P.(FC) Nos.2872 and No.3094 of 2012. By Ext.P5 judgment a Division Bench of this Court disposed of the petitions as follows:-

> "3. We therefore, set side the impugned order and remand I.A. No.1798/2012 to the Family Court, Thrissur. The Family Court is directed to take a fresh decision in the I.A. addressing all relevant issues such as:-
>
> 1) The liability of the father to pay pendente lite maintenance in O.P.No.818/2011 in view of section 36 of the Divorce Act.
>
> 2) The liability of the husband to pay maintenance to the wife and what if any should be the quantum of interim maintenance payable by the husband as pendente lite alimony of the wife.
>
> 3) The eligibility of the wife to litigation expenses, if any, and if so the amount."

4. Accordingly, the matter was reconsidered and Ext.P6 order was passed by the Family Court. In this order, the Family Court held that the child was not entitled for alimony pendente lite in a petition filed under section 36 of the Act. Proceeding further the Family Court upheld the entitlement of the wife for alimony and directed the husband to pay Rs.5,000/- per month from the date of service of notice on him. He was also ordered to pay Rs.10,000/- towards litigation expenses.

5. Challenging Ext.P6 order, the wife has filed O.P. (FC) No.1699/2013 for enhancement of the alimony awarded to her and also for payment for the maintenance to the child. The husband has filed O.P. No.1675/2013 seeking to challenge Ext.P6 order granting alimony and litigation expenses.

6. We heard the counsel for both sides. According to the counsel for the wife, although the language of section 36 of the Act provides for payment of alimony to the wife, that does not mean that her claim cannot include amount for the maintenance of the child also. Therefore, according to him, the Family Court erred in denying payment of the amount claimed by the wife for the maintenance of the minor child, who admittedly is in her custody and care. However, counsel for the husband sought to sustain the order of the Family Court denying the benefit to the child and, according to him, payment for the maintenance of the child is not contemplated within the scope of section 36 of the Act. He also brought to our notice the provisions of enactments such as Special Marriage Act, 1954, Hindu Marriage Act, 1955, Parsi Marriage and Divorce Act, 1936 and Hindu Adoptions & Maintenance Act, 1956 to drive home his contention that in the Divorce Act, the legislature has consciously confined the benefit of alimony only to the wife.

7. In the light of the aforesaid contention raised before us, the question which arises for our consideration is whether section 36 of the Act enables a wife to claim amount for the maintenance of the child also. Section 36 of the Divorce Act reads thus:-

> "36. Alimony pendente lite.-- In any suit under this Act, whether it be instituted by a husband or a wife, and whether or not she has obtained an order of protection, the wife may present a petition for expenses of the proceedings and alimony pending the suit.

Such petition shall be served on the husband; and the Court, on being satisfied of the truth of the statements therein contained, may make such order on the husband for payment to the wife of the expenses of the proceedings and alimony pending the suit as it may deem just;

Provided further that the petition for the expenses of the proceedings and alimony pending the suit, shall, as far as possible, be disposed of within sixty days of service of such petition on the husband."

8. Reading of this provision shows that in any suit under the Divorce Act the wife is entitled to present a petition for expenses of the proceedings and alimony pending the suit. Admittedly, in Ext.P1 what the wife claimed was Rs.10,000/- for herself and Rs.7,500/- for the child. This monetary claim of the wife is contained in para 7 of the affidavit filed in support of the I.A., relevant part of which reads thus:-

"7. I beg to submit that I have no means of income and myself and my child are now depending on my father for our day to day living and sustenance. Since my child is allergic to dust, I was compelled to move from my old house, to my father's house at Pallikara in Ernakulam District. The respondent is legally liable to maintain me and my child. Though the respondent is having good financial capacity, ability and ample means to provide maintenance for me and my child, he has failed in his duties and obligations. To conduct the case also I have to incur heavy expenditure. So considering my needs and that of my minor child and the means of my husband, this Honourable Court may be pleased to direct the respondent/husband to pay Rs.25,000/- towards expenses of the proceedings to the petitioner and alimony pendente-lite @ Rs.10,000/- per month for the petitioner and Rs.7,500/- per month to the minor child Geevarghese, born out of this lawful wedlock; from the date of service of summons. If the petition is not allowed, I will be put to irreparable hardship and difficulties. In the interest of justice also my petition may be allowed."

9. Language of section 36 of the Act would show that only the wife is entitled to claim alimony, which expression is understood as an allowance paid to a woman by her husband. However, while providing so, the Legislature did not employ any clause narrowing down the scope of the section and indicating that a claim under section 36 of the Act can only be for the benefit of the wife alone. In other words, words of the statute does not prevent a wife from including her claim for alimony amount required for maintaining the child also. In fact the Supreme Court had occasion to consider the scope of section 24 of the Hindu Marriage Act, language which is similar to section 36 of the Act, which provides for payment of maintenance pendente lite . This section also provides that such benefit is payable only to the wife or to the husband. Interpreting this provision, in Jasbir Kaur, Sehgal V. District Judge, Dehradun (1997 (7) SCC 7) the Apex Court held that a wife maintaining a child is entitled to include in her claim for maintenance under section 24 of the said Act, the expenses necessary for maintaining the child also.

The relevant portion of the judgment reads thus:

" .. Section 24 of the Act no doubt talks of maintenance of wife during the pendency of the proceedings but this section, in our view, cannot be read in isolation and cannot be given restricted meaning to hold that it is the maintenance of the wife alone and no one else. Since wife is maintaining the eldest unmarried daughter, her right to claim maintenance would include her own maintenance and that of her daughter. This fact has to be kept in view while fixing the maintenance pendente lite for the wife. We are aware of the provisions of Section 26 of the Act providing for custody of minor children, their maintenance and education but that section operates in its own field."

10. The reasoning adopted by the Apex Court applies to this case also and is a complete answer to the contention urged on behalf of the husband. While considering this issue, we cannot forget the fact that there is no other provision in the Divorce Act entitling the wife to maintain a claim for the maintenance of the child. Therefore, if the argument of the husband is accepted, resultant position would be that in a proceeding under the Divorce Act the wife will be dis-entitled to claim the amount necessary for OP(FC)

1675/2013 and con. case 10 the maintenance of the child and will have to pursue this claim independently under different statutes. Such an interpretation, resulting in multiplicity of proceedings and defeating the rightful claim of destitute woman and children cannot be accepted. Therefore, we are unable to uphold the view taken by the Family Court that in a proceeding under section 36 of the Act a wife is not entitled to claim the amount required for the maintenance of the minor child.

11. What now remains is the quantum of the amount that should be awarded for the maintenance of the child. By November, 2013 the child would be completing 4 years and, according to the counsel for the wife, the child is now attending play school. Irrespective of the dispute regarding the means of the father, in Ext.P4, the counter affidavit filed by him in O.P. No.866/2011 before the Family Court, Thrissur, he has stated that "I am financially sound and capable of catering to all needs of the minor child for both his mental and physical development and the respondent being mentally unsound is incapable of providing the same".

12. Therefore, the financial capacity of the father to maintain the child has not been disputed by the him. In such circumstances and also having regard to all the circumstances, we are inclined to think that it would be only reasonable that the father should pay an amount of Rs.2,500/- per month towards the expenses maintenance of the child. Therefore, we direct that the husband, petitioner in O.P. No.1765/2013, shall pay Rs.2,500/- per month to the wife from the date of service of the notice on him, towards maintenance of the child.

13. The wife has claimed enhancement of Rs.5,000/- awarded to her and the husband has sought to set aside this order and also the order requiring him to pay Rs.10,000/- towards litigation expenses.

    From the order of the Family Court we notice that it was taking note of of all the relevant circumstances, the Family Court awarded Rs.5,000/- per mensem and both parties have not produced any material before us to disagree with the view taken by the Family Court requiring either enhancement or invalidation of the OP(FC) 1675/2013 and con. case 12 alimony awarded to the wife. For this reason itself, we uphold the order directing payment of Rs.10,000/- towards litigation expenses. Therefore, we are not in a position to accept the case of either of the parties and maintain the order as such.

14. It was complained that the Family Court ordered payment from the date of service of notice on the husband and the counsel for the husband contended that the payment should have been from the date of the order. Having considered this contention, we are of the view that fixation of the date from which payment is to be made is entirely within the discretion of the Family Court and we do not see any perversity in its exercise. In such circumstances, we are not inclined to modify that direction also.

15. In the result,

    1) O.P. (FC) No.1699/2013 is disposed of setting aside the order of the Family Court to the extent amount claimed for the maintenance OP(FC) 1675/2013 and con. case 13 of the child is denied and the husband, the petitioner in O.P. (FC) No.1675/2013, is directed to pay Rs.2,500/- per month from the date of service of notice on him for the maintenance of the child. The order passed by the Family Court is confirmed in all other respects.

    2) O.P. (FC) No.1675/2013 is accordingly dismissed.

**ANTONY DOMINIC, JUDGE.**

**P. D. RAJAN, JUDGE.**

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# KALAISELVI VERSUS A.D.NANTHAKUMAR

**Madras High Court**

*Kalaiselvi*
*Versus*
*A.D.Nanthakumar*

**Bench : Hon'ble Mr. Justice M.Dhandapani**

**Crl.R.C.(MD) No.512 of 2017**

**and**
**Crl.O.P.(MD)No.4986 of 2013**
**Crl.R.C.(MD) No.512 of 2017**

**Decided on 1 November, 2017**

- **The wife filed a maintenance case under Section 125 of Cr.P.C before the learned Chief Judicial Magistrate, Thiruchirappalli, in M.C.No.116/2011. After full fledged trial, the lower Court awarded maintenance to the tune of Rs.5,000/- each to the wife and the daughter, in toto Rs.10,000/-.**
- **The complainant or the accused cannot be allowed to take recourse to a second revision. However, this Court holds that the said provision is not absolute bar. The High Court can entertain a petition under Section 482 Cr.P.C. when there is serious miscarriage of justice and abuse of process of the Court or when mandatory provisions of law are not complied with, and if the the High Court feels that the inherent jurisdiction is to be exercised finding that there is grave miscarriage of justice, abuse of process of the Court, or the order of the trial Court as well as the lower appellate Court is perverse or incorrigible one.**
- **However, in the present cases on hand, the husband did not show any miscarriage of justice or abuse of process of Court. In the absence of any materials, this Court cannot convert as the second revision Court.**
- **Accordingly, the criminal original petition is dismissed. Though this Court rejected the prayer sought by the husband in the criminal original petition, the question is as to whether the wife is entitled to any relief in the criminal revision filed against the order of the learned session judge. It is an admitted fact that the lower appellate Court reduced the maintenance amount from Rs.10,000/- to Rs.5,000/- (each to Rs.2,500/-), by elaborately discussing the economical status of the husband and wife and with regard to the husband is concerned, his payment towards L.I.C, Car Loans and House Loans, on perusal of the material, the loan has been obtained from the husband's employer and considering the material fact that the Kingfisher Airlines went on loss and hence, the husband is not able to pay the said amount. Accordingly, the lower Court reduced the maintenance amount from Rs.10,000/- to Rs.5,000/-.**

**COMMON ORDER**

The petitioners in Crl.R.C.(MD)No.512 of 2017 are the wife and daughter and the respondent is the husband of the first petitioner herein. For the sake of convenience, the parties are referred to as wife and husband.

2. The facts of the case are as follows:

The wife filed a maintenance case under Section 125 of Cr.P.C before the learned Chief Judicial Magistrate, Thiruchirappalli, in M.C.No.116/2011. After full fledged trial, the lower Court awarded maintenance to the tune of Rs.5,000/- each to the wife and the daughter, in toto Rs.10,000/-.

Aggrieved against the said order passed by the lower Court, the husband filed a Revision in Crl.R.C.No.62 of 2012 on the file of the learned III Additional District Judge (FAC), Trichy. After elaborate arguments, the Revisional Court reduced the maintenance amount from Rs.10,000/- to Rs.5,000/- (Rs.2,500/- each) and also directed the husband to pay a sum of Rs.30,000/- as annual maintenance for both the wife and the child and the same shall be paid on or before 5th May of every year. As against the same, the wife and the husband filed Crl.R.C.(MD)No.512 of 2017 and Crl.O.P.(MD)No.4986 of 2013 respectively before this Court.

3. The learned counsel for the petitioners in Crl.R.C.(MD)No.512 of 2017 and the respondents in Crl.O.P.(MD)No.4986 of 2013 would submit that the wife is under the care of her parents and she is taking care of her child as well as her parents. Out of her meagre income, she was maintaining the entire family. Without considering the hardship suffered by the wife, the Revisional Court reduced the amount from Rs.5,000/- each to Rs.2,500/- each, which is unsustainable and therefore, the learned counsel prayed for enhancement of reasonable amount in order to maintain the family of the wife.

4. The learned counsel for the respondent/husband would submit that due to cruelty caused by the wife, he was forced to file a divorce petition. He would further submit that the wife employed as a Teacher in private school and she is earning Rs.15,000/-(Rupees Fifteen Thousand Only) per month. However, the husband is an employee in Kingfisher Airlines and his employer company is facing the heavy financial crises, hence, he is not able to earn as stated by the wife. Accordingly, he prays for allowing this Criminal Original Petition.

5. In support of his submissions, the learned counsel for the respondent relied on the following Judgments:

   (a) Rajan Kumar Machananda Vs. State of Karnataka reported in 1990 SCC (Cri) 537, wherein at paragraph 2, it has been held as follows:

   "2.Heard learned Counsel for the parties. The respondent- State had challenged the order before the Court of Sessions when the learned Magistrate before whom the matter was proceeding directed release of the truck in favour of the appellant. The Revisional Court dismissed the petition of the State. A second Revision did not lie at the instance of the State to the High Court in view of the provisions of Section 397(3) of Cr.P.C. Obviously, to avoid this bar, the application moved by the State before the High Court was stated to be under Section 482 Cr.P.C. asking for exercise of inherent powers. In exercise of that power, the High Court has reversed the order of the Magistrate as affirmed by the Sessions Judge. The question for consideration is as to whether the bar under Section 397(3) Cr.P.C. should have been taken note of to reject the revision at the instance of the State Government or action taken by the High Court in exercise of its inherent power has to be sustained. It is not disputed by counsel appearing for the State that the move before the High Court was really on application for revision of the order of the Magistrate releasing the truck. That is exactly what is prohibited under Section 397(3) Cr.P.C. Merely by saying that the jurisdiction of the High Court for exercise of its inherent power was being invoked the statutory bar could not have been overcome. If that was to be permitted every revision application facing the bar of Section 397(3) of the Code could be labelled as one under Section 482. We are satisfied that this is a case where the High Court had no jurisdiction to entertain the revision. The appeal is allowed and we set aside the order of the High Court. The Order of the Magistrate as affirmed by the Session Judge is upheld."

   (b) Rajathi Vs. C.Ganesan reported in 1999 SCC (Cri) 1118, wherein at paragraphs 9 to 13, it has been held as follows:

"9. We are not going into the question if the High Court on examining the case on merit was correct in coming to the conclusion that the wife was possessed of sufficient means and was able to maintain herself. In the present appeal, we are only concerned to see if the High Court was justified in invoking its inherent powers under Section 482 of the Code and we do not think the High Court was right.

10. In Krishnan & Anr. vs. Krishnaveni & Anr. [(1997) 4 SCC 241] this Court explained the scope and power of the High Court under Section 482 of the Code. The question before the Court was if in view of the bar of second revision under sub-section (3) of Section 397 of the Code was prohibited, inherent power of the High Court is still available under Section 482 of the Code. This Court said as under [SCC P.248, Para 10]:

"10. Ordinarily, when revision has been barred by Section 397(3) of the Code, a person - accused/ complainant - cannot be allowed to take recourse to the revision to the High Court under Section 397(1) or under inherent powers of the High Court under Section 482 of the Code since it may amount to circumvention of the provisions of Section 397(3) or Section 397(2) of the Code. It is seen that the High Court has suo motu power under Section 401 and continuous supervisory jurisdiction under Section 483 of the Code. So, when the High Court on examination of the record finds that there is grave miscarriage of justice or abuse of the process of the courts or the required statutory procedure has not been complied with or there is failure of justice or order passed or sentence imposed by the Magistrate requires correction, it is but the duty of the High Court to have it corrected at the inception lest grave miscarriage of justice would ensue. It is, therefore, to meet the ends of justice or to prevent abuse of the process that the High Court is preserved with inherent power and would be justified, under such circumstances, to exercise the inherent power and in an appropriate case even revisional power under Section 397(1) read with Section 401 of the Code. As stated earlier, it may be exercised sparingly so as to avoid needless multiplicity of procedure, unnecessary delay in trial and protraction of proceedings. The object of criminal trial is to render public justice, to punish the criminal and to see that the trial is concluded expeditiously before the memory of the witness fades out. The recent trend is to delay the trial and threaten the witness or to win over the witness by promise or inducement. These malpractices need to be curbed and public justice can be ensured only when trial is conducted expeditiously."

11. In the present case, the High Court minutely examined the evidence and came to the conclusion that the wife was living separately without any reasonable cause and that she was able to maintain herself. All this High Court did in exercise of its powers under Section 482 of the Code which powers are not a substitute for a second revision under sub-section (3) of Section 397 of the Code. The very fact that the inherent powers conferred on the High Court are vast would mean that these are circumscribed and could be invoked only on certain set principles.

12. It was not necessary for the High Court to examine the whole evidence threadbare to exercise jurisdiction under Section 482 of the Code. Rather in a case under Section 125 of the Code the trial court is to take a prima facie view of the matter and it is not necessary for the court to go into the matrimonial disputes between the parties in detail. The section provides maintenance at the rate of Rs.500/- per month. There is an outcry that this amount is too small. In the present case, however, we are quite surprised that the court granted paltry amount of Rs.200/- per month as maintenance which was confirmed in the revision by the Sessions Court and the High Court thought it fit to interfere under Section 482 of the Code in exercise of its inherent jurisdiction.

13. Whatever may be the merit of the case, the High Court wrongly exercised its jurisdiction under Section 482 of the Code in passing the impugned order. The appeal is allowed and the impugned order dated 04.12.1997 of the High Court is set aside."

6. I have considered the rival submissions made by the learned counsel on either side.

7. The issue involved in these cases is whether the petition under Section 482 Cr.P.C., is maintainable in view of bar under Section 397(3) Cr.P.C.

8. As per Section 397(3) Cr.P.C., if an application under this Section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.

9. However the husband filed the criminal original petition against the order of revisional Court approaching inherent jurisdiction available under Section 482 Cr.P.C., which is bad in law in view of the judgments rendered by the Hon'ble Apex Court.

10. It is true that in the above said decision, the Hon'ble Apex Court has clearly held that in view of the prohibition under Section 397(3) Cr.P.C., the complainant or the accused cannot be allowed to take recourse to a second revision. However, this Court holds that the said provision is not absolute bar. The High Court can entertain a petition under Section 482 Cr.P.C. when there is serious miscarriage of justice and abuse of process of the Court or when mandatory provisions of law are not complied with, and if the the High Court feels that the inherent jurisdiction is to be exercised finding that there is grave miscarriage of justice, abuse of process of the Court, or the order of the trial Court as well as the lower appellate Court is perverse or incorrigible one.

11. However, in the present cases on hand, the husband did not show any miscarriage of justice or abuse of process of Court. In the absence of any materials, this Court cannot convert as the second revision Court. Accordingly, the criminal original petition is dismissed.

12. Though this Court rejected the prayer sought by the husband in the criminal original petition, the question is as to whether the wife is entitled to any relief in the criminal revision filed against the order of the learned session judge. It is an admitted fact that the lower appellate Court reduced the maintenance amount from Rs.10,000/- to Rs.5,000/- (each to Rs.2,500/-), by elaborately discussing the economical status of the husband and wife and with regard to the husband is concerned, his payment towards L.I.C, Car Loans and House Loans, on perusal of the material, the loan has been obtained from the husband's employer and considering the material fact that the Kingfisher Airlines went on loss and hence, the husband is not able to pay the said amount. Accordingly, the lower Court reduced the maintenance amount from Rs.10,000/- to Rs.5,000/-.

13. In view of the above discussions and decisions cited supra, this Court does not find any error in the order passed by the Lower Appellate Court. Accordingly, both the Criminal Revision Case and the Criminal Original Petition are dismissed and the order dated 18.01.2013 passed in Crl.R.C.No.62 of 2012 by the III Additional District Judge (FAC), Trichy, is confirmed.

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# R.KALARANI VERSUS JEEVA ASHOK

**Madras High Court**

*R.Kalarani*
*Versus*
*Jeeva Ashok*

**Crl.R.C.(MD). No.246 of 2017:**

**Bench : Hon'ble Mr. Justice A.D. Jagadish Chandira**

**Decided on 22 December, 2017**

- **Being aggrieved by the above order of the Family Court Dindigul, contending that the maintenance awarded to the wife and daughter was exorbitant the husband had filed a petition in Crl.R.C (MD) No.694 of 2017 seeking reduction of monthly maintenance**
- **Under the law the burden is placed in the first place upon the wife to show that the means of her husband are sufficient. In the instant case there is no dispute that the appellant has the requisite means.But there is an inseparable condition which has also to be satisfied that the wife was unable to maintain herself. These two conditions are in addition to the requirement that the husband must have neglected or refused to maintain his wife. It has to be established that the wife was unable to maintain herself. The appellant has placed material to show that the respondent-wife was earning some income. That is not sufficient to rule out application of Section 125 Cr.P.C. It has to be established that with the amount she earned the respondent-wife was able to maintain herself.**
- **Here is a case of a woman with a temporary job taking care of her minor daughter seeking maintenance from her husband who is better placed than them. The woman and her daughter have to take care of their boarding, lodging, medical, clothing and also the educational expenses of her daughter. As on today (the date of hearing), as admitted by both the counsels the consolidated monthly pay for the wife is Rs.9,116/- and the salary of the husband is Rs. 53,459/- per month. Taking into consideration the cost of living index as on today and also the fact that the minor daughter is being taken care of by wife, the Court finds the amount of maintenance awarded by the Family Court is low and not consistent with the income of the husband at Rs.53,459/- per month. The Family Court erred in not enhancing the monthly maintenance of the wife and the daughter.**
- **This Court finds that when the husband is able to pay Rs.8,000/- per month towards his contribution for Provident Fund, there is no reason for him deny enhancement of maintenance to his wife and child which would be consistent with his standard of living.**
- **In such circumstances this Court taking into consideration the consolidated income of the wife which is also temporary in nature and the income of the respondent husband this Court finds that it would be just and appropriate that the maintenance awarded to the wife is enhanced to Rs.4,000/- per month from Rs.2,500/- per month and the maintenance awarded to the minor child is enhanced to Rs.7,500/- per month from Rs.6,000/- per month**

PRAYER : Criminal Revision Petition filed under Sections 397 and 401 of Criminal Procedure Code, to call for the records relating to the order, dated 24.08.2016, made in Cr.M.P.No.75 of 2014 in M.C.No.63 of 2008, on the file of the Family Court, Dindigul and to set aside the same.

## COMMON ORDER

Since both the criminal revision petitions have been filed challenging the very same order and the parties being one and the same, they have been clubbed, heard together and are being disposed of by this common order.

2. Being aggrieved by the order of the Family Court Dindigul dated 24.08.2016, made in Cr.M.P.No.75 of 2014 in M.C.No.63 of 2008, stating that the amount of maintenance awarded is not sufficient, the wife had filed a petition in Crl.R.C (MD) No.246 of 2017 for enhancement of maintenance for herself and her daughter.

3. Being aggrieved by the above order of the Family Court Dindigul, contending that the maintenance awarded to the wife and daughter was exorbitant the husband had filed a petition in Crl.R.C (MD) No.694 of 2017 seeking reduction of monthly maintenance.

4. For the sake of convenience the parties are referred as per the ranking in Criminal M.P.No.75 of 2014 in M.C.No.63 of 2008 on the file of the Family Court, Dindigul as 1st petitioner/wife,2nd petitioner/daughter and respondent/husband.

5. The brief facts of the case are: The marriage between the first petitioner /wife and the respondent/husband was solemnized on 26.04.2004 at Dindigul and thereafter the same got to be registered at the Office of the Territorial Sub-Registrar, Dindigul, Dindigul District. Out of the wedlock a female child/second petitioner was born and the child is now in the custody of the first petitioner. Due to marital discord the respondent filed a case for grant of divorce in H.M.O.P.No.236 of 2008 before the Sub Court concerned on the ground of adultery. However, the H.M.O.P., was dismissed and the respondent had filed C.M.A.No.35 of 2011 before the District Court, Dindigul challenging the order of dismissal of the petition for divorce and that the C.M.A., had also been dismissed. The petitioner/wife had originally filed a petition before the learned Judicial Magistrate, Dindigul claiming maintenance for herself and her minor daughter during 2008 and the court by order dated 31.08.2010 directed the respondent to pay a sum of Rs.1,000/- per month to each petitioners. Challenging the order of maintenance the respondent/husband filed Crl.R.P 36/2010 and the petitioner/wife filed Crl.R.P 1/2011 before the Prl. Sessions Court Dindigul and by common order dated 21.04.2011, the Principal Sessions Court, Dindigul dismissed Crl.R.P.36 of 2010 and partly allowed Crl.R.P.No.1 of 2011 and enhanced the monthly maintenance of the first petitioner/wife to Rs.2,500/- and the monthly maintenance of the second petitioner/daughter to Rs.3,500/-. Against the said order the respondent had filed Crl.R.C.(MD) No.459 of 2011 before this Court and this Court by order dated 30.07.2013 disposed the revision with the direction to both parties to produce documents and adduce evidence before the trial Court regarding their respective incomes and thereby directed the Court below to refix the quantum of maintenance after hearing both sides. Thereafter, petitioner/wife had filed Crl.M.P.No.75 of 2014 before the Family Court, Dindigul, under Section 127 Cr.P.C., claiming Rs.10,000/- per month towards maintenance each for herself and the second petitioner/daughter. In the petition, the petitioner/wife had stated that she was working as an Account in Surva Siksha Abiyan for consolidated pay of Rs.6,000/- and that her job was temporary one which was subjected to be terminated any time and that her husband the respondent was working as a Government Teacher earning Rs.34,875/- and that she being unable to maintain herself and her daughter, prayed for enhancing the maintenance at the rate of Rs.10,000/- each for herself and her daughter. The respondent/husband filed a counter starting that the petitioner/wife was earning an amount of Rs.6,000/- and that she being able to maintain herself was disqualified from claiming maintenance under Section 125 Cr.P.C. Further, he had stated that his take home income was only Rs.33,565/- and that since the Hon'ble High Court in Crl.R.C., had not altered the maintenance amount and that the High Court had directed both parties to produce documents towards proof of income and decide the quantum of maintenance and thereby submitted that the petition filed under Section 127 Cr.P.C., for enhancement of maintenance amount is not maintainable.

6. During the proceedings the first petitioner/wife examined herself as P.W.1 and she had marked Exs.P1 to P11 on her side. The respondent had examined himself as R.W.1, his father Selvam as R.W.2 and the Office staff of the Addl. C.E.O as R.W.3. The authorisation given to R.W-2 was marked as Exs.X1 and the consolidated pay details of the petitioner / wife for the month of May 2016 was marked as Ex X2.

7. The court below after hearing both sides and taking into consideration the consolidated monthly income of Rs.6,000/- received by the first petitioner and the amount of Rs.47,709/- as the income of the respondent/husband as per Ex.P11 and passed an order fixing the amount of maintenance at Rs.2,500/- for the first petitioner/wife and Rs.6,000/- for the second petitioner/daughter and the respondent/ husband was directed to pay the arrears within three months and he was also directed to pay the arrears of maintenance and future maintenance of the second petitioner to her mother first petitioner. This is order which is now challenged by both parties before this Hon'ble Court.

8. Heard Mr.A.Jayaramachandran, learned counsel for the wife and Mr.R.R.Kannan, learned counsel for the husband.

9. The learned counsel for the petitioner/wife contended that the Family Court erred in not enhancing the maintenance of the wife and daughter taking into consideration the status of the husband and the income earned by him. He further contended that as on date the husband is earning the amount of Rs.53,459/- per month that that he is a teacher working in Government School and that having neglected to maintain his wife and daughter the Family Court ought to have awarded enhanced maintenance as prayed for and contended that the wife besides taking care of herself was also taking care of her daughter and that the present job in Surva Shiksha Abiyan is only a temporary job and it is only on a consolidated pay and that she may be terminated from the above work at any time and thereby contended that the Family Court erred in not awarding the enhanced amount. The counsel contended that the Family Court failed to take into consideration the Judgments of the Apex Court with regard to the maintenance and submitted that the Family Court erred in taking into consideration the income of the wife and thereby refusing to enhance the maintenance to the wife. The test to be decided is whether the wife was in a position to maintain herself in the way she was used to be in the place of her husband and thereby the court ought to have taken note of the income and status of the husband and comparatively considered the status of the wife which was not on par with the status of her husband and thereby ought to have enhanced the maintenance amount. The counsel for the petitioner contended that as per the salary drawn on July 2017, the income of the husband was Rs.52,806/- and that the Family Court ought to have enhanced the amount in commensurate with the monthly income of the respondent/husband rather than considering the income of the wife which was only on a temporary basis.

10. In support of his contention the learned counsel for the petitioner relied on the decisions of the Hon'ble Apex Court in Chaturbhuj vs. Sita Bai reported in (AIR 2008 SC 530) and in Sunita Kachwaha & Ors. vs. Anil Kachwaha reported in (AIR 2015 SC 554) contending that merely because the wife was earning something it would not be a ground to reject her claim for maintenance and that the test to be decided by the court is whether the wife is in a position to maintain herself in the way she used to be in the place of her husband.

11. The learned counsel for the respondent vehemently opposed the plea of the first petitioner stating that she is not entitled to any maintenance for the reason that she has refused to live with her husband without any reasonable cause and thereby she is not entitled to maintenance as per Section 125 (4) Cr.P.C. He further contended that the wife is getting consolidated pay of Rs.6000/- per month and that the salary of the husband is only Rs.52,806/- as on July 2017 and that his take home salary after deduction towards loans is only Rs.32,393/-. and that the husband is taking care of his aged parents and the Family Court erred in fixing the quantum of maintenance at Rs.2,500/- per month to the first petitioner and Rs.6,000/- per month to the second petitioner/daughter. He further contended that the respondent/husband had availed loans for settling the arrears amount of maintenance and that very recently he had also paid

a sum of Rs.3.00 lakhs towards the arrears of maintenance. He further contended that he was always willing to live along with his wife whereas she has refused to join him. Further, the counsel contended that the wife had filed several vexatious and false cases against the husband and her family members and that he had been forced to run between courts and that even after an acquittal by the trial court the wife is witch hunting him by filing appeal against acquittal and thereby contended that the wife is not entitled to maintenance.

12. In reply to the above arguments of the learned counsel for the respondent/husband Mr.A.Jayaramachandran, learned counsel for the first petitioner/wife vehemently contended that it was the husband who invited the litigation and false allegations of adultery were raised against the petitioner/wife and moreover, the respondent/husband had also committed fraud on the court through one of his relatives who was working in the court and attempted to show as if court summons were served on a fictitious person to be the 2nd respondent in the Divorce proceedings and thereby the petitioner/wife was constrained to initiate proceedings against him. The counsel further contended that the husband having raised a false and vague serious allegations of adultery cannot now fault with the wife for not joining him and that the divorce petition filed by the husband on the ground of adultery had been dismissed and the appeal has also been dismissed. In such circumstances, there was sufficient reason and grounds for the wife to refuse to live with him. Moreover, the wife had been subjected to severe cruelty and thereby she was forced to give a criminal complaint against her husband and that having forced her into four corners, the husband cannot now find fault with her in taking appropriate legal recourse against him for the fault committed by him. The counsel for the petitioner/wife further contended that as on today, the monthly income of the respondent is Rs.53,459/- per month and even as per the records submitted by him he is contributing Rs.8,000/- towards Provident Fund and he is purposely and wilfully avoiding payment of maintenance to his wife. Whereas the wife is suffering without permanent income and that she has to maintain herself and her daughter and her educational expenses, rent for dwelling house and in the present day cost of living in comparison to the amount earned by the husband and the life style of the husband, she and her daughter are in poor state of living and prayed for enhancement of maintenance considering the plight of the destitute woman and her child.

13. At this juncture with regard to the contention of the counsel for the respondent/husband that the wife had refused to live with him without any reasonable cause and that he was willing and ready to live with her, it is worthwhile to refer to an earlier judgment of this Court in Kandasamy Moopan vs. Angmmal reported in AIR 1960 Madras 348, wherein this Court has held that a deliberate attribution of immorality of a wife must be considered as legal cruelty entitling the wife to live separately and claim maintenance. It had also held that the last minute offers to take back the wife are open to scepticism as they are put forward with no other object than to ward off applications arising in civil and criminal proceedings for supporting wife

14. The Family Court in its order dated 24.08.2016 made in Cr.M.P.No.75 of 2014 in M.C.No.63 of 2008, while passing the order for maintenance had taken into consideration the salary of the wife and the monthly salary of the husband and awarded maintenance at Rs.2,500/- to the wife and Rs.6,000/- to the daughter. In the judgment reported in AIR 2015 SC 554 (Sunita Kachwaha & Ors. vs. Anil Kachwaha ) the Hon'ble Apex Court has held that where the wife states she had great hardships in maintaining herself and the daughters, while her husband's economic condition is quite good the wife would be entitled to maintenance. In the very same judgment it has also been held that merely because the wife was earning something it would not be a ground to reject her claim for maintenance.

15. In Chaturbhuj vs. Sita Bai reported in (AIR 2008 SC 530) = 2008 2 SCC 316, it has been held that Section 125 is a measure of social justice and is especially enacted to protect women and children, para 5 to 8 of the judgment is extracted hereunder:

5. The object of the maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy by compelling those who can provide support to those who are unable to support themselves and who have a moral claim to support. The phrase "unable to maintain herself" in the instant case would mean that means available to the deserted wife while she was living with her husband and would not take within itself the efforts made by the wife after desertion to survive somehow. Section 125 Cr.P.C. is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in Captain Ramesh Chander Kaushal v. Mrs. Veena Kaushal and Ors. (AIR 1978 SC 1807) falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India, 1950 (in short the 'Constitution'). It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in Savitaben Somabhai Bhatiya v. State of Gujarat and Ors. (2005 (2) Supreme 503).

6. Under the law the burden is placed in the first place upon the wife to show that the means of her husband are sufficient. In the instant case there is no dispute that the appellant has the requisite means.

7. But there is an inseparable condition which has also to be satisfied that the wife was unable to maintain herself. These two conditions are in addition to the requirement that the husband must have neglected or refused to maintain his wife. It has to be established that the wife was unable to maintain herself. The appellant has placed material to show that the respondent-wife was earning some income. That is not sufficient to rule out application of Section 125 Cr.P.C. It has to be established that with the amount she earned the respondent-wife was able to maintain herself.

8. In an illustrative case where wife was surviving by begging, would not amount to her ability to maintain herself. It can also be not said that the wife has been capable of earning but she was not making an effort to earn. Whether the deserted wife was unable to maintain herself, has to be decided on the basis of the material placed on record. Where the personal income of the wife is insufficient she can claim maintenance under Section 125 Cr.P.C. The test is whether the wife is in a position to maintain herself in the way she was used to in the place of her husband. In Bhagwan v. Kamla Devi (AIR 1975 SC 83) it was observed that the wife should be in a position to maintain standard of living which is neither luxurious nor penurious but what is consistent with status of a family. The expression "unable to maintain herself" does not mean that the wife must be absolutely destitute before she can apply for maintenance under Section 125 Cr.P.C.?

16. Heard both sides Counsels and analysed the judgments of the Honble Apex Court cited supra. In reference to the judgments cited above it is made clear that when the personal income of the wife is insufficient she can claim maintenance under Section 125 Cr.P.C., and next to fix the quantum of maintenance, the test is whether the wife is in a position to maintain herself in the way she was used to be in the place of her husband.

17. Here is a case of a woman with a temporary job taking care of her minor daughter seeking maintenance from her husband who is better placed than them. The woman and her daughter have to take care of their boarding, lodging, medical, clothing and also the educational expenses of her daughter. As on today (the date of hearing), as admitted by both the counsels the consolidated monthly pay for the wife is Rs.9,116/- and the salary of the husband is Rs. 53,459/- per month. Taking into consideration the cost of living index as on today and also the fact that the minor daughter is being taken care of by wife, the Court finds the amount of maintenance awarded by the Family Court is low and not consistent with the income of the husband at Rs.53,459/- per month. The Family Court erred in not enhancing the monthly maintenance of the wife and the daughter.

18. This Court finds that when the husband is able to pay Rs.8,000/- per month towards his contribution for Provident Fund, there is no reason for him deny enhancement of maintenance to his wife and child which would be consistent with his standard of living.

19. In such circumstances this Court taking into consideration the consolidated income of the wife which is also temporary in nature and the income of the respondent husband this Court finds that it would be just and appropriate that the maintenance awarded to the wife is enhanced to Rs.4,000/- per month from Rs.2,500/- per month and the maintenance awarded to the minor child is enhanced to Rs.7,500/- per month from Rs.6,000/- per month.

20. In the result, Crl.R.C.(MD) No.246 of 2017 filed by the petitioners/wife and daughter is partly allowed and Crl.R.C.(MD)No.694 of 2017 filed by the respondent/husband is dismissed and thereby the order, dated 24.08.2016, made in Cr.M.P.No.75 of 2014 in M.C.No.63 of 2008, by the Family Court, Dindigul, is modified and the maintenance awarded to the wife is enhanced to Rs.4,000/- per month and the maintenance to the minor child is enhanced to Rs.7,500/- per month.

21. It is made clear that in the event of any change of circumstances in the status of the parties, they are at liberty to file appropriate petition for alteration of allowances under Section 127 of Criminal Procedure Code, before the Family Court which has originally passed the maintenance order. The petitioners are entitled to claim the revised amount of maintenance from the date of order of the Family Court, Dindigul viz., 24.08.2016 passed in Cr.M.P.No.75 of 2014 in M.C.No.63 of 2008.

Three months time is given to the respondent/husband to pay the arrears of enhanced maintenance amount.

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# RANGANATHAM VERSUS SHYAMALA

**Madras High Court**

*Ranganatham*
*Versus*
*Shyamala*

**Bench: Hon'ble Mr. Justice K. Natarajan**

**AIR 1990 Mad 1**

**Decided on 5 November, 1988**

- **The only substantial question of law that arises in this appeal is whether the permanent alimony can be granted to wife u/S. 25 of the Hindu Marriage Act, even though the main petition for annulment of marriage u/S. 12 of the Act is dismissed.**
- **I have no hesitation in holding that the existence of any of the decrees referred to in Ss. 9 to 13 of the Act is a condition precedent to the exercise of the jurisdiction under S. 25(1) of the Act, and the granting the ancillary relief for permanent alimony and maintenance and not when the main petition was dismissed and no substantial relief was granted under Ss. 9 to 14 of the Act. Since there was no 'passing of decree' as contemplated under S. 25(1) of the Act, the jurisdiction to pass an order for maintenance under that section does not arise.**

**ORDER**

1. C.R.P. 1324 of 1986 converted into C.M.S.A. No. 8 of 1988:-- In view of the order passed in C.M.P. 12496 of 1988 this petition is converted into C.M.S.A. and disposed of accordingly. The only substantial question of law that arises in this appeal is whether the permanent alimony can be granted to wife u/S. 25 of the Hindu Marriage Act, even though the main petition for annulment of marriage u/S. 12 of the Act is dismissed.

2. According to the learned counsel for the appellant Mr. M. N. Padmanabhan that U/S. 25 of the Hindu Marriage Act, a permanent alimony can be granted only when on the petition filed by either of the spouses u/Ss. 9, 10, 11, 12 or 13 of the Act, a decree is passed and not in cases where the petition is dismissed. According to the learned counsel, only in cases where the marriage relationship comes to an end or altered, a permanent alimony can be granted and not in cases where the relationship of the marriage is subsisting and the remedy of the spouse is to proceed under the Hindu Adoption and Maintenance Act, 1956 for the relief of maintenance and not under the Hindu Marriage Act. In support of his contention, the learned counsel relied on various decisions reported in Shantaram Gopal Shet Narkar v. Hirabai ; Minarani Majumdar v. Dasarath Majumdar, ; Shantaram Dinakar Karnik v. Malti Shantaram Karnik ; Akasam Chinna Basu v. Akasam Parbati (DB); Purshotam v. Devki ; Gurucharan Kuar v. Ramchand ; Darshan Singh v. Mst Daso ; Sushma v. Satishchandra ; and Vinod Chandra Sharma v. Rajesh Pathak . The ratio laid down in the above said decisions is to the effect that in the context of S. 25 of the Act, the expression 'passing any decree' means any of the decrees provided for u/Ss. 9 to 13 of the Act, and not the dismissal of a petition. But although technically speaking dismissal of a suit may be called a decree, such a decree is not contemplated u/S. 25 of the Act. The learned counsel appearing on either side frankly conceded that there is no judgment of this Court on this question. However, the learned counsel for the appellant submitted that there is one decision of this Court u/S. 37 of the Indian Divorce Act, reported in Devasahayam v. Devamony (1923) ILR 46 Mad 133 : (AIR 1923 Mad 211) wherein it was held as follows -

"It is not competent to the Court dismissing a husband's petition for dissolution of marriage, to award maintenance to the wife, u/S. 15 or 37 of the Indian Divorce Act. Though the wife might have filed an application for divorce or judicial separation on the husband's petition u/S. 15 of the Act, still in the absence of a decree for dissolution or judicial separation, no order for maintenance can be made under the Act," To appreciate the aforesaid decision, it is worthwhile to quote the provisions of S. 37 of the Indian Divorce Act, which runs thus -

"The High Court may, if it thinks fit, on any decree absolute declaring a marriage to be dissolved, or any decree of judicial separation obtained by the wife, and the District Judge may, if he thinks fit, on the confirmation of any decree of his declaring a marriage to be dissolved or any decree of judicial separation obtained by the wife, order that the husband shall, to.the satisfaction of the Court secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her own life, as having regard to her fortune (if any) to the ability of the husband, and to the conduct of the parties, it thinks reasonable; and for that purpose may cause a proper instrument to be executed by all necessary parties. In every such case the court may make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the Court may think reasonable."

See. 25 of Hindu Marriage Act reads as follows -

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

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

(3) If the Court is satisfied that the party in whose favour an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or if such party is the husband, that he has had sexual interecourse with any woman outside wedlock, it may at the instance of the other party vary, modify or rescind any such order in such manner as the Court may deem just."

This S. 25 of the Hindu Marriage Act is not identical to S. 37 of the Divorce Act, It is clear from S. 37 of the Indian Divorce Act, that only in a case where the Court on passing any decree absolute declaring a marriage to be dissolved, or any decree of judicial separation obtained by the wife and on its confirmation, make an order on the husband for payment to the wife, the monthly or weekly maintenance. But, this is not the case in so far as S. 25 of the Hindu Marriage Act is concerned. Hence, that section is not at all helpful in deciding the issue involved in this appeal. The very S. 37 itself contemplates passing of a decree, for, dissolution or a judicial separation for granting a permanent alimony to the wife. But S. 25 of the Hindu Marriage Act contemplates only passing of any decree and it does not further proceed to say a decree for either dissolution or nullity of marriage, restitution of conjugal rights, or judicial separation.

3. It is clear from the above two provisions that what is contemplated under S. 37 of the Divorce Act, 1869 is materially different from the language used by the Legislature under S. 25 of the Hindu Marriage Act, 1955, and that the decision rendered in Darshan Singh v. Mst. Daso , cannot afford any guidance in construing the language used by the Legislature in S. 25 of the Hindu Marriage Act, 1955. We are now concerned with the words "at the passing of any decree or at any time consequent thereto with regard to the grant of permanent alimony in favour of the defeated spouse". In this connection, it is

worthwhile to refer to the various decisions relied on by the learned counsel for the appellant. In Akasam Chinna v. Parbati , a Division Bench of the said Court relying on the earlier decisions reported in Harilal Purushotham v. Lilavathi Gokaldas, Shanta-ram Gopalshet v. Hirabai, ; Shantaram Dinakar v. Malti Shantaram Karnik , Minarani v. Dasarath , held that the expression 'any decree' means passing of any of the decrees mentioned in Ss. 9 to 14 of the Act and it does not include an order of dismissal and further the passing of an order of dismissal is not the same thing as passing of a decree and that therefore it cannot be regarded as the passing of a decree and permanent alimony cannot be granted to a party while dismissing the petition under the Act. In the decision reported in Smt. Sushma v. Satish Chandra, a Division Bench of the said Court, while considering the earlier decisions held as follows -

"Hindu Marriage Act (25 of 1955) S. 25 --

Permanent alimony and maintenance --

When can be granted -- Words "passing any decree" in S. 25. -- Mean passing of decree of divorce, restitution of conjugal rights or judi cial separation -- Alimony and maintenance cannot therefore be granted as passing of decree dismissing divorce petition.

Permanent alimony and maintenance under S. 25 can only by granted in case divorce is granted and not if the marriage subsists. The word 'decree' is used in matrimonial cases in a special sense different from that in which it is used in C.P.C. The passing of the 'decree' in S. 25 means the passing of the decree of divorce, restitution of conjugal rights, or judicial separation and not the passing of a decree dismissing the petition. If the petition fails then no decree is passed, i.e., the decree is denied to the applicant. Alimony, cannot therefore, be granted in a case where a decree for divorce or other decree is refused because in such a case the marriage subsists.

The power to grant alimony contained in S. 25 can only be exercised when the court is faced with the problem of setting the mutual rights of the parties after the matrimonial ties have been determined or varied by the passing of the kind of decree mentioned in Ss. 9, 10, 11 and 13 of the Act and not in other cases.

Secs. 23 and 27 also show that a decree is passed only when application for divorce or other relief is granted and not when the application is dismissed."

The Division Bench has elaborately dealt with the reasoning in paras 5 to 8 and ultimately came to the conclusion that the word 'decree' in a specific sense is different from that in which it is used in the C.P.C. and that accounted for the reasons which have prompted the reference to the Bench for proper consideration of the term 'decree' used in the context under S. 25 of the Act. The learned Judges have also considered the word 'decree' used in Ss. 26, 27 and 23 of the Act, in support of the said conclusion. As rightly observed by the learned Judges in the above mentioned case alimony on a permanent basis is maintenance given to an ex-spouse of the marriage by the other ex-spouse, and if a petition fails, then the marriage still subsists unaltered by the intervention of any decree. In that event, the normal rights of the parties are to be found in the legal system under which they are married (which have) to prevail. There is no question of alimony being granted in such cases, because the matrimonial rights of the parties are to be found in the legal system which operates, requiring one of the parties to support the other and if there is failure to do so, then the other partner can seek maintenance by recourse to the civil or criminal court. There is no question of granting alimony in such cases. It has to be maintenance simplicter as per S. 18 of the Hindu Adop-tions and Maintenance Act, Furthermore, sub-sec. (3) to S. 25 of the Act provides that alimony has to end on the re-marriage of the ex-spouse or proof of sexual relations with another partner or unchastity. These conditions clearly show that the matrimonial ties have to be determined before an order for alimony can be passed. In cases, where the dismissal of the petition is made there is no alteration or the variation of the rights of the matrimonial parties and the question of granting alimony does not arise. Under S. 23 of the Act, certain safeguards are provided for passing a decree for divorce or other relief and not for the dismissal of those petitions. Similarly, regarding the custody of the child

under S. 26 of the Act and the disposal of the property u/S. 27 of the Act, reliefs are granted only in cases where the decrees for the relief u/Ss. 9 to 14 of the Act were granted.

4. As regards the contention that all the decrees made by the court in any proceeding under this Act be treated as the decrees of the court made in exercise of its original civil jurisdiction and every such appeal shall He to the Court to which appeals ordinarily lie from the decisions of the court given in exercise of its original civil jurisdiction of the said decree referred to u/ S.25 of the Act which includes the dismissal of the petition and as such the same meaning has to be attributed to the word 'decree' u/S. 25 of the Act. It is seen that the word 'passed' under S. 25 of the Act has not been made use of in S. 28 of the Act and on the other hand, the word 'made' alone has been used. The difference clearly reflects the intention of the Legislature in the sense of 'granting relief and 'making any decree'. The term 'making any decree' is used for or against any of them for the granting of any relief or refusing any relief. The word decree in its ordinary connotation may mean normal expression of the adjudication to determine the rights of the parties in any case. The definition of the word 'decree' given u/S. 2(2) C.P. Code may be applicable so far as may be to the expression 'decree under S. 25 of the Act. Sec. 21 of the Hindu Marriage Act makes the C.P.C. applicable for regulating the proceedings under the Act, subject to the provisions of the Hindu Marriage Act, and the rules of the High Court. In the decision reported in Darshan Singh v. Mst. Daso , it was observed as follows (at p. 107 of AIR) - "Passing of any decree under S. 25 of the Act would mean decree granting relief of the nature stated in Ss. 9 to 13 of the Act and the expression 'decree' made under the provisions of the Act would mean decrees granting relief or refusing relief and it cannot be the intention of the Legislature to attach finality to the orders of the District Judge regarding the dismissal of the petitions u/Ss. 9 to 13 of the Act. Thus I hold that the present appeal against the dismissal of the petition under S. 9 of the Act is maintainable and I further hold that as relief of restitution of conjugal rights has not been granted, award of maintenance under S. 25 of the Act was without jurisdiction."

   In the decision reported in Vinod Chandra Sharma v. Rajesh Pathak it was held as follows - "Where an application for divorce is dis-missed there is no decree passed. Obviously, alimony cannot therefore, be granted in a case where a decree for divorce is refused because in such a case the marriage will subsist. The power to grant alimony contained in S. 25 has to be exercised when the court is called upon to settle the mutual rights of the parties after the marital ties have snapped by determination or variation by the passing of the decree of a type mentioned in Ss. 10, 11, and 13 of the Act, read with Ss. 23, 26 and 27 of the Act, a decree can be assumed to have been passed when an application for divorce or similar other relief is granted but not when the application is merely dismissed."

   In the above quoted case, reliance was also placed on the decision reported in Smt. Sushma v. Satischandra . The details of the said decision have been discussed in the earlier part of this judgment.

5. On going through the ratio laid down in the above decisions which is supported by convincing reasons, I am of the view that the words 'passing of any decree' have been properly interpreted. I am also in respectful agreement with the decisions rendered by the various High Courts that 'the passing of a decree' u/S. 25 of the Act means the passing of the decree of divorce, restitution of con-jugal rights or judicial separation and not the passing of a decree through which the petition itself is dismissed and therefore, it is clear that alimony cannot be granted in a case where a decree for divorce is refused. On the other hand, I do not find any merit in the submissions made by the learned counsel for the respondent-wife, Mr. R. S. Venkatachari, who drew my attention to the views expressed by the learned author, Mr. N. R. Raghava-chaiar in the text Book 'Hindu Law' (Principles and Precedents), 8th Edn. at page 77 wherein it was observed as follows - "Words "at the time of passing any decree" may support the argument that it is only if the main petition is decreed that a maintenance order for life of the petitioner can be passed by the matrimonial court and not when the petition is dismissed (Purushotham v. Devaki, , Shantaramv. Malti, , Shantarm v. Hirabai, ; Kadia Harilal Purushotham v. Kadia Leela-vati Gopaldas, ; Minarani v. Dasrath, and as by the dismissal of the petition the parties are left in the position in which they were prior to the institution of the matrimonial proceeding under this Act the ordinary Court of the country has jurisdiction

to entertain a suit for maintenance. There are two ways of considering this question. One construction is to hold that 'passing any decree' includes passing a decree of dismissal of the petition. In this view, the Court having jurisdiction for ordering permanent maintenance is the matrimonial Court under the Act. If, on the other hand, the expression 'passing any decree' should be construed as 'passing any decree allowing the petition' then the above contention would be plausible (Ramachandra Behera v. Snehalata Dei,. It appears, however, that the former construction is the preferable one. A decree may be a decree allowing the petition or a decree dismissing the petition. The words 'any decree' must take in both kinds of decrees. If the latter construction should be considered as the correct one, then the words will not say 'decree' but merely 'a decree'. See contra in Minarani v. Dasrath Majumdar, , Besides, there would be no meaning in allowing the parties to go to some other Court and start their battle once again after they had done it before the matrimonial Court which knows their respective strength and can be expected to do justice, especially when the Court is one of the superior Courts in the country being a District Court or its equivalent."

There is absolutely no case law to support this view. On the other hand, the learned Author himself had observed : the words 'at the time of passing any decree' may support the arguments that it is only if the main petition is decreed that order for alimony for life of the petitioner can be passed by the matrimonial Court and not when the petition is dismissed. The said view is proper and reasonable and the construction is also a plausible one, as in cases where no relief is granted, the remedies are provided by recourse to the civil or criminal Court under S. 18 of the Hindu Adoptions and Maintenance Act or S. 125, Cri.P.C., as the case may be. As has been observed, S. 21 of the Hindu Marriage Act is not at all helpful to decide the questions involved here, as the S. 21 of the Act relates to only regulating the proceedings under the Act as far as may be by the C.P.C., 1908, and that too subject to the other provisions contained in the Hindu Marriage Act, and the rules framed thereunder. I do not find any merit in the contentions of the learned counsel for the respondent, Mr. R.S. Venkatachari, that the preamble to the Hindu Marriage Act says that the Act is enacted only for the betterment of the wife and on the other hand, it is seen that the preamble relating to the Hindu Marriage Act lays down rules, viz., formation of marriage and solemnisation thereof and matrimonial reliefs etc. It is also not helpful to decide the interpretation of the words 'passing of any decree' and granting of relief of permanent alimony, in cases, where the relief is negatived. For the discussions already made, I have no hesitation in holding that the existence of any of the decrees referred to in Ss. 9 to 13 of the Act is a condition precedent to the exercise of the jurisdiction under S. 25(1) of the Act, and the granting the ancillary relief for permanent alimony and maintenance and not when the main petition was dismissed and no substantial relief was granted under Ss. 9 to 14 of the Act. Since there was no 'passing of decree' as contemplated under S. 25(1) of the Act, the jurisdiction to pass an order for maintenance under that section does not arise.

6. Further, the learned counsel for the respondent also relied on a decision reported in Nalini v. Velu, . That was a case u/ s. 24 of the Hindu Marriage Act, and that has nothing to do with the provisions of S. 25 of the Hindu Marriage Act. It was held in the above decision that 'arrears of maintenance allowable from the dates of service of summons of the main petition for restitution of conjugal right on the wife, notwithstanding the maintenance application was filed only at the appellate stage of the main proceedings. The learned counsel for the respondent also filed three petitions C.M.P. 13290 to 13292 of 1988 for awarding interim maintenance and the legal expenses, fees and other charges to the respondent. The respondent claimed interim maintenance at the rate of Rs. 500 per month. Both the Courts below on the basis of the materials available before them fixed the quantum of maintenance at Rs. 300 per month. The appellant also did not dispute the same. It is to be noted that even though the respondent is not entitled to the permanent alimony till her lifetime, in view of the findings already arrived at in this judgment, she is certainly entitled to claim maintenance till the termination of the proceedings in view of the provisions u/ss. 24 and 25 of the Act. Hence, I feel that it is just and proper to award the pendente lite maintenance till the disposal of the appeal, A.A.A.O. 38 of 1986 to the respondent, even though her claim for permanent alimony till her lifetime is negatived.

7. In the result, C.M.S.A. 8 of 1989 (C.R.P. 1324 of 1986) is partly allowed and it is further ordered that the orders passed by the Court below in I.A. 79 of 1983 in H.M.O.P. 49 of 1982, which was confirmed by the District Court in C.M.A. 10 of 1984, are all set aside and instead, the appellant is directed to pay the respondent the pendente lite maintenance allowance at the rate of Rs. 300 per mensem till 1-11-1988 when A.A.A.O. 38 of 1986 is dismissed from the date of order of the Principal Subordinate Judge. However there will be no order as to costs. At this stage learned counsel for the respondent prays for time for payment of arrears of maintenance. Three months' time is granted for payment of arrears.

8. Order accordingly.

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# B.VIJAYAKUMAR VERSUS S.SARASWATHY

**Madras High Court**

**Bench : Hon'ble Mr. Justice T. Ravindran**

*B.Vijayakumar ... Petitioner*
*Versus*
*S.Saraswathy ... Respondent*

**C.r.p.(Npd) (Md) No.746 Of 2006**

**and**
**M.P.(MD) No.1 of 2006**

**Decided on 27 July, 2017**

- **I.A.No.276 of 2005 has been preferred by the respondent herein under Section 25 of the Hindu Marriage Act, 1955 for an order awarding Rs.5,00,000/- as permanent alimony and maintenance as agreed by the revision petitioner in the joint memo of compromise, dated 24.03.2005, filed before the Court and directing him and his men to discharge the fixed deposit receipt and pay the same to her.**
- **Petitioner had agreed for compromise to get divorce, the terms of the compromise were reduced into writing and as per the terms of the said compromise, the revision petitioner has to pay a sum of Rs.5,00,000/- in lump sum towards the future maintenance of the respondent and it is also found that the amount was deposited in the Bank in the name of two persons and it was mutually agreed that after the order of divorce, the amount deposited in the Bank should be appropriated with all interest by the respondent herein.**
- **It is found that the Court below has rightly noted that inasmuch as the respondent is entitled to seek maintenance and permanent alimony even subsequent to the passing of the Decree and further since the revision petitioner had failed to honour his commitment given under the terms of compromise filed before the Court, held that the respondent is entitled to seek for the payment of the said sum by filing necessary application on account of the failure of the revision petitioner to fulfil his promise as per the terms of the compromise.**
- **Court below has rightly held that the application filed by the respondent herein seeking for permanent alimony and maintenance of Rs.5,00,000/- as agreed to be paid by the revision petitioner is maintainable and it is perfect both legally as well as factually and it does not warrant any interference from this Court.**

Date of Reserving the Order : 24.07.2017

Date of Pronouncing the Order : 27.07.2017

**ORDER**

Impugning the fair and decreetal orders, dated 07.04.2006, passed in I.A.No.276 of 2005 in H.M.O.P.No.8 of 2005, on the file of the Additional Subordinate Judge, Thanjavur, the civil revision petition has been preferred invoking Article 227 of the Constitution of India.

2. I.A.No.276 of 2005 has been preferred by the respondent herein under Section 25 of the Hindu Marriage Act, 1955 for an order awarding Rs.5,00,000/- as permanent alimony and maintenance as agreed by

the revision petitioner in the joint memo of compromise, dated 24.03.2005, filed before the Court and directing him and his men to discharge the fixed deposit receipt and pay the same to her.

3. As seen from the case of the respondent herein in the above said application, she has preferred a petition for divorce against the revision petitioner and as the revision petitioner had agreed for compromise to get divorce, the terms of the compromise were reduced into writing and as per the terms of the said compromise, the revision petitioner has to pay a sum of Rs.5,00,000/- in lump sum towards the future maintenance of the respondent and it is also found that the amount was deposited in the Bank in the name of two persons and it was mutually agreed that after the order of divorce, the amount deposited in the Bank should be appropriated with all interest by the respondent herein. Accordingly, it is the case of the respondent herein that the marriage between her and the revision petitioner had been dissolved on 24.03.2005 and when she had approached the revision petitioner to discharge the fixed deposit and pay the said lump sum of Rs.5,00,000/- towards her future maintenance, it is stated that on some pretext or the other, the revision petitioner is avoiding the payment and inasmuch as the revision petitioner herein is liable to pay the amount after discharging the fixed deposit and inasmuch as the revision petitioner had failed to do so by honouring the terms of the compromise, she has been necessitated to lay the application.

4. The above said application preferred by the respondent herein was resisted by the revision petitioner on the footing that even before the divorce has been ordered by the Court, the respondent demanded the entire amount to be paid to her and inasmuch as one of the joint holders of the Bank deposit was not available at that point of time, the amount could not be withdrawn and hence, the revision petitioner's father had arranged the payment of Rs.5,00,000/- to the respondent in order to get peace and put an end to the litigation and paid the amount to her and the respondent, after the receipt of the entire amount, cannot again seek to claim the amount lying in the Bank deposit and further according to the revision petitioner, the respondent has relinquished her right to seek maintenance in the divorce proceedings, which was also recorded by the Court and in such view of the matter, according to him, the respondent cannot reopen the issue further and seek future maintenance once again from the revision petitioner by way of the present application and further, according to him, the application is not legally maintainable and hence, it is liable to be dismissed.

5. The above application was taken up for consideration and the Court below, after noting the fact that under the terms of the compromise filed before the Court the revision petitioner herein had agreed to pay a lump sum of Rs.5,00,000/- towards future maintenance to the respondent, finding that even though the H.M.O.P., had been disposed of, inasmuch as the revision petitioner had not honoured the terms and conditions of the compromise and paid the amount as promised by him and also further finding that Section 25 of the Hindu Marriage Act provides for the payment of the permanent alimony and maintenance at any stage of the matter even after the passing of the decree in the main proceedings and inasmuch as the revision petitioner herein despite admitting to pay the amount had not made the payment and on the other hand claimed to have made the payment through some other mode, for which there is no material, held that the application preferred by the respondent herein is maintainable and directed the matter to be posted on 12.04.2006 for adduction of evidence.

6. Challenging the same, it is found that the present civil revision petition has been preferred.

7. As seen from the materials placed, on the subsequent hearing dates, the revision petitioner did not participate in the proceedings and accordingly, the Court below, considering the evidence adduced by the respondent both oral and documentary, allowed the application preferred by the respondent herein on 18.04.2006.

8. It is found that the revision petitioner has not challenged the final order passed by the Court below, dated 18.04.2006, in I.A.No.276 of 2005. However, he has only challenged the impugned order, dated

07.04.2006 of the Court below holding that the application preferred by the respondent herein is legally maintainable.

9. It is not in dispute that the respondent herein has moved a petition seeking for divorce against the revision petitioner. It is also not in dispute that the parties have entered into a compromise and pursuant to the same also filed a Memorandum of Compromise before the Court, wherein the revision petitioner had agreed to pay a lump sum of Rs.5,00,000/- to the respondent towards future maintenance. The said amount was deposited in the Bank in the name of two persons and it was agreed that on the Court passing order of divorce the respondent is entitled to get the amount. Now, according to the respondent, inasmuch as the revision petitioner has failed to honor his commitment and not discharged the fixed deposit, she has been necessitated to prefer the application seeking for appropriate reliefs.

10. The case of the revision petitioner that even though he had deposited the amount agreed to be paid towards the respondent's future maintenance in the Bank deposit, which has been incorporated in the terms of the compromise and the respondent had been given liberty to get the amount after order of the Court allowing the divorce petition, according to him, as the respondent insisted for the payment of the said sum even before the Court had passed order of divorce, he had made arrangement to pay the amount through his father and as the respondent had received the amount, she is not entitled to seek for the claim of the amount again lying in the Bank deposit and hence, the application is not legally maintainable.

11. However, as per the contention put forth by the revision petitioner, to establish that he has paid the said amount of Rs.5,00,000/- to the respondent even prior to the order of divorce, there is no material forthcoming. Merely because the respondent in the divorce proceedings had agreed that she has received the payment cannot be held that she indeed received the payment. As rightly contended by the respondent's counsel the said admission is only given in pursuance of the terms of the compromise entered into between the parties and filed before the Court on the date of grant of order of divorce and in such view of the matter, it is found that the contention of the revision petitioner that the respondent had already received the amount as such cannot be countenanced. As seen above, there is no reliable material placed on the part of the revision petitioner that the respondent had already received the amount agreed to be paid by the revision petitioner towards future maintenance as incorporated in the terms of compromise.

12. In such view of the matter, it is found that the Court below has rightly noted that inasmuch as the respondent is entitled to seek maintenance and permanent alimony even subsequent to the passing of the Decree and further since the revision petitioner had failed to honour his commitment given under the terms of compromise filed before the Court, held that the respondent is entitled to seek for the payment of the said sum by filing necessary application on account of the failure of the revision petitioner to fulfil his promise as per the terms of the compromise.

13. Considering the impugned order in its entirety, it is found that the Court below has rightly held that the application filed by the respondent herein seeking for permanent alimony and maintenance of Rs.5,00,000/- as agreed to be paid by the revision petitioner is maintainable and it is perfect both legally as well as factually and it does not warrant any interference from this Court.

14. Resultantly, the civil revision petition is dismissed with costs. Consequently, connected miscellaneous petition is closed.

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# LANDMARK JUDGMENTS ON

# DIVORCE

# DR. N. SHIVA MOHANA REDDY VERSUS SMT. APARNA REDDY

**Andhra Pradesh High Court**

**Bench: Hon'ble Mr. Justice N.V. Ramana**

*Dr. N. Shiva Mohana Reddy*
*Versus*
*Smt. Aparna Reddy*

**(Civil Revision Petition No. 2653 of 2004)**

**Decided on 3 September, 2004**

- **The petitioner is the husband and the respondent is the wife. The marriage between the petitioner and the respondent was performed on 17.11.1996 as per Hindu rites and customs. The petitioner and the respondent led conjugal life for some time. Thereafter, some differences arose between them. Thereupon, the petitioner filed O.P. No. 13 of 2003 on the filed of the Senior Civil Judge, Vikarabad, for judicial separation, stating that the respondent wife deserted him in the month of October, 2000.**
- **While so, the petitioner filed the present application I.A. No. 625 of 2003 seeking amendment of the prayer and other portions in the contents of the O.P. In effect, by the amendment, the petitioner sought to convert the O.P. filed for judicial separation into O.P. for divorce. He inter alia contended that due to adamant behavior of the respondent, the marriage ties had broken, and as such, he should be permitted to amend the prayer and other portions in the O.P. to seek divorce.**
- **I perused the pleadings made by the petitioner in the application filed for amendment of the prayer in the O.P. from one of judicial separation to one of divorce, and I do not find any pleading indicating the changed circumstance to amend the petition for judicial separation into a petition for divorce. What are the changed circumstances that led to the filing of the application for amendment, are not indicated in the affidavit, and the affidavit merely reiterates the stand taken in the petition for judicial separation. No new facts are brought to the notice of the Court. Merely because the amendment sought is not prejudicial to the rights of other party, it does not mean that such an amendment is to be accepted.**

## JUDGMENT

**Hon'ble Mr. Justice N.V. Ramana**

1. This C.R.P. is directed against the order dated 5-3-2004, passed by the Senior Civil Judge, Vikarabad, Ranga Reddy District, dismissing the application in I.A. No. 625 of 2003 in O.P. No. 13 of 2003, filed by the petitioner seeking to amend the O.P.

2. The facts leading to the filing of the C.R.P. may be noted, and they run thus:

   The petitioner is the husband and the respondent is the wife. The marriage between the petitioner and the respondent was performed on 17.11.1996 as per Hindu rites and customs. The petitioner and the respondent led conjugal life for some time. Thereafter, some differences arose between them. Thereupon, the petitioner filed O.P. No. 13 of 2003 on the filed of the Senior Civil Judge, Vikarabad, for judicial separation, stating that the respondent wife deserted him in the month of October, 2000.

3. While so, the petitioner filed the present application I.A. No. 625 of 2003 seeking amendment of the prayer and other portions in the contents of the O.P. In effect, by the amendment, the petitioner sought

to convert the O.P. filed for judicial separation into O.P. for divorce. He inter alia contended that due to adamant behavior of the respondent, the marriage ties had broken, and as such, he should be permitted to amend the prayer and other portions in the O.P. to seek divorce. The respondent resisted the application for amendment stating that the facts mentioned by the petitioner in the affidavit filed in support of the amendment petition are not correct. According to her, the petitioner himself is responsible for break down of the marital ties between her and the petitioner. The Court below considering the rival contentions, dismissed the amendment application. The said order is assailed in this C.R.P. Heard the learned counsel for the petitioner and the learned counsel for the respondent. The arguments that were advanced before the Court below were reiterated by them.

4. The question that arises for consideration in this C.R.P. is whether the amendment application filed by the petitioner to amend the prayer in the O.P. from one of judicial separation to one for divorce, can be allowed on facts and circumstances of the present case. Before dealing with the facts of the case, it is just and necessary to look into the relevant provisions the Hindu Marriage Act, 1955 (for short 'the Act'). Section 10 of the Act, which deals with "judicial separation", reads as follows:

10. Judicial separation: -

(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of Section 13, and in the case of a wife also on any of the grounds specified in sub-section (2) thereof, as grounds on which a petition for divorce might have been presented.

(2) Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the Court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.

Section 13 of the Act, which deals with "divorce" reads thus:

13. Divorce: -

(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party, -

(i) has, after the solemnization of marriage, had voluntary sexual intercourse with any person other than his or her spouse; or (ia) 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 continuously 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.

5. The consequence of a decree passed in a petition filed under Section 10 of the Act is that parties would reside separately during the period of decree without any conjugal rights over the other and he marriage between the parties is put under suspended animation: whereas in case of decree for divorce, the marital ties between the parties gets snapped as soon as the decree for divorce is passed. The object and scope of the judicial separation and divorce are different and distinct, though some of the grounds to grant decree for judicial separation and divorce appear to be one and the same. On looking into the intent of the legislation, the approach to the problems of judicial separation and divorce need not necessarily be

one and the same. It is not necessary and desirable that the grounds for judicial separation and grounds for divorce should be identical.

6. While dealing with judicial separation and divorce the lofty ideals of the Hindu community and religion shall have to be taken into consideration. In case of divorce, the law was so framed to provide an opportunity for mutual adjustment between the spouses. On perusal of the legislation, and particularly the intention of both the provisions, relating to judicial separation and divorce, there are apparent differences between judicial separation and divorce.

7. In case of judicial separation, it offers an opportunity to the parties to reconcile their differences and come together, in case the parties fail to reconcile, then only the law enables under Section 13(1-A) of the Act to pass a decree for dissolution of marriage, though some of the grounds for judicial separation and divorce are one and the same. While granting a decree, different parameters are being followed. For instance under Sections 10 and 13 of the Act, unsoundness of mind is one of the grounds for seeking the respective relief. But in real sense, under Section 10 of the Act unsoundness for relevant period is a ground for seeking judicial separation, whereas for granting a decree for divorce under Section 13 of the Act, it is for the petitioner to plead and establish that such unsoundness of mind is incurable. Under Hindu Law, marriage is considered sacred. After codification of Hindu Law, and enactment of Hindu Marriage Act, 1955, Hindu Marriage, appears to be sacred as well as a contract. By virtue of the said enactment, either of the spouses can present a petition for a decree either for judicial separation or for divorce. There is fundamental difference between a petition for judicial separation and divorce. Under Section 10(2) of the Act, even after passing a decree for judicial separation on the application filed by either of the spouses. On being satisfied the truth of the statement made in such petition, the Court can rescind the decree if it considers it just and reasonable to do so. But in the case of decree under Section 13 of the Act, the question of rescinding the decree is does not arise, except by filing a petition for review or appeal by way of common law remedy.

8. The application under Section 10 of the Act permits the parties to a marriage to live apart. Even after passing a decree for judicial separation the marriage tie exists, though during the existence of such decree, it shall no longer be an obligation for either party to cohabit with the other. The effect of decree for judicial separation has mutual rights and obligations arising from the marriage, suspended, and the rights and duties prescribed by the decree are substituted between the parties. The decree does not severe the marriage ties or dissolve the marriage completely, but it continues to subsist, which ultimately may offer an opportunity for reconciliation and adjustment. On the other hand, in case of decree for divorce, the marriage ties are severed and there is no possibility of reconciliation and adjustment. In case of judicial separation, if the parties agreed for reconciliation, the rights of respective parties which flow from the marriage are restored. The provision of judicial separation is made with an intention to reconciliate the parties after tempers of the rival parties are cooled down. On the other hand, seeking divorce is an extreme relief to severe the marriage ties permanently.

9. Application under Section 10 of the Act may furnish a ground for divorce if not reconsidered after passing a decree for judicial separation, and cohabitation is not resumed for a period of one year, whereas the decree for divorce has the effect of dissolution of marriage and puts an end to the marriage ties, and separation is absolute and final. The marital relationship or marriage in Hindu Law is to be treated as samskara or sacred. The marriage is necessarily one of the basis with regard to legal and cultural rights and obligations in the society, it is required to keep in mind while dealing with the cases on matrimonial matters, the provisions of Act cannot be liberally constructed like a beneficial legislation. While dealing with matrimonial matters, the importance and imperative character of the marriage in Hindu Dharma, should be kept in mind, as the institution of marriage is one of the stages for social order and progress. Hindu Law is not static, it changes with the time, butit does not mean that the provisions of marriage laws cannot be interpreted in a liberal manner as the same would be ultimately detrimental to the social order.

10. I perused the pleadings made by the petitioner in the application filed for amendment of the prayer in the O.P. from one of judicial separation to one of divorce, and I do not find any pleading indicating the changed circumstance to amend the petition for judicial separation into a petition for divorce. What are the changed circumstances that led to the filing of the application for amendment, are not indicated in the affidavit, and the affidavit merely reiterates the stand taken in the petition for judicial separation. No new facts are brought to the notice of the Court. Merely because the amendment sought is not prejudicial to the rights of other party, it does not mean that such an amendment is to be accepted. In the absence of specific pleading made with regard to the changed circumstances and other relevant ingredients, the order passed by the trial Court does not suffer from any infirmity.

11. The counsel for the petitioner relied on the judgment of the Calcutta High Court in Smt. Sundari Dasi v. Basudeo Lal Guraliar, . The point that arose for consideration in the said case was whether an amendment is permissible during the pendency of the appeal against the decree passed for judicial separation. He also relied on similar judgment of the Madhya Pradesh High Court in N.C. Dass v. Smt. Chin Mayee Dass, and the judgement in Smt. Sundari Devi v.Basudeo Lal Gwaliar, 1977 All India Hindu Law Reporter 350, wherein the question that arose for consideration was whether an amendment can be allowed at the appellate stage. In Smt. Prakash Wati alias Krishna Devi v. Shri. P.C. Verma, 1978 Hindu Law Reported 517, the Delhi High Court held that converting an application under Section 10 of the Act to one under Section 13 of the Act, in strict sense is not an amendment to the Original Petition, but is converting the Original Petition from judicial separation to divorce. It was a case where the husband filed the O.P. for judicial separation and subsequently it was amended as petition for divorce. The Court after elaborate consideration of the matter granted a decree for divorce. The wife filed appeal before the Delhi High Court. The question that arose for consideration before the Delhi High Court was whether an amendment application would be deemed to have been filed in August 1975 with retrospective effect. The Delhi High Court held that amendment cannot relate back to a date anterior to the date of application. The judgments relied on the petitioner is not applicable to the facts of the case on hand. The learned counsel for the petitioner also placed reliance on the judgment of Delhi High Court in J.P. Sharma v. Shrimati Shashi Bala, 1979 All India Hindu Law Reporter 474. In that case, the Delhi High Court held that if petition for amendment from judicial separation to that of decree for divorce under Section 13 (1) (iii) of the Act, it to be ordered, it would change the very nature of the case. The amendment was allowed to the extent of seeking the decree for divorce on the ground of mental cruelty. The Delhi High Court upheld the order of the trial Court dismissing the application filed for judicial separation. In the first appellate stage, the appellant husband sought for an amendment of the petition for judicial separation to that of a petition for decree of divorce alleging that the respondent has become incurable of unsoundness of mind or has been suffering continuously or intermittently from mental disorder of such mind and to such an extent that the petitioner cannot be expected to live with the respondent. On peculiar facts and circumstances of the case, as the husband took the ground that his wife is suffering disease of unsoundness of mind, which is incurable, the Court was pleased to order amendment. The facts and circumstances of the said judgment have no application to the facts of the case on hand. Therefore, they do not, in any manner, help the petitioner. For the reasons stated above, the revision is invariably required to be dismissed. No Costs.

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# ANIL KUMAR BHUTANI VERSUS MANYA BHUTANI

**Delhi High Court**

*Anil Kumar Bhutani ..... Appellant Mr. Yogesh Sharma, Adv.*
*Versus*
*Manya Bhutani ..... Respondent*

**Bench : Hon'ble Mrs. Justice Hima Kohli and Hon'ble Mrs. Justice Deepa Sharma**

**MAT. APP.(F.C) 130/2017 and CM No. 27084/2017**

**Decided on September 12, 2017**

- **The appellant/husband has assailed the order dated 29.05.2017 passed by the Family Court, whereby his petition for dissolution of marriage under Section 13(1)(ia) of the Hindu Marriage Act, 1955 (hereinafter referred to as "the HMA"), was dismissed.**
- **The appellant claimed that the respondent did not perform the duties of a devoted Hindu wife and as she refused to do the household chores, his family member, had to do all the household chores; she did not look after him during his illness and never even offered him a glass of water on his returning from work; she used to sarcastically state that he was incapable of giving her physical satisfaction. Her behaviour was motivated by her desire to live separately from the family members of the appellant and she used to go to her parents house quite frequently.**
- **Mental cruelty is a state of mind and feeling with one of the spouses due to the behavior or behavioral pattern by the other..The parties are not expected to be an ideal husband and wife; their conduct has to be ascertained in the backdrop of their social status, educational qualifications, physical and mentalconditions and cultural and social background. When a party approaches the Court for seeking the relief ofdivorce on the ground of cruelty, he is expected to give particulars of the facts which according to him, are of such a nature which would have caused mentalcruelty to him of such an intensity that made it impossible for him to continue in the relationship. It is not sufficient to merely plead that the respondent had treated the appellant with cruelty. The behaviour and conduct should be so acute and grave that it has the effect of causing anguish, disappointment and frustration to the wronged spouse and make it difficultfor that spouse to continue with the matrimonial alliance. Adopting the said criteria, the court is expected to assess as to whether the facts pleaded and proved would constitute cruelty sufficient to severe the matrimonial relationship.**
- **All these admissions lends credence to the plea of the wife that she was not living with the appellant after the incidence of poisoning on 24.12.2007, and that it was he who had refused to permit her to stay with him. Since the statement of the appellant remains unsubstantiated and he has contradicted himself on material facts during his cross-examination and failed to prove specific instances ofcruelty that he had pleaded his petition for seeking dissolution of marriage on the ground of cruelty was turned down. We find no perversity, illegality or infirmity in the conclusion arrived at in the impugned judgment, for interference. Accordingly, the impugned judgment is upheld and the present appeal is dismissedin limine, along with the pending application**

**Hon'ble Mrs. Justice Deepa Sharma :—**

The appellant/husband has assailed the order dated 29.05.2017 passed by the Family Court, whereby his petition for dissolution of marriage under Section 13(1)(ia) of the Hindu Marriage Act, 1955 (hereinafter referred to as "the HMA"), was dismissed.

2. The admitted facts of the case are that the parties had got married at Delhi on 11.10.2000, as per the Hindu rites and ceremonies. The marriage was consummated and two children, namely, Aniket and Kavya were born from out of this wedlock. In the petition for divorce, the husband has alleged that the marriage was a simple one; no dowry was given or accepted in the marriage or at any time after the marriage and the respondent/wife was treated with love, affection and respect in the matrimonial home by him and his family member. She, however, misbehaved grossly and abused him and his family members without any rhyme or reason. The respondent did not allow the marriage to be consummated for about ten days due to her cold behaviour. On the day of theirSuhagrat, she disclosed to the appellant that she was in love with someone else and was not interested in marrying him, but was forced into the marriage. As a good husband, the appellant had asked her to forget the past and start a new life as his legally wedded wife. Throughout her stay, the respondent/wife was constantly fighting and abusing the appellant and his family members with filthy language, kept calling them names which had caused mental cruelty to him and his family members. This had also affected his career and health.

3. The appellant claimed that the respondent did not perform the duties of a devoted Hindu wife and as she refused to do the household chores, his family member, had to do all the household chores; she did not look after him during his illness and never even offered him a glass of water on his returning from work; she used to sarcastically state that he was incapable of giving her physical satisfaction. Her behaviour was motivated by her desire to live separately from the family members of the appellant and she used to go to her parents house quite frequently. The respondent also pressurized the appellant to have a separate accommodation which was not possible for him due to the expenses entailed and his limited resources. He made efforts to explain his financial constraints to her, but she just refused to understand anything. On every such occasion, the respondent used to abuse the appellant in front of his relatives and thus humiliated him. This caused acute mental torture and tension to him. On one occasion, when the mother of appellant/husband had fallen ill and was not in a position to even stand, he had asked the respondent to take care of his father and to prepare the meals for the family members, but she had straightaway refused and started fighting with him. The respondent used to threaten the appellant that she would go to her parental home and would agree to stay in the matrimonial home only on the condition that she would not be asked to do any household chores.

4. As per the appellant, the constant bickering, abuses and use of filthy language by the respondent continued and rather, escalated over the period. She kept on insisting on a separate accommodation. She refused to have any physical relationship with him with effect from December, 2005, which caused him a greatmental trauma. Finally, on 27.12.2007, the respondent deserted the appellant and left her matrimonial home along with her gold jewellery, clothes and cash. All his efforts to bring her back had failed and she refused to return to him. In order to further harass the appellant and his family members, the respondent filed a complaint under Section 12 of the Protection of Woman from Domestic Violence Act, 2005. Based on these facts and contentions, a decree for divorce on the groundof cruelty was prayed for by the appellant/husband.

5. In her written statement, the respondent/wife had denied all the allegations levelled against her by the appellant. She contended that the boot was on the wrong foot and it was the appellant who was trying to take advantage of his own wrongs as he was the one who had treated her with cruelty. It was averred in the written statement that the petition for divorce is not in conformity with the High Court Rules framed under the HMA Act as it did not mention any specific act ofcruelty by giving the relevant dates, time and place of such act or incident. It was also stated that the pleas raised by the husband in the petition are vague, scandalous, malicious, defamatory, frivolous and misleading. The respondent/wife asserted that she was always ready and willing to live with the appellant/husband and is still ready and willing to do so; that she had always been taking care of her husband, his family members and their children and was also performing all her matrimonial duties. She claimed that it was her sister-in-law, who after leaving her matrimonial home, was residing with them and continuously interfering in their life and she used to constantly nag and abuse her and pass comments degrading her for bringing less dowry. Despite that, the respondent/wife continued to perform her duties. The respondent stated that she was treated

with so much cruelty that she had wanted to end her life. She was also made to consume a poisonous substance on 24.12.2007 and then taken to Hindu Rao Hospital where she was treated. Since her life in the matrimonial home was unsafe, she had moved with her parents. It was further contended that false allegations have been made in the petition to the effect that no dowry was demanded or accepted in the marriage. Had that truly been the case, there was no occasion for the appellant to have pleaded that the respondent had left the matrimonial home with her gold jewellery and other articles. She also averred in the written statement that it was her lawful right to invoke the provisions of Domestic Violence Act for seeking redressal of her grievances and she had simply exercised that right. The respondent further stated that the appellant cannot take the benefit of his own wrong, since she was actually forced to leave the matrimonial home under compelling circumstances after 24.12.2007, when she felt that her life was not safe and secure in the matrimonial home.

6. On the basis of the pleadings of the parties, the learned Family Court had framed the following issues on 24.12.2007:—

"1. Whether after solemnisation of marriage of the petitioner with the respondent the respondent has treated the petitioner with cruelty asalleged? OPP

2. Whether the petitioner is entitled to the relief claimed? OPP

3. Relief."

7. Both the parties had filed their respective affidavits by way of evidence in support of their cases and they were duly cross-examined.

8. After hearing the arguments of the parties and appreciating the evidence on record, the impugned judgment was passed, dismissing the divorce petition filed by the appellant.

9. In this appeal, the main grievance of the appellant/husband is that the learned Family Court erred in holding that he has not pointed out any specific instance of cruelty and that the averments made in the petition are only bald statements. It was argued by learned counsel for the appellant that what constitutesmental cruelty in a domestic relationship entitling a decree for divorce is that which goes on for a prolonged period of time. Mental cruelty cannot be discerned from one or two incidents or events and any event running for a short span of time, is itself condonable by the spouses. It was further argued that the appellant had categorically pleaded facts like the abusive nature of respondent, her refusal to do household chores; refusal to take care of his father when his mother had fallen sick; her leaving the matrimonial house without his consent on 27.12.2007; the incident of the first night of their marriage when she had disclosed about her love affair with another person due to which the marriage could not be consummatedfor a considerable period of time; the fact that she had refused to cohabit with him with effect from December, 2005, till she left the matrimonial home. It was argued by learned counsel that all these instances taken collectively, are sufficient to constitute cruelty.

10. It was next argued by the learned counsel forthe appellant that the observation of the Family Court that since the appellant has failed to examine any of his family members in support of his case, his testimony cannot be believed, is contrary to the settled position of law which is that in matrimonial cases, what is required is the preponderance of evidence showing probability of existence of a fact which can sufficiently be relied upon and those facts need not be proven beyond a reasonable doubt, as is the requirement in criminal cases. It was urged that the Family Court's refusal to believe the testimony of the appellant is contrary to law and the impugned judgment is liable to be set aside on that ground alone. It was further argued that the learned Family Court has failed to consider that the appellant/husband is a man of peaceful nature and had always believed in bringing his wife on the right track and that is why he had persuaded her to forget about her past and adjust herself in the matrimonial home on the first night, when she had disclosed her love affair.

11. The next ground taken by learned counsel to assail the impugned judgment was that the learned Family Court has failed to appreciate the status of the parties who belong to a lower middle strata of the society and disclosure of such liaisons by the respondent to others would have caused much more humiliation to the appellant. It was urged that the fact that the respondent had denied the appellant the right to cohabit with her after December, 2005, till she had left the house, is sufficient to cause cruelty of such a nature which would entitle him for a decree ofdivorce. The appellant denied that the respondent was ever turned out from the matrimonial home but stated that when she had consumed phenyl, she had to be taken to the hospital from where she had left for her parental home and ever since then, she did not return to her matrimonial home which fact has been totally ignored by the Family Court. Asserting that the Family Court did not appreciate the facts in the correct perspective and interpreted the facts and circumstances of the case incorrectly, it was argued that the impugned judgment is liable to be set aside and a decree ofdivorce passed in favour of the appellant.

12. We have given our thoughtful consideration to the arguments addressed on behalf of the appellant. In this case, the petition has been filed by the appellant/husband seeking divorce from the respondent/wife on the grounds of cruelty under Section 13(1)(ia) of HMA. The Apex Court in Shobha Raniv. Madhukar Reddi (1988) 1 SCC 105, has held asunder:—

> "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 bemental 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."

13. The above principles were reiterated by the Supreme Court in V. Bhagat v. Mrs. D. Bhagat ((1994) 1 SCC 337) wherein it was held that "Mental cruelty in Section 13(1)(ia) can broadly be defined as that conduct which inflicts upon the other party suchmental pain and suffering as would make it not possible for that party to live with the other." Again, in the case of Praveen Mehta v. Inderjit Mehta ((2002) 5 SCC 706 : AIR 2002 SC 2582), the Supreme Court observed that "Mental cruelty is a state of mind and feeling with one of the spouses due to the behavior or behavioral pattern by the other."

14. In Praveen Mehta (supra), the Supreme Court had made the following pertinent observations:—

> "21. ……The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehavior in isolation and then pose the question whether such behavior is sufficient by itself to causemental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in thedivorce petition has been subjected to mentalcruelty due to conduct of the other."

15. Subsequently, in Jayachandra v. Aneel Kaur((2005) 2 SCC 22 : AIR 2005 SC 534), the Supreme Court held that "…one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. The Court further observed that "to constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be

reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". The Supreme Court went on to observe that "But before the conduct can be calledcruelty, it must touch a certain pitch of severity. It isfor the Court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it. It has to be considered whether the complainant should be called upon to endure as a part of normal human life. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount tocruelty."

16. The above principles were restated by the Supreme Court in the case of Naveen Kohli v. Neelu Kohli ((2006) 4 SCC 558 : AIR 2006 SC 1675).

17. It is thus a settled proposition of law that the HMA Act does not define the word 'cruelty'. The existence or non-existence of mental cruelty has to be assessed from the behaviour and conduct of the spouse. Normal behaviour and conduct of a spouse is not sufficient to constitute cruelty. The parties are not expected to be an ideal husband and wife; their conduct has to be ascertained in the backdrop of their social status, educational qualifications, physical and mentalconditions and cultural and social background. When a party approaches the Court for seeking the relief ofdivorce on the ground of cruelty, he is expected to give particulars of the facts which according to him, are of such a nature which would have caused mentalcruelty to him of such an intensity that made it impossible for him to continue in the relationship. It is not sufficient to merely plead that the respondent had treated the appellant with cruelty. The behaviour and conduct should be so acute and grave that it has the effect of causing anguish, disappointment and frustration to the wronged spouse and make it difficultfor that spouse to continue with the matrimonial alliance. Adopting the said criteria, the court is expected to assess as to whether the facts pleaded and proved would constitute cruelty sufficient to severe the matrimonial relationship.

18. It is also a settled proposition of law that the person who approaches the Court seeking a relief, has to plead and prove all the facts which can entitle him to the relief prayed for. As discussed above, while laying down the principles which constitute cruelty for the purpose of Section 13(1)(ia) of HMA, the Supreme Court has time and again held that it should be of such a nature which would have caused a genuine apprehension in the mind of the wronged spouse that it was no longer in his welfare to continue with the relationship. Since an inference can be drawn from the attending facts and circumstances of each case, those facts and circumstances need to be pleaded elaborately and with specifics.

19. In the instant case, merely stating that the respondent was neglecting her duties or that she was abusive and had insulted the appellant and his family members in front of others or that she had refused to cook food for him or offer him even a glass of water on his return from work, would not be sufficient to constitute an act of cruelty unless and until specific instances showing such conduct of the respondent/ wife are pleaded or proved. The facts that have been stated by the appellant, cannot be treated as sufficient to constitute cruelty.

20. It has been argued on behalf of the appellant/husband that the appellant has specifically pleaded in the petition that the respondent/wife had refused to take care of his father when his mother had fallen ill and was unable to stand on her feet; that she had refused to cook meals or take care of his father during that period; that she had committed cruelty of a grave and serious nature when on the very first night of their marriage she made a disclosure about her love affair and when she refused to cohabit with him and, thereafter, denied him his conjugal rights with effect from December, 2005 and also when she deserted him on 27.12.2007, yet the Family Court had held that no specific plea has been made by the appellant to provecruelty and he had failed to prove the same and in the absence of any evidence of corroborative nature, the said allegations had to be treated as bald statements which could not be believed, when facts of such a nature can only be proven by preponderance of evidence and need not be proved beyond any reasonable doubt.

21. There is no dispute that the facts in a civil matter are not required to be proved beyond a reasonable doubt, but by applying the principle of preponderance of probability, if the evidence on record, points towards the existence of a particular set of facts, the Court can presume the existence of such facts and the said facts can be said to have been proved. Also, in matrimonial cases, in order to prove cruelty, it is the contemporaneous nature of evidence which is important. Such evidence could be in any form, be it letters or complaints, but the ground rule is that the evidence has to be of a contemporaneous nature. Bald statements made in a petition, unsupported by any evidence of contemporaneous nature cannot be considered sufficient to prove the facts alleged.

22. In the present case, the divorce petition is a litany of general complaints made by the appellant/husband against the respondent/wife, but no specific incident of cruelty has been pleaded. It has not been shown if during their seven years of their marriage, he had ever complained about the behaviour of his wife to any person, including her parents. In fact, the divorce petition is bereft of such averments. The Family Court had also brought on the glaring contradictions that had emerged during the cross-examination of the appellant. In his petition, the appellant had pleaded that the respondent/wife had refused to take care of his father and refused to cook meals when his mother had fallen ill and was unable to stand on her feet, but she did not take care of his father or prepare the meals. But during his cross-examination, the appellant had admitted to the fact that his mother had expired before his marriage was solemnized. The Court had also rejected the argument that the same was a typographical mistake in the plaint and the affidavit submitted by the appellant in evidence, on the groundthat in her written statement, the respondent had very clearly taken a plea that her mother-in-law had expired before their marriage, yet in his affidavit by way of evidence filed later, the appellant had testified to the said fact, without seeking amendment of his petition.

23. The learned Family Court observed that the appellant/husband had failed to produce sufficient evidence in support of his plea that his wife had refused to cohabit with him on the first night or disclose about her love affairs to him. The Court had refused to believe this statement in the absence of any other evidence by noticing that the reaction of the husband was not that of a normal person. Assuming that the appellant had been able to prove the ground of cruelty on account of the respondent having refused to cohabit with him on the first night after their marriage, there still remains a question as to whether the appellant had condoned the said resistance put up by the respondent, declining to discharge her marital obligation. In this regard, Section 23(1)(b) of the HMA gains significance. The said provision requires the Court to satisfy itself as to whether the ground taken in a petition amounts tocruelty under Section 13(1)(ia) of the HMA and the petitioner has not in any manner, condoned the saidcruelty. In this context, we can do no better than to reproduce the principles laid down by the Supreme Court in the case of Dr. N.G Dastane v. Mrs. S. Dastane,(1975) 2 SCC 326 : AIR 1975 SC 1534 as below:—

> "54. Before us, the question of condonation was argued by both the sides. It is urged on behalf of the appellant that there is no evidence of condonation while the argument of the respondent is that condonation is implicit in the act of cohabitation and is proved by the fact that on February 27, 1961 when the spouses parted, the respondent was-about 3 months pregnant. Even though condonation was not pleaded as a defence by the respondent it is our duty, in view of the provisions of Section 23(1)(b), to find whether the cruelty was condoned by the appellant. That section casts an obligation on the court to consider the question of condonation, an obligation which has to be discharged even in undefended cases. The relief prayed for can be decreed only if we are satisfied "but not otherwise", that the petitioner has not in any manner condoned the cruelty. It is, of course, necessary that there should be evidence on the record of the case to show that the appellant had condoned the cruelty.
>
> 55. Condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation there must be, therefore, two things: forgiveness and restoration. The Law and Practice of Divorce and Matrimonial Causes by D. Tolstoy Sixth Ed., p. 75. The evidence of condonation in this case is, in our opinion, as strong and satisfactory as the evidence of cruelty. But that evidence

does not consist in the mere fact that the spouses continued to share a common home during or for some time after the spell of cruelty. Cruelty, generally, does not consist of a single, isolated act but consists in most cases of a series of acts spread over a period of time. Law does not require that at the first appearance of a cruel act, the other spouse must leave the matrimonial home lest the continued cohabitation be construed as condonation. Such a construction will hinder reconciliation and thereby frustrate the benign purpose of marriage laws."

24. As per the appellant's own case, he had asked his wife to forget her past and try to adjust in the matrimonial life with him, which shows that he had condoned the acts of the respondent. What could be better proof of such condonation than the fact that the marriage was duly consummated and two children were born from out of the wedlock in the years 2001 and 2005.

25. The appellant/husband's plea that the respondent/wife had refused to cohabit with him with effect from December, 2005 was also rightly disbelieved by the learned Family Court on the grounds that it was again a bald statement made by him. The appellant had failed to produce any evidence of a contemporaneous nature to show that his wife had refused to cohabit with him from December, 2005 till 27.12.2007, on which date she had allegedly left him and gone to her parent's residence. The testimony of the appellant was found to be untrustworthy because he had even failed to prove his plea that his wife had deserted him on 27.12.2007 The impugned judgment notes that in his cross-examination, the appellant had admitted that "we lived together till 24.12.2007" and this itself falsifies his plea that the wife had deserted him on 27.12.2007 He has failed to prove that the respondent had left him on her own and had refused to live with him. Rather, in his cross-examination the appellant admitted that "it is correct that I have refused to allow the respondent to live with him." All these admissions lends credence to the plea of the wife that she was not living with the appellant after the incidence of poisoning on 24.12.2007, and that it was he who had refused to permit her to stay with him. Since the statement of the appellant remains unsubstantiated and he has contradicted himself on material facts during his cross-examination and failed to prove specific instances ofcruelty that he had pleaded his petition for seeking dissolution of marriage on the ground of cruelty was turned down. We find no perversity, illegality or infirmity in the conclusion arrived at in the impugned judgment, for interference. Accordingly, the impugned judgment is upheld and the present appeal is dismissedin limine, along with the pending application.

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# D ... VERSUS P @ R ...

**Delhi High Court**

**Bench : Hon'ble Mrs. Justice Hima Kohli and Hon'ble Mrs. Justice Deepa Sharma**

*D ..... Appellant Mr. Vijay Malik, Advocate with Mr. Jogminder Rana, Advocate.*
*Versus*
*P @ R ..... Respondent*

**MAT. APP.(F.C) 161/2017**

**Decided on December 15, 2017**

- **Family and Personal Laws — Hindu Marriage Act, 1955 — S. 13(1)(i)(a) Cruelty — Held, every person has his/her own mental makeup — His/her behaviour is guided by social status, education, physical and mentalcondition — General incompatibilities arising from such factors might cause anguish or disappointment to spouse but they are not by themselves cruelty in law — Erring spouse's conduct, in order to constitute mental cruelty, should be of such a nature that it is reasonably not possible to live with him/her — Spouse seeking divorce must give specific details and also furnish proof, from which court may be able to draw an inference that it is impossible to live with erring spouse**
- **Reasons for seekingdivorce must be grave and weighty — On facts held, appellant-husband's allegations were of general nature.**
- **Family and Personal Laws — Hindu Marriage Act, 1955 — S. 23(1)(b) and 13(1)(i)(a) —Divorce — Grounds — Cruelty — Conciled or condoned acts — Held, could not be complained subsequently for seeking divorce — On facts held, the fact that quarrel between husband and wife was reported to police and then matter was subsequently reported to be sorted out, could not be raked up as cruelty — Similarly, alleged suppression of fact that wife was older than husband, could not be taken matrimonial fraud when husband later on accepted it as a reality**

**A.** **Family and Personal Laws — Hindu Marriage Act, 1955 — S. 13(1)(i)(a) — Divorce — Grounds — Cruelty — Meaning — Legal crueltyas distinguished from perceived cruelty — Held, every person has his/her own mentalmakeup — His/her behaviour is guided by social status, education, physical and mentalcondition — General incompatibilities arising from such factors might cause anguish or disappointment to spouse but they are not by themselves cruelty in law — Erring spouse's conduct, in order to constitute mental cruelty, should be of such a nature that it is reasonably not possible to live with him/her — Spouse seeking divorce must give specific details and also furnish proof, from which court may be able to draw an inference that it is impossible to live with erring spouse — Reasons for seekingdivorce must be grave and weighty — On facts held, appellant-husband's allegations were of general nature, rather than concrete instances from which inference of cruelty, could be drawn — Trial court rightly declined divorce on general allegations made by appellant-husband that wife was (i) quarrelsome, (ii) disrespectful to him and his parents, (iii) her attitude was self-centred keeping aloofness from in-laws, (iv) her brothers threatened him, and (v) leaving matrimonial home without husband's consent — Hindu Marriage Rules, 1979, R. 7 (Delhi) —Divorce petition — Contents**

**B.** **Family and Personal Laws — Hindu Marriage Act, 1955 — S. 13(1)(i)(a) — Divorce — Grounds — Cruelty — Wife's visit to her parents — Held, this by itself is not a cruelty — A married women is entitled to visit her parents**

**C. Family and Personal Laws — Hindu Marriage Act, 1955 — S. 13(1)(i)(a) — Divorce — Grounds — Cruelty — Family discord leading to father-in-law's heart ailment — On facts held, heart problems do not development suddenly — Angiography is done to detect heart blockage which develops over a period of time — This could not be treated as outcome of allegedcruelty**

**D. Family and Personal Laws — Hindu Marriage Act, 1955 — S. 23(1)(b) and 13(1)(i)(a) —Divorce — Grounds — Cruelty — Conciled or condoned acts — Held, could not be complained subsequently for seeking divorce — On facts held, the fact that quarrel between husband and wife was reported to police and then matter was subsequently reported to be sorted out, could not be raked up as cruelty — Similarly, alleged suppression of fact that wife was older than husband, could not be taken matrimonial fraud when husband later on accepted it as a reality**

**E. Family and Personal Laws — Hindu Marriage Act, 1955 — S. 13(1)(i)(a) — Divorce — Grounds — Cruelty — Standard of proof — Preponderance of probabilities Dismissing appeal, the High Court of Delhi,**

Held :

The normal behaviour and conduct of a spouse is not sufficient to constitute cruelty. It must be something more than that. The behaviour and conduct of the spouse is guided by their social status, educational qualifications, physical and mental condition and the cultural and social background. The behaviour of a spouse might cause anguish, disappointment, frustration or agitation to the wronged spouse, but that by itself, is not sufficient. The party who approaches court is expected to furnish particular facts which according to him/her are of such a nature that would have caused mental cruelty of such an intensity that it is impossible for him/her to continue to live with the other spouse. It is legal cruelty which is required to be proved in order to succeed. The behaviour and conduct of spouse should be so acute, and of such a grave nature and magnitude that would make it difficultfor the wronged spouse to continue in the relationship. The court should be able to deduce that it is not in his/her welfare to continue with such a relationship. The wronged spouse needs to prove all these facts which create such an apprehension in his/her mind. An inference must be drawn by the court from the attending facts and circumstances which need to be pleaded elaborately and specifically in the petition. (Para 14)

The facts as proved on record are to be examined to ascertain if the appellant/husband was able to prove by preponderance of probabilities that the conduct of the respondent/wife was so grave and weighty that it was impossible and unreasonable to expect him to continue living with the respondent. An inference has to be drawn from the conduct of respondent/wife which the husband/appellant ought to have proved on record. When the conduct of the respondent/wife is examined, which the appellant/husband has pleaded has caused him immense mental pain and anguish, it is found that the instances pleaded are of a very general nature and quite vague, with no specific dates or time given of the alleged conduct of the respondent/wife. Rule 7 of Delhi High Court Rules, 1967, prescribes as to what should be the contents of a petition filed under the HM Act. (Para 15)

Not only has the appellant/husband failed to specify any instance of cruelty, he has failed to prove the pleas taken by him in his petition. The appellant had pleaded that his wife never respected his family members and she extended threats to them, used filthy and abusive language and had threatened him of dire consequences, and that she is a lady of quarrelsome nature who neglected their child, and did not allow the appellant to play with him, and failed to perform her domestic duties like cooking food, cleaning of house, washing clothes etc. The very nature of these pleas are devoid of any specific act of cruelty. Nor has the appellant/husband disclosed the time and place when such a quarrel had taken place or a threat extended or abuses hurled. No specific instance or incident has been pleaded to show that the respondent/wife had quarrelled with his family members or threatened them or abused them, as has been averred in the petition. The appellant/husband has also failed to prove the fact that the respondent/wife had shifted her belongings to the first floor against his wishes. He had himself stated that some articles, which respondent had brought with her, were kept in a separate room due to paucity of space. Although the appellant/husband alleges that the respondent/wife and her four brothers

had extended him threats, no specific date or time of circumstances in which such threats were extended have been pleaded, nor has any complaint against them been lodged by the appellant or proved. It remains a bald statement of a general nature, unsupported by any material on record. (Paras 16 and 20)

The appellant/husband has failed to prove the facts in support of his contention that a fraud had been played upon him that the respondent-wife was older than him. On the contrary, he has himself admitted that he had condoned this act, and had continued the relationship. An act of alleged cruelty once condoned, cannot be takenas a ground of cruelty subsequently, for seekingdivorce, in view of Section 23(1)(b) of HM Act. (Para 18)

Simply because one of the family members had developed some medical problem, the cause of the same cannot be attributed to other family members. Nothing has been placed on record to justify the appellant's claim that his father had developed such an ailment that needed an angiography within three months of his marriage. Angiography is generally done for addressing heart blockages. It cannot be urged that his father had developed heart blockages of such a magnitude within three months from the date of his marriage with the respondent. These conditions take a long time before they manifest. The appellant/husband's plea has no merit especially when no specific instances of the respondent/wife creating a tense atmosphere in the house has been mentioned. (Para 21

The appellant husband has not pleaded any specific date or month or circumstance in which the respondent had left for her parental home, without seeking his permission or intimating him. He has simply made a bald statement that she used to frequently visit her parental home. A wife is entitled to visit her parents' home. Such a visit per se cannot be the reason for a husband to complain. The respondent/wife in her cross-examination deposed that she stayed at the matrimonial home from date of marriage (7-11-2011) till 10-9-2012, and even in her cross–examination, the appellant did not point out any date or the period during which she had left the matrimonial home without his or his family members' consent, and had remained at her parental home. Filing of a criminal complaint by the respondent/wife on 30-9-2012, cannot be construed as cruelty for grant ofdivorce specially when the difference between parties had been sorted out later on, and the respondent/wife had joined the company of the appellant, and they had started living together. An intimation of such a reconciliation was also given to the Station House Officer (SHO) on 2-10-2012. The appellant/husband has failed to prove on record, cruelty of such a nature that would entitle him for a decree of divorce. (Paras 22 and 23)

The Judgment of the Court was delivered by

**Hon'ble Mrs. Justice Deepa Sharma :—** The appellant/husband has assailed the order dated 04.08.2017 of the Family Court, dismissing his petition for dissolution of marriage under Section 13(1)(ia) of the Hindu Marriage Act, 1955 (hereinafter referred to as "the HM Act").

2. The admitted facts of the case are that the marriage between the appellant/husband and the respondent/wife was solemnized on 07.11.2011, according to the Hindu rites, customs and ceremonies. Out of this wedlock, a male child namely, Kartik was born on 15.08.2012

3. The appellant has alleged in his divorce petition that the marriage was solemnized without taking any dowry; that on the very first day of their marriage, the respondent/wife had shifted all her belongings to the first floor of the house; that she had refused to serve the parents of the appellant; that a fraud was played upon him by her parents as well as the mediator who had concealed the correct age of the respondent who was 35 years of age at the time of the marriage, while he was just 25 years old, i.e ten years younger to her.

4. It was further contended that the respondent/wife never had any respect for the family members of the appellant/husband and had extended threats and used filthy and abusive language for him and his family members and had also threatened them of dire consequences; that she is a lady of quarrelsome nature who neglected their child and did not allow the appellant/husband to play with him; that she had failed to perform her domestic duties like cooking food, cleaning the house, washing clothes etc; that she

frequently used to visit her parental home, without informing the appellant. It is alleged that this behavior of the wife had caused mental pain, and tension to the appellant and had vitiated the atmosphere in the house. Her abusive language and quarrelsome nature had resulted in his father suffering a heart attack after three months of their marriage. The respondent/wife had left the matrimonial home on 10.09.2012 along with their son and has taken away all the gold and other jewellery items without the consent and permission of the appellant/husband or his family members. Thereafter, the respondent/wife allegedly filed a false complaint at P.S Sultanpuri, on 30.09.2012 implicating the appellant/husband and his family members. On the above grounds, the dissolution of his marriage with the respondent was sought by the appellant.

5. The respondent/wife had duly contested the said petition. She had denied that the marriage was without demanding any dowry and alleged that various items of dowry were given at the time of the marriage, as was desired by the appellant/husband and his family members and an amount of Rs. 8,50,000/- (approx) was spent by her parents on the marriage function; that she had duly performed all her household chores but was never treated with respect or dignity by the appellant/husband and his family members; that she was abused and beaten by her mother-in-law; a demand of car and cash was raised by the appellant/husband and his family members who threatened her that on her failure to fulfill their demands, they will turn her out of the matrimonial house.

6. The respondent/wife had further contended that when she had conceived, she was forced to abort the child but she retained the child and gave birth to their son. On discovering that a male child was born, the appellant/husband and his family members were happy and they celebrated it. The respondent/wife claimed that in December 2011, she was badly beaten up by her husband and his mother and sister and they had left her at her parental home and did not provide her any medical care. Initially, efforts for reconciliation were made with the help of local persons but the appellant/husband had refused to take the respondent back in the matrimonial home and it was only then that she had filed a complaint at P.S Sultanpuri. Subsequently, the matter was resolved between the parties and they reconciled their difference and the respondent started living at her matrimonial home. An intimation of such a reconciliation was given to the SHO, PS Sultanpuri on 02.10.2012 The behavior of the appellant/husband, however, remained cruel towards the respondent/wife and he refused to cohabit with her. She was again forced to go back to her parental home. Thereafter on 09.01.2013, the respondent approached the ACP Women Cell, Sector-3 Rohini, Delhi. It was contended that the appellant/husband cannot be allowed to take advantage of his own wrong i.e of thecruelty that he had committed on her and is therefore, not entitled to a decree of divorce.

7. On the basis of the pleadings of the parties, the learned Family Court had framed the following issues on 05.08.2013:—

   "1. Whether the respondent has treated the petitioner with cruelty, as alleged, after the solemnization of the marriage? OPP

   2. Whether the petitioner is entitled to the decree of dissolution of marriage u/s 13(1)(i-1) of HMA? OPP

   3. Relief."

8. On examining the evidences led by the parties, considering the case laws cited by both the parties and on appreciating the proposition of law laid down by the Supreme Court in the cases of V. Bhagat v. D. Bhagat, 11 (1993) DMC 568 (SC), A. Jayachandra v. Aneel Kaur(2005) 2 SCC 22, Naveen Kohli v. Neelu Kohli, (2006) 4 SCC 558 : AIR 2006 SC 1675, Vinita Saxena v. Pankaj Pandit, (2006) 3 SCC 778 and Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511, the learned Family Court arrived at the conclusion that the appellant/husband had failed to prove on record, the element of cruelty, a necessary concomitant for dissolution of marriage and resultantly, dismissed his petition.

9. We have heard the arguments addressed by learned counsel for the appellant and perused the record.

10. It was argued by learned counsel for the appellant/husband that the Family Court has failed to consider that the marriage of the parties had irretrievably broken down and there were no chance of reunion and they cannot live as a husband and wife due to the magnitude of cruelty committed by the respondent/wife. He contended that all the acts which constitute cruelty were committed by the respondent/wife within the four walls of the house, so neighbours were not aware of such instances ofcruelty and therefore, they could not have appearedas the appellant's witnesses and that the appellant is the best witness in this case and his evidence has been wrongly discarded by the Family Court. Learned counsel submitted that the parties have been living separatelyfor the past five years and the matrimonial bond has broken down beyond repair, as the marriage has become a fiction, only supported by a legal tie and in the circumstance of the case, the said legal tie is required to be formally severed.

11. Dissolution of marriage is sought by the appellant/husband on the ground of cruelty. Althoughcruelty is one of the grounds for dissolution of marriage under Section 13(1)(a) of the HM Act, the expression 'cruelty' has not been defined under the Act. The meaning of the expression, 'cruelty' necessaryfor dissolution of marriage under Section 13(1)(a), has been defined by the Supreme Court in several judicial pronouncements. In the case of Shobha Rani v.Madhukar Reddi, (1988) 1 SCC 105, the Supreme Court had clearly held that 'the word 'cruelty' has not been defined". The Court had subsequently observed that "it has been used in relation to human conduct or human behavior. 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." It was further held that "crueltymay be mental or physical, intentional or unintentional'. The Supreme Court was of the opinion that where cruelty meted out is mental, firstly, an enquiry must begin as to the nature of the cruel treatment and its impact on the mind of the spouse is required to be ascertained on the basis of the behavior of the parties so to decide as to whether it had caused reasonable apprehension that it would be harmful or injurious for the wronged spouse to live with the other. It is such cruelty which makes the ground for grant of divorce under Section 13(1)(a) of HM Act. The Court had further held that "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."

12. The very same principle was reiterated by the Supreme Court in V. Bhagat v. Mrs. D. Bhagat, (1994) 1 SCC 337, where it was clearly held that "Mentalcruelty in Section 13(1)(a) can broadly be definedas 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." In Praveen Mehta v.Inderjit Mehta, ((2002) 5 SCC 706 : AIR 2002 SC 2582), it was held as under:—

> "21. Cruelty for the purpose of Section 13(1)(ia) is to be taken as a behavior by one spouse towards the other which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behavior or behavioral pattern by the other. Unlike the case of physical cruelty the mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case ofmental cruelty it will not be a correct approach to take an instance of misbehavior in isolation and then pose the question whether such behavior is sufficient by itself to cause mentalcruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected tomental cruelty due to conduct of the other." (emphasis supplied)

13. In Jayachandra v. Aneel Kaur, (2005) 2 SCC 22 :AIR 2005 SC 534, the Supreme Court had again reiterated the above principles by observing that "….legal cruelty has to be found out, not merelyas a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other." In the case of Jayachandra(supra), the Supreme Court had observed that thecruelty should be "grave and weighty" and that too of such a nature that "the petitioner spouse cannot be reasonably expected to live with the other spouse". The Court had further observed that "…It must be something more serious than "ordinary wear and tear of married life" and "..The conduct, taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts tocruelty in the matrimonial law." The aforesaid principles were highlighted by the Supreme Court yet again in the case of Naveen Kohli v. Neelu Kohli, (2006) 4 SCC 558 : AIR 2006 SC 1675.

14. The settled proposition of law is that the normal behaviour and conduct of a spouse is not sufficient to constitute cruelty. It must be something more than that. The behavior and conduct of the spouse is guided by their social status, educational qualifications, physical and mental condition and the cultural and social background. The behavior of a spouse might cause anguish, disappointment, frustration or agitation to the wronged spouse, but that by itself, is not sufficient. The party who approaches the court is expected to furnish the particular facts which according to him/her are of such a nature that would have causedmental cruelty of such an intensity that it is impossible for him/her to continue to live with the other spouse. It is legal cruelty which is required to be proved in order to succeed. The behavior and conduct of response should be so acute and of such a grave nature and magnitude that would make it difficult forthe wronged spouse to continue in the relationship. The court should be able to deduce therefrom that it is not in his/her welfare to continue with such a relationship. The wronged spouse needs to prove all these facts which creates such a apprehension in his/her mind. An inference must be drawn by the court from the attending facts and circumstances which need to be pleaded elaborately and specifically in the petition.

15. In the background of this settled proposition of law, the facts as proved on record are to be examined to ascertain if the appellant/husband was able to prove by preponderance of probabilities that the conduct of the respondent/wife was so "grave and weighty" that it was impossible and unreasonable to expect him to continue living with the respondent. An inference has thus to be drawn from the conduct of the respondent/wife which the husband/appellant ought to have proved on record. When we examine the conduct of the respondent/wife herein which the appellant/husband has pleaded has caused him immense mental pain and anguish, we find that the instances pleaded are of a very general nature and quite vague, with no specific dates or time given of the alleged conduct of the respondent/wife. Rule 7 of Delhi High Court Rules, 1967, prescribes as to what should be the contents of a petition filed under the HM Act and states that as follows:—

> "7. Contents of petition-In addition to the particulars required to be given under Order VII Rule 1 of the Code and Section 20(1) of the Act, all petitions under Section 9 to 13 shall state:
>
> (g) The matrimonial offence or offences alleged or other grounds, upon which the relief is sought, setting out with sufficient particularity the time and places of the acts alleged, and other facts relied upon, but not the evidence by which they are intended to be proved, e.g:
>
> (i) xxx xxx xxx
>
> (ii) xxx xxx xxx
>
> (iii) xxx xxx xxx
>
> (iv) ……in the case of cruelty, the specific acts ofcruelty and the occasion when and the place where such acts were committed."

16. Not only has the appellant/husband herein failed to specify any instance of cruelty, he has failed to prove the pleas taken by him in his petition. The appellant had pleaded that his wife never respected his family

members and she extended threats to them, used filthy and abusive language and had threatened him of dire consequences and that she is lady of quarrelsome nature who neglected their child and did not allow the appellant to play with him and failed to perform her domestic duties like cooking food, cleaning of house, washing clothes etc. The very nature of pleas noted above are devoid of any specific act of cruelty. Nor has the appellant/husband disclosed the time and place when such a quarrel had taken place or a threat extended or abuses hurled. No specific instance or incident has been pleaded to show that the respondent/wife had quarreled with his family members or threatened them or abused them, as has been averred in the petition.

17. It was argued by learned counsel that the appellant/husband had suffered immense mental pain and agony when he had learnt that the actual age of the respondent/wife had been concealed from him. He stated that the date of birth of the appellant/husband is 23.01.1986, while that of the respondent/wife is 23.04.1978, but an incorrect "kundli" (Birth Chart) was fraudulently given to them by the family of the respondent/ wife prior to the marriage. This fact has however been vehemently denied by the respondent/wife. After examining the evidences of the parties on this point, the learned Family Court observedas under:—

"…….However, it has not been proved on record in case the kundlis as relied by the petitioner had been furnished on behalf of the respondent or her family members as even the name of the mediator through whom the said kundli had been forwarded, has not been disclosed and no independent witness to the aforesaid extent has been examined. The mere production of photocopy of kundlis do not prove the fact that the same had been given on behalf of the respondent prior to marriage thereby concealing the age of the respondent. It may also be noticed that petitioner is 12th pass while the respondent is 10th fail and normally prior to marriage the documents relating to the education having been seen by the parents of the parties alongwith kundali cannot be ruled out. Herein the photocopy of kundli produced is merely a hand prepared document and a computer generated printout without reflecting the name of person who may have prepared the same. The mere production of photocopies does not prove if the same had been handed over by parents of the respondent. Assuch, the factum of concealment of age by the respondent/family members has not been proved. It may also be observed that despite difference in age, the marriage between the parties for their own reasons is not uncommon. Further, even in case there was difference of age, petitioner admitted during cross-examination that he had pardoned his wife regarding her misconduct. It may further be observed that the fact that the respondent was older than the petitioner was known to him within a week of the marriage asadmitted by him during cross-examination but the still be continued the relationship and a son was born out of the wedlock on 15.08.2012 after about 09 months of the marriage." (emphasis supplied)

18. It is thus clear from the above that the appellant/husband has failed to prove the facts in support of his contention that a fraud had been played upon him. On the contrary, he has himself admitted that he had condoned the said act and had continued the relationship. An act of alleged cruelty once condoned, cannot be taken as a ground of crueltysubsequently, for seeking divorce in view of Section 23(1)(b) of HM Act which 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) xxx xxx xxx —

(b) where the ground of the petition is theground specified in clause (i) of sub-section (1) of section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is crueltythe petitioner has not in any manner condoned the cruelty, and……."

19. Another instance of cruelty which the appellant/husband alleges is that the respondent/wife had shifted all her belongings to the first floor and had flatly refused to serve his parents in any manner. In the impugned judgment, the learned Family Court has observed as below:—

"…It may be noticed that qua shifting of the respondent after marriage, it was stated by the petitioner in the cross-examination that some articles brought by the respondent were kept in another room due to paucity of space available in the bedroom. It cannot be ruled out that shifting of the respondent and petitioner in a separate room in the same premises may have been on account of paucity of space and to given them privacy. The same is further to be seen in the light of the background that statement of the petitioner was recorded by ld. Predecssor u/s 165 Evidence Act on 05.08.2013 after filing of the petition wherein he stated that he had two married and two unmarried sisters aged about 23 years and 17 years besides his parents and his father was a fourth class employee in DDA. As such, shifting of the respondent in a separate room in the same premises does not appear to be for purpose of separation as claimed by petitioner."

20. The appellant/husband has, therefore, failed to prove the fact that the respondent/wife had shifted her belongings to the first floor against his wishes. He had himself stated that some articles, which respondent had brought with her, were kept in a separate room due to paucity of space. Although, the appellant/husband alleges that the respondent/wife and her four brothers had extended him threats, no specific date or time of circumstances in which such threats were extended have been pleaded; nor has any complaint against them been lodged by the appellant or proved. It remains a bald statement of a general nature, unsupported by any material on record.

21. His contention that due to a tense and vitiated atmosphere created by the wife, the appellant's father had suffered a heart attack within three months of his marriage and an angiography had to be done on him, is of no consequence especially when he has failed to plead any specific incident that had caused tension and the atmosphere in the house had become so vitiated that it had led to his father suffering a heart attack. Simply because one of the family members had developed some medical problem, the cause of the same cannot be attributed to other family members. Nothing has been placed on record to justify the appellant's claim that his father had developed such an ailment that needed an angiography within three months of his marriage. Angiography is generally donefor addressing heart blockages. It cannot be urged that his father had developed heart blockages of such a magnitude within three months from the date of his marriage with the respondent. These conditions take a long time before they manifest. The said plea of the appellant/husband has no merit especially when no specific instances of the respondent/wife creating a tense atmosphere in the house, has been mentioned.

22. The appellant/husband has also contended that the frequent visits of his wife to her parental home without intimating him and his family members has caused him mental pain and anguish. Again, he has not pleaded any specific date or month or circumstance in which the respondent had left for her parental home, without seeking his permission on intimating him. He has simply made a bald statement that she used to frequently visit her parental home. A wife is certainly entitled to visit her parents' home and such a visit per se, cannot be the reason for a husband to complain. The Family Court has noted that the respondent/wife in her cross-examination had clearly deposed "that she stayed at the matrimonial home from date of marriage till 10.09.2012" and even in her cross-examination, the appellant did not point out any date or the period during which she had left the matrimonial home without his or his family member's consent and had remained at her parental home. Filing of a criminal complaint by the respondent/wife on 30.09.2012, cannot be construed as cruelty for grant of divorcespecially when the difference between parties had been sorted out later on and the respondent/wife had joined the company of the appellant and they had started living together. Admittedly, an intimation of such a reconciliation was also given to the SHO, P.S Sultanpuri on 02.10.2012

23. In view of the above discussion, we are firmly of the opinion that the appellant/husband has miserably failed to prove on record, cruelty of such a nature that would entitle him for a decree of divorce. Learned counsel has failed to point out any illegality, infirmity or perversity in the impugned order for interference. The appeal is meritless and is accordingly dismissed in limine.

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# SMT (DR) SMITHA VERSUS SHRI SATHYAJITH

**Karnataka High Court**

*Smt (Dr) Smitha*
*Versus*
*Shri Sathyajith*

**Bench : Hon'ble Mr. Justice K.L.Manjunath & Hon'ble Mr. Justice B.V.Nagarathna**

**M.C.No.699/2005**

**Decided on 17 September, 2009**

- **This appeal is filed by the wife challenging the Judgment and Decree dated 15.4.2008 passed in M.C.No.699/2005 by the III Addl.Judge, Family Court, Bangalore by which the marriage solemnized between the parties on 4.8.2003 at Bangalore is dissolved by a decree of divorce and a sum of Rs.20,000/-p.m has been ordered toward interim maintenance from the date of petition till the date of decree along with litigation expenses of Rs.10,000/-**
- **It is submitted on behalf of he appellant that the Family court was not justified in giving a finding against the appellant that her acts and emotions amounted to cruelty against the respondent herein. It is also submitted that the Family Court was not right in holding that the appellant had deserted the respondent herein. The observations made by the Family Court with regard to Ex.P3 and P4 are unsustainable and that the parties lived together for a very short period of 1 months only. Hence the Judgment and Decree of he Family Court ought to be reversed in this appeal.**
- **Having regard to the above submission, the following points would arise for our consideration:**
  1. **Whether the petitioner has proved cruelty on the part of the respondent?**
  2. **Whether the respondent is entitled to restitution of conjugal rights?**
  3. **What order?**
- **In the face of the explicit admission of the petitioner regarding a satisfactory marital life and the strong denial of the respondent regarding acts of cruelty on her part and considering the fact that the parties lived together continuously for only 1 months and the fact that respondent is interested in continuing her marital life with the petitioner, we cannot hold that the petitioner has proved the allegations of cruelty against the respondent. Hence the finding of the Family Court on this issue is reversed and point No.1 is answered in favour of the appellant herein.**
- **Keeping in mind the above principles and the fact that the intention of the respondent to reside with the petitioner being apparent and that on account of breakdown of talks between the parties and their respective parents and due to the filing of the petitioner seeking divorce and the respondent has been residing with her parents, we are of the view that the trial court ought to have considered this aspect of the matter also. Hence we hold that the respondent has made out a case for restitution of conjugal rights and answer the point No.2 in favour of the appellant.**

This appeal is filed by the wife challenging the Judgment and Decree dated 15.4.2008 passed in M.C.No.699/2005 by the III Addl.Judge, Family Court, Bangalore by which the marriage solemnized between the parties on 4.8.2003 at Bangalore is dissolved by a decree of divorce and a sum of Rs.20,000/-p.m has been ordered toward interim maintenance from the date of petition till the date of decree along with litigation expenses of Rs.10,000/-

2. After condoning the delay in filling the appeal, though this matter was posted for orders on I.A.No. II/2008, both the parties were directed to appear before the court to explore the possibility of a settlement. However, on 5.1.2009 the counsel for the respondent filed a photo copy of the certificate of registration of marriage of the respondent with one Smt.Vyshali M. Ashok which was registered on 27.6.2008. On the subsequent dates when the parties appeared, this court directed the parties to settle the dispute amicably by the respondent offering a reasonable permanent alimony to the appellant considering the fact that the respondent had entered into another marriage alliance and under the circumstance practically it would have been difficult for the appellant to get the benefit of any order that would have been made in her favour in the event of the appeal being allowed. The appellant however, did not accept the offer made by the respondent to pay a permanent alimony of a sum of Rs.30,00,000/- including a sum of Rs.7,20,000/- paid towards arrears of maintenance. Thereafter the matter was posted on subsequent dates and sufficient time was also granted to the appellant to think over about giving up her right to agitate this appeal by accepting the permanent alimony from the respondent, in view of the respondent having married again. The appellant, though a qualified dentist could not persuade herself to accept any kind of settlement in the matter but on the other hand insisted upon a judgment on merits. Under the circumstances with the consent of parties on both sides, we have heard the appeal at the stage of admission, itself. We have also secured the lower court records and perused the same.

3. For the sake of convenience the parties shall be referred to in terms of their status before the trial court.

4. The petitioner before the trial court who is the respondent herein filed the petition under section 13(1)(1a) of the hindu marriage act, 1955 seeking dissolution of his marriage with the respondent by a decree of divorce. According to the petitioner he was married to the respondent as per Hindu rites and custom on 4.8.2003 at Saraswathi convention Centre, Magadi Road, Bangalore. The petitioner is an Engineer by profession. He had studied at Ramakrishna Ashram and that the respondent is a qualified dentist and has obtained Masters Degree in Dental Science (MDS). After marriage the parties left for Hyderabad where the petitioner was working, but the petitioner found that the respondent was very rude and egoistic and adamant in her behaviour while she was always projecting that she was MDS. According to the petitioner, he was put to severe mental agony and cruelty on account of the following factors narrated in the petition:

   a) the respondent never respected the petitioner, his parents and elders and always using foul and abusive language by making much of herself and her parents howsoever she be wrongful.

   b) The respondent never performed the household works and never used to do the cooking and always expecting the petitioner to do such works and expected him to take her out to costly restaurants as and when she liked.

   c) The respondent always used to be in the dark room not coming out and conversing with the petitioner even after he came back from the office and sending messages after messages in her mobile sitting there in the room being locked inside.

   d) The respondent was impossibly careless towards household articles and to say towards the very life itself.

   e) The respondent always threatened that she would commit suicide.

   f) The respondent always used to have altercations and quarrels with the petitioner even on trivial matters and tried always engage him in such things without allowing him to look after his work, wherever he be either at home or at his office, either personally or telephonically.

   g) The respondent never liked the things, which the petitioner liked and she intentionally used to dislike them so as to be dominant over him.

h) She used to hurt at him with all possible bad words and then she used to use all imaginary language as though she was sorry for that and requesting for a chance to mend it.

i) She used to pack her bag and baggage and used to go off to her parents place at Hassan without the permission of the petitioner and without even informing him.

5. According to the petitioner, the respondent was always suspicious of the fidelity and character of the petitioner and she used to frequently access website called www.amma.com and by seeking advice therein she used to call upon the parents and friends of the petitioner and asked them whether the petitioner had an extra marital relationship as he was never interested in her. Within a few weeks after marriage, the respondent declared that she would never be able to live with him and one day she took out her managalasutra and threw it on the face of the petitioner stating that she would not accept him as her husband and went to her parents house. But her father intervened and persuaded her and advised her, but on account of her adamant and arrogant attitude, within a few days she returned to Hassan, despite the petitioner s father advising her not to return back as it would create difference between the newly wed couple. On hearing this she fell down as if she was unconscious thereby putting his parents to disgrace and ridicule before several neighbours, after which the parents of the respondent took her to Hassan and persuaded her to attend Yoga and Pranayama classes. After a month she returned to Bangalore with her parents and then left for Hyderabad, but the petitioner found that there was no change in her attitude. After three days stay at Hyderabad she returned Hassan along with her mother without informing the petitioner. After she returned to Hassan she wrote letters and sent E-mails to petitioner admitting her mistakes but also defending herself in the following words:

I have been a rule maker both at work place and at home. Nobody has pointed out my mistakes earlier because of that I will try to defend myself . .

6. On another occasion she went to the extent of saying that if the petitioner was unhappy with the marriage, he was free to walk out of the marriage to which the petitioner stated that it would be better to live separately for the next three months and that to stay together after things settle down between them, but she replied that she would never agree for divorce and that she wanted him to be alone for the rest of his life. The parents of the petitioner tried to find a solution by visiting the parents of the respondent at Hassan, but without any avail. On 25.7.2004 when the petitioner along with his father went to the respondent s house, they found that there were other strangers in the house of the respondent and they demanded a sum of Rs.50,00,000/- if the petitioner wanted that he should not be troubled, otherwise the respondent would file dowry harassment case against the petitioner, his parents and sister. The conduct of the respondent and her attitude put the petitioner in severe mental cruelty and he apprehended physical and mental danger by living with the respondent. He therefore, sought for dissolution of the marriage.

7. After service of notice from the Family Court, the respondent appeared and denied the allegations made in the petition by contending that it was a fact that she had completed her MDS course in the year 2001 and her marriage was celebrated in the year 2003. She was working in a Dental College as a lecturer. Petitioner had advertised in a newspaper for matrimonial alliance and accordingly her father had responded and after the parents of the petitioner interviewed her at a hostel at Mysore, where she was staying and on being satisfied gave their approval and consent for the marriage of his son. When the petitioner along with his parents visited Mysore, she found that the parents of the petitioner were interacting with her more than the petitioner and the father of the petitioner never involved the petitioner in any conversation. According to her, the reason was on account of the petitioner being fully blind in one eye. The parents of the petitioner insisted that the marriage be performed in a grand manner and accordingly Saraswathi Convention Centre was booked for two days on 3.8.2003 and 4.8.2003 for the marriage and reception and a sum of Rs.5,00,000/- was spent towards the marriage apart from expenditure on jewelry, clothes and transportation. Next day petitioner and his parents hosted a lunch (Beegara Outana) for the invitees at Prakash Caf , Bangalore, but the parents and the relatives of the respondent were not invited. Thereafter

the parties spent a week in Bangalore and went to Kerala for honeymoon for about four days, during which period the petitioner kept himself aloof and was not talking with the respondent. Thereafter they left for Hyderabad where the petitioner was working and again the petitioner s behaviour was uncaring and he was not communicating with her. During their stay at Hyderabad she did all the household chores as the petitioner s mother had instructed her not to employ a servant. The petitioner and the respondent once drove all the way from Hyderabad to Dandeli and then to Mumbai and back to Hyderabad by car, but during the long drive the hardly spoke to her. During Deepavali festival the petitioner refused to visit the respondent s parents on their invitation and sent the respondent alone in a night bus to Bangalore. During that period the petitioner s mother questioned the respondent s mother as to why she had not stayed at Hyderabad for a month and there were verbal altercations between them and thereafter the father of the petitioner directed the respondent to remain at Hassan to learn Yoga and Pranayama and for 1 months there was no response from the petitioner. Subsequently, the parents of the respondent took her to Hyderabad and after ten days, the mother of the respondent wanted to return along with the respondent for a cousin s marriage at Hassan, but the petitioner demanded that she stay for a couple of months at Hyderabad or take the respondent away to Hassan. When the respondent s mother insisted that the respondent should live with the petitioner, he said that he would not be responsible if anything untoward happened to the respondent, and he also stated that his parents were of the view that she should return to Hassan with her mother. Accordingly, the respondent and her mother hurriedly left Hyderabad and returned to Hassan. After ten days she called the petitioner to ask about her return to Hyderabad to which the petitioner replied that they were not made for each other and they should part ways. After five months the father of the petitioner along with some other persons visited Hassan and met the parents of the respondent and offered to settle the matter by separation of he parties by paying a sum of Rs.15,00,000/- but the parents of the respondent rejected the offer and requested that the respondent be taken back to the matrimonial home. According to the respondent though she has been staying with her parents, she does not have any intention of separating from the petitioner as the petitioner is a good person but has been acting at the instigation of his parents. As a result the petitioner has been behaving in a strange manner. According to the respondent it is the intention of the petitioner to get more dowry and hence they were looking for another girl to get their son married. Hence she prayed for dismissal of the petition for divorce by way of counter claim sought for restitution of conjugal rights. No objections were filed by the petitioner with regard to the counter claim made by the respondent.

8. In support of his case the petitioner examined himself as PW.1 and got marked Ex.P1 to P4 while the respondent examined herself as PW.2.

9. On the basis of the material on record, the Family Court raised the following points for its consideration:

   1. Whether the petitioner proves that after the solemnization of marriage, the respondent treated the petitioner with cruelty?

   2. Whether the respondent proves that she is very keen to reside with the petitioner and perform all her marital obligations and therefore, the petitioner has to be directed to take her back to the matrimonial home?

   3. Whether the respondent is entitled for interim maintenance and litigation expenses as claimed?

   4. What order?

10. After considering the material on record, it answered point No.1 in the affirmative and point No.2 in the negative and awarded maintenance of Rs.20,000/- p.m and litigation charges of Rs.10,000/- and passed a judgment and decree dissolving the marriage between the parties on 4.8.2003 by granting a decree of divorce and allowing the petition on the ground of cruelty. Being aggrieved by the said judgment and decree, the respondent/wife has preferred this appeal.

11. We have heard the learned counsel for the appellant and learned counsel for the respondent.

12. It is submitted on behalf of he appellant that the Family court was not justified in giving a finding against the appellant that her acts and emotions amounted to cruelty against the respondent herein. It is also submitted that the Family Court was not right in holding that the appellant had deserted the respondent herein. The observations made by the Family Court with regard to Ex.P3 and P4 are unsustainable and that the parties lived together for a very short period of 1 months only. Hence the Judgment and Decree of he Family Court ought to be reversed in this appeal.

13. Per contra, it is submitted on behalf of the respondent that on the basis of the material, on record, the Family Court was justified in concluding that the petitioner was entitled to a decree of divorce on the ground of cruelty and the fact that the appellant s counter claim for restitution of conjugal rights was not granted clearly indicates that the respondent herein had made out a case for dissolution of the marriage and accordingly, the Family Court granted the relief sought by the respondent herein by its Judgment and Decree which does not call for any interference in this appeal.

14. Having regard to the above submission, the following points would arise for our consideration:

    1. Whether the petitioner has proved cruelty on the part of the respondent?

    2. Whether the respondent is entitled to restitution of conjugal rights?

    3. What order?

15. From the material on record it is not in dispute that the petitioner and respondent were married on 4.8.2003 and that the marriage was an arranged marriage. The petitioner is a qualified Engineer and the respondent is a dentist who is teaching in a Dental College at the time of the marriage.

16. According to the petitioner who was examined as PW.1 for a few days after marriage, they stayed together at Bangalore and then went for honey moon for four days and subsequently they resided at Hyderabad for 1 months as the petitioner was working in Hyderabad. During the said period, the respondent did not behave properly with the petitioner as she was always projecting that she is a MDS degree holder and used to have frequent quarrels and altercations with the petitioner and always had an adamant attitude. According to the petitioner on one occasion, the respondent declared that she would not be able to live with him and threw her mangalasutra on the petitioner s fact saying that she would never accept him. It is the further contention of the petitioner that the respondent suspected his fidelity and was suspicious about his character, and that he was having an affair with another lady. Therefore, the respondent was always doubtful about the character of the petitioner. The petitioner has also stated in his evidence that he is a non-vegetarian and the respondent did not like non-vegetarian food. He has in effect re-iterated the contents of his petition in his affidavit by way of examination-in-chief.

17. In his cross-examination, PW1 has stated that in the year 1999, he completed his Engineering Course and he denied that during his college days he had affairs with his classmates. He has also denied that he had agreed to marry one Kathyayini who was a student of Yoga under his mother. He has admitted that after negotiation of the marriage, there was one month period, during which he had talk with the respondent. He has also stated that during the said period, they went to restaurants and other places and spent time together and that both of them were happy with each other before marriage. He has also admitted that the marriage expenses were borne by respondent s father, but he denied that a sum of Rs.50,000/- was given to him from the respondent s side for the marriage expenses for buying clothes etc. According to him, after the marriage on 5.8.2003, he went to the respondent s parents house at Hassan on 6.8.2003 where they spent two days and that they went on a honeymoon to Kerala and returned on 19.8.2003. He has also admitted that even during honeymoon, the parties did not have any grievance with each other and after they returned from honeymoon, the respondent went to her parents house for Gowri Festival and since he was working at Hyderabad during that period of time, he went to the respondent s house at Hassan and then went to Hyderabad and the respondent returned to Hyderabad with her mother. PW.1 has stated that the respondent stayed with him at Hyderabad for one and a half

months, during which period she used to prepare food and that there was no maid servant also nor did they have a washing machine. According to him, during their stay at Hyderabad, initially they did not have any grievance. Then from Hyderabad, respondent came to Bangalore and when she was at Hassan, she used to enquire about him regularly. That after she returned from Hassan, she stated with his parents at Bangalore for about a week, where she did not do any household work. According to PW.1, he is a non-vegetarian and though the respondent did not like non-vegetarian food, when they went to restaurants, she used to eat the same with him. He has also admitted that at Hyderabad, he stated at a penthouse and used to leave the house for work at 6 a.m. and return home at 4 p.m. He has also admitted that he did not have any grievance against his wife in connection with washing clothes, cleaning the house and cooking at Hyderabad. He has also admitted that from Bangalore, respondent went to Hyderabad along with her parents and she stayed there for five days in February 2004 and he has denied that he forced her to return to her parents house. But in October, 2003 from Hyderabad she went to her parents house to attend to Deewali Festival. He has also admitted that she stayed for a day at Bangalore, his mother had an argument with the respondent and as a result she fell down, but he has denied that she fell down because his mother pushed her or his father told her to return to her parents house to learn yoga and then returned to the matrimonial fold and then returned after a month. He has however, admitted that after she went to her parents house, the petitioner contacted her over phone and she returned to his parents house for a few days. He has stated that while the respondent was staying with him at Hyderabad, she used to disturb him in his work. But he has denied that he had stated that he would commit suicide. He has however, admitted that he had a satisfactory marital life with his wife and he does not have any grievance about her education. She was not respecting him because of the defect in vision in his left eye. He admits that he did not mention about the same before marriage to his wife. He has denied that in order to get married to another girl he filed the petition or to extract any dowry from respondent he had filed a case. To a categorical question whether he is willing to stay with the respondent, he has answered in the negative.

18. In support of his case the petitioner has produced two letters in order to prove the attitude of the respondent. In one of the letters the respondent has sought for forgiveness of the petitioner as she had hurt him knowingly or unknowingly. She has also said that the would like to change things between them in the following words:

Please, Please tell me when I am wrong. May be I will defend myself at that moment and argue with you. But deep down I want to change .

She has also accepted her mistakes and stated the following words:

That is the problem with me when you point out my mistake, I might try to defend myself, may be because, I want to mould myself to your wishes. May be, it takes little bit more time to accept because of the ego that I have nurtured over these years. Please give me sometime to change myself. But please criticize me when I am wrong, and point out my mistake, even if I am argumentative .

Regarding her personality this is the view she has all herself:

I am not trying to defend my mistakes. At this age, I have already formed my personality. I have been rule maker, both at work place and at home. Nobody has, pointed out my mistakes. May be because of that, I will try to defend myself, when mistakes are pointed out as I have already formed my views .

She has further stated as follows:

I know my short comings. I had even told you before marriage my short temper and stubborn etc. I am trying my level best to control them .

She has further sought for forgiveness and apologized as follows:

I know I have hurt you unkind words. I tried to put myself in your place. May be even I would have reacted the way you have reacted. Please forgive me for those unkind words and give me one more chance. Believe me those words were not from my heart. I am really sorry for whatever I have done knowingly and unknowingly.

In an other letter she has stated as follows:

If you feel sorry for marrying me, if you are unhappy and repenting for marrying, you are free to walk out anytime. I want you to be happy always and no relationship can flourish if there is unhappiness. May be it will hurt me. But hurts and wounds are common in my life. I keep my finger crossed and I want you to be always with me. I will try my level best to keep my house happy and sweet.

It is just a piece of my mind, If you are hurt by the contents of this letter, I am sorry and please let me know if it hurts you .

In another letter the respondent has admitted about her feelings of the petitioner as follows:

May be in 1 months, we stayed together, there was misunderstanding between us, I may be because our wavelength was not matching. You expected me to understand your needs and I expected you to understand my needs, without communicating properly about each other needs. I tried to express my dissatisfaction by calling you selfish, egoistic, impossible and you resorted to being silent, distancing from me, hurting each other. Instead of telling me, you always complained to your parents.

She then states as follows:

why don t you realize that my mind is like steel, whatever write on it, is un-erasable, and I don t have to re-enforce my mind by writing, when I am determined to look beautiful, communicate well and keep of health.

The respondent also admits that she had called the petitioner as being selfish, impossible, egoistic and blames the mobile phone to be root cause of the problem in the following words:

If I had not had a cell, may be I would never been able to call you selfish, impossible, egoistic. I will throw that mobile which is the root cause of our problem. Why don t you realize that, when I say I had rejected many, and married you, why don t you see it as a compliment and it is true. I love you.

The above letter was written on 30.4.2004, few months after the marriage and when she was residing away from the petitioner.

19. It is also to be borne in mind that though according to the respondent she was sent back by the petitioner within a few months after marriage, no steps were initiated by her for seeking restitution of conjugal rights except by way of counter claim in the instant proceeding before the Family Court. The only material that we have on record is the oral evidence of the parties and the letters written prior to the filing of the petition

20. As opposed to the petitioner s evidence, the respondent in her affidavit by way of examination-in-chief has also reiterated the contents of her statement objections and has stated that she was living happily with her husband-petitioner, but due to interference of the parents of the petitioner differences arose between them. Both of them would be happy if the parents of the petitioner do not interfere and she has also stated that she was ready and willing to reside with the petitioner in the matrimonial home and she had no intention to separate from her husband at any point of time and therefore, she sought dismissal of the case and that her counter claim for restitution of conjugal rights be allowed.

21. In her cross-examination, she has stated that after completion of her post-graduation in Dental surgery, she joined Hasanamba Dental College at Hassan, where she worked and then joined Farukia Dental College, Mysore, where she worked till the date of her marriage. That after her separation from the petitioner since February 2004 and in June 2004, she joined Oxford Dental College where she worked for

11 months and then she joined Rajarajeshwari Dental College as a Reader till September 2007. Thereafter she joined Bangalore Institute of Dental Sciences as a reader where she was working and her gross salary is Rs.23,000/- p.m. That she was also working at Manasa Multispeciality Dental Care Centre in the year 2004. But at the time of filing her affidavit evidence, she was unemployed. She has stated that after the marriage talks were concluded, she had met the petitioner twice and that after understanding him thoroughly, she agreed to marry him and that till February 2004 they were living together. Till she was thrown out of the house at Hyderabad, there was no quarrel between them. Thereafter, the petitioner s parents asked her to attend the panchayat in Bangalore in which she told that she was ready to go with the petitioner, but they did not agree. After marriage she came to know from the petitioner that he had affairs with the classmates when he was studying and was told about Kathyayini. She said that the petitioner is a good person, but his parents are interfering in their life. That the petitioner is a mild and God fearing person.

22. In her further cross-examination RW.1 has stated that at the instance and on the instructions of her father-in-law, she had addressed letters to her husband though she had no intention to do so and in fact had objected to the same. She had stated this in respect of Ex.P3 and P4. She has also stated that since February, 2004 they have been living separately and that in July 2004 re-conciliation meeting was held but nothing came out of it. She has also denied all allegations of cruelty which have been attributed by the petitioner against her. She has however categorically stated that three days after marriage, the petitioner informed her about his having an affair with his classmate but she thought that the matter was closed and the same also did not come in the way of their marital life. She has however, stated that she has no problem to reside along with the petitioner and that she has made a prayer to that effect byway of seeking restitution of conjugal rights.

23. In Black s law dictionary the term mental cruelty as a ground of divorce has been defined as a course of conduct of a spouse that creates such anguish that it endanger the life, physical health or mental health of the other spouse.

24. The Hon ble Supreme Court in the case of N.G. Dastane (Dr) Vs. S. Dastane reported in (1975) 2 SCC 326 has observed that enquiry by the court in a case where cruelty is alleged must be 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 him to live with the respondent.

25. In the case of V. Bhagat Vs. D. Bhagat reported in (1994) 1 SCC 337, it has been observed that 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. 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 circumstance which it is neither possible nor desirable to set out exhaustively.

26. In the case of Savithri Pandey Vs. Prem Chandra Pandey reported in (2002) 2 SCC 73 the Hon ble supreme Court observed that cruelty must be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct, which would in general, be dangerous for a spouse to live with the other.

27. In the case of Parveen Mehta Vs. Indrajit Mehta reported in (2002) 5 SCC 706 it has been observed that the approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other.

28. In the case of A. Jayachandra Vs. Aneel Kaur reported in (2005) 2 SCC 22 it has been observed that 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.

29. In the case of Vinitha Saxena Vs. Pankaj Pandit reported in (2006) 3 SCC 778 it has been observed that as to what constitutes the required mental cruelty for the purpose of the said provision, will not depend upon the numerical count of such incidents or only on the continuous course of such conduct but really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude, necessary for maintaining a conducive matrimonial home.

30. In the case of Samar Ghosh Vs. Jaya Ghosh reported in (2007) 4 SCC 511 the Hon ble Supreme Court after reviving the English, American, Canadian and Australian cases held that no uniform standard can ever be laid down for guidance with regard to mental cruelty. But however, has enunciated certain instances being illustrative but not exhaustive of what constitutes mental cruelty wherein it has been held that the married life should be reviewed as a whole and 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. But mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day-today life would not be adequate for grant of divorce on the ground of mental cruelty.

31. While referring to an earlier decision in the case of Naveen Kohli Vs. Neelu Kohli reported in (2006) 4 SCC 558 it has been observed that Public interest demands not only that the married status should as far as possible, as long as possible and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact.

32. Keeping the above principles in mind the evidence would have to be appreciated in the instant case. From the material on record it is seen that the parties have lived together continuously for about one and half months at Hyderabad and their stay together has otherwise been intermitted as they were married on 4.8.2003 and have been living separately since February 2004. What is to be seen is as to whether in the brief period of their stay together, the petitioner has suffered cruelty at the hands of the respondent. Though the petitioner has made several allegations in the petition which are also extracted above and has repeated the same in his examination-in-chief. In his cross-examination however, he has admitted that both the parties were quite happy with each other before the marriage with regard to they getting married and both the parties were satisfied about each others qualifications and career and he has further admitted that both of them did not have any grievance during honeymoon. He has also admitted that during their stay together for 1 months at Hyderabad, the respondent used to prepare food and there was neither a cook nor maid servant and nor a washing machine and the respondent also did other household work. Subsequently, she stayed with her parents for about a week and though the respondent did not like the non-vegetarian food, she ate non-vegetarian food as he liked it. In Hyderabad he used to leave house at 6.a.m. and return home at 4.p.m and he did not have any grievance about his wife with regard to house hold work. He has also denied that he asked the respondent to return to her parental house. Under these circumstances it is difficult to conclude that the respondent has caused any kind of cruelty mental or physical to the petitioner. When a specific question was put as to whether he was willing to reside with the respondent, he has answered that he is not willing to do so. On the other hand he has admitted that he had satisfactory marital life with the respondent. When the petitioner has failed to prove the allegations of cruelty made by him against the respondent and the respondent is interested in living with him, we fail to understand as to why the petitioner stated that he was not willing to reside with her.

33. Further a reading of all the letters and particularly the extracts also do not reveal that the respondent has caused any cruelty to the petitioner except making it apparent that she is a strong minded person. However, what becomes apparent from her letters are that she has realized that there may have been some mistakes on her part, but she is willing to change and that she is trying to control her short temper as well as her egoistic attitude. At any rate according to the respondent, the said letters were written at the instance of her father-in-law, despite objecting to the same and hence much cannot be read into the contents of the said documents. In the face of the explicit admission of the petitioner regarding a satisfactory marital life and the strong denial of the respondent regarding acts of cruelty on her part and considering the fact that the parties lived together continuously for only 1 months and the fact that respondent is interested in continuing her marital life with the petitioner, we cannot hold that the petitioner has proved the allegations of cruelty against the respondent. Hence the finding of the Family Court on this issue is reversed and point No.1 is answered in favour of the appellant herein.

33. The respondent has also sought restitution of conjugal rights which aspect has not been adverted to by the Family Court in its judgment. According to the respondent, the parties have been separated since February, 2004 and though she did not seek for restitution immediately thereafter, however, by way of counter claim to this petition filed by the petitioner, she has sought for restitution of conjugal rights in the year 2005 along with her statement of objections.

34. Under section 9 of the hindu marriage act when either of the spouses without reasonable excuse withdraws from the society of the other, then a petition could be filed by the aggrieved party seeking restitution of conjugal rights and the court on being satisfied with the truth of the statements made in such petition and that there is no legal ground why the application should not be granted can pass a decree of restitution of conjugal rights accordingly. The explanation pertains to the burden of proving reasonable excuse for withdrawal from the society of the other spouse or the party who has withdrawn from the society. The basis for enforcing restitution of conjugal rights is the right of a spouse to consortium of the other spouse and where the other spouse had abandoned or withdrawn from the society of the aggrieved spouse without reasonable excuse or just cause, the court should grant a decree of restitution. This section must however be read with Section 23 of the Act which imposes a duty on the court to enquire into and pass a decree for restitution of conjugal rights after satisfying itself about the petitioner who has approached the court having a bonafide intention to resume matrimonial co-habitation and to render his duties of matrimonial life. The party who resist the petition must however prove that there was a reasonable excuse or just cause for the withdrawal from the society of the petitioner or that the petitioner by taking advantage of his/her own wrong or any disability is not entitled to the relief under Section 9. A husband has the right to require his wife to live with him wherever he may choose to reside and unless there are special circumstances the Court cannot absolve the wife from discharging for corresponding duty. The initial onus of proving that the respondent has without reasonable excuse withdrawn from the society of the petitioner obviously rests on the petitioner, but the burden of proving reasonable excuse is on the respondent. The reasons for the one spouse to withdraw from the other spouse must be grave and weighty.

35. In the case of Revanna V/s. Susheelamma reported in AIR 1967 Mysore 165, it has been held that reasonable excuse contemplated in the Section must be one which would afford that ground either for judicial separation or for nullity of marriage or for divorce. Keeping the above principles in mind, the evidence on record would have to be appreciated.

36. Keeping in mind the above principles and the fact that the intention of the respondent to reside with the petitioner being apparent and that on account of breakdown of talks between the parties and their respective parents and due to the filing of the petitioner seeking divorce and the respondent has been residing with her parents, we are of the view that the trial court ought to have considered this aspect of the matter also. Hence we hold that the respondent has made out a case for restitution of conjugal rights and answer the point No.2 in favour of the appellant.

37. What follows is the relief that we can grant to the parties herein as, the reality of the present case has now to be considered by us, Considering the fact that we are reversing the decree of divorce granted by the Family Court. At this stage we have to take note of the fact that after the decree of divorce was granted by the Family Court, the petitioner has married once again and whether the said circumstance has led to a situation of irretrievable breakdown of the marriage between the parties herein, even though the petitioner has failed to establish the ground of cruelty and desertion. No doubt the said ground of irretrievable breakdown of marriage is not an independent ground under the provisions of the hindu marriage act, 1955 and hence not a ground for seeking divorce and neither does this court have any powers to grant a decree of divorce on the said ground. But the peculiar facts and circumstances of the present case has in our view lead to such a situation.

38. Prior to the enactment of the hindu marriage act, 1955, the concept of divorce under Hindu Law was absent except in the erstwhile states of Bombay, Madras and Saurashtra under certain circumstances. But in the said enactment Section 13 deals with the relief of divorce on certain grounds. The Act was later amended to add grounds on the basis of which the wife alone could seek a decree of divorce. Normally divorce postulates two things namely a guilty party i.e., party who has committed one of the specified matrimonial offences and an innocent party who has suffered, in which even the innocent party can on proving the guilt of the other party, seek the relief of decree of divorce. However, even in the absence of guilt on either of the parties to the marriage or on account of guilt of both the parties, there can be a breakdown of the marriage, in which event it would not be necessary for a party to prove the fault of the other party. According to a learned author, irretrievable breakdown of marriage is in the realm of the breakdown theory of marriage, when the marriage has broken down without any possibility of repair and therefore should be dissolved without looking to the fault of either party.

39. Justice Krishna Iyer has figuratively expressed such a situation in the following words:

Daily, trivial differences get dissolved in the course of time and may be treated as teething trouble of early matrimonial adjustment. While the stream of life lived in married mutuality, may wash away small pebbles, what is to happen if intransigent incompatibility of minds breaks up flow of the stream? In such a situation we have a break down of the marriage itself and the only course left open is for law to recognize what is a fact and accord a divorce.

40. I would be relevance to note that the Law Commission in England had submitted its report on the introduction of breakdown of marriage as a ground for divorce and in the year 1969 the Divorce Law Reform Act was passed laying down certain criteria for breakdown of marriage. In fact the Law Commission in India in its 71st report has touched upon irretrievable breakdown of marriage as a ground of divorce relying on the English Matrimonial law, but same has not yet resulted in any enactment.

41. Another aspect of this concept is the long separation of spouses. When there is such a separation there would obviously be no continuity in marriage and the law would not serve any purpose to continue such a marriage as there would be no reasonable probability of the spouses living together as husband and wife. section 1 of matrimonial clauses act, 1973 legislated in England lays down that after the commencement of the Act, breakdown of the marriage shall be the sole ground for divorce and Section 2 formulates certain criteria of breakdown which are as follows:

(a) Adultery of the respondent but then the petitioner has also to establish that on this account he finds it impossible to live with the respondent;

(b) Cruelty of the respondent (i.e., the respondent has behaved in such a way, that the petitioner cannot reasonably be expected to live with the respondent);

(c) Two years desertion;

(d) Two years living apart of the spouses, provided the respondent agrees to divorce (this is the English version of divorce by mutual consent; and

(e) Five years living apart of the spouses (in this consent or non-consent of the respondent is immaterial). This is the English law version of irretrievable breakdown of marriage.

42. There is also another aspect with regard to the dissolution on the basis of irretrievable breakdown and the same is also envisaged under the hindu marriage act under section 13. This is an aspect of dissolution on the basis of irretrievable breakdown of marriage wherein if a decree for restitution of conjugal rights is not complied within one or either party may seek divorce. Further even if there is no resumption of co-habitation between the parties for one year or upwards after passing of the decree for judicial separation, then it is a ground for dissolution of the marriage. Therefore, Section 13(1A) of the Act recognizes to some extent irretrievable breakdown of marriage under the above two circumstances.

43. Under Section 13(2) of the Act a wife can also present a petition for dissolution of her marriage by a decree of divorce on the ground that the husband has married again i.e., he is guilty of bigamy. This is one aspect of irretrievable breakdown of marriage which has arisen on the facts of the present case. Considering the fact that in the instant case, the petitioner has married after the decree of divorce was granted by the Family Court and even in the event of reversal of the Judgment and Decree of the Family Court, no substantial relief can be given to the respondent who is the appellant, the only alternative for the respondent-wife is to seek appropriate reliefs against the petitioner as we cannot lose sight of the fact that the act of contracting the second marriage by the petitioner clearly implies that he is not interested in continuing his marital relationship with the respondent and even in the absence of his proving the allegations of cruelty against the respondent, we have to conclude that there is an irretrievable breakdown of marriage in the instant case. However, since there is no specific provision under the hindu marriage act, 1955 by which we can dissolve the marriage between the parties on the said ground and in view of our reversing the decree of divorce granted by the Family Court our hands are tied in granting any relief to the parties, except stating that the parties can seek appropriate remedies available to them in law. By reversing the Judgment and decree of the Family Court, in law, the marital tie between the parties herein continue but in fact there is a breakdown of marriage, despite that fact that we have held point No.2 in favour of the appellant/wife. We are also conscious of the fact that this order would be causing injustice to an innocent third party who is a stranger to this proceeding, namely, the second wife of the respondent herein. Under the circumstance we had suggested an amicable settlement between the parties.

44. At this juncture we would observe that in several case, the Hon ble Supreme Court has put an end to the marital tie on the ground of irretrievable breakdown of marriage by exercising powers under article 142 of the constitution of india so as to ensure complete justice between the parties. This court is not conferred with such a power and hence we have no option but to allow the appeal filed by the appellant/ wife and set aside the judgment and decree of the Family Court by dismissing the petitioner filed by the respondent herein, reserving liberty to the parties to seek whatever remedies are available them in law.

45. Before parting with this case we would like to observe that the Law Commissioner of India in its 71st report recommended amendment to the hindu marriage act by adding irretrievable breakdown of marriage as an additional ground. In fact a bill was prepared providing three years of separation as a proof of breakdown of marriage and the said bill was envisaged that the spouse was entitled to seek relief on the ground of irretrievable breakdown irrespective of the fact that he or she was at fault or was taking advantage of his or her own wrong. Though the said bill was introduced in parliament in the year 1987, it was not enacted. In fact the Hon ble Supreme Court in certain decisions have relied upon this ground for dissolving a marriage even when the petitions were filled on the ground of matrimonial fault and was not substantiated enough to grant relief.

46. The observations in Neelu Kohli s case and also in V. Bhagat Vs. D. Bhagat reported in AIR 1994 SC 710 referred to above where a decree of divorce in favour of husband was granted inspite of the finding that

the allegations of cruelty leveled by him against his wife were not proved are relevant in this context. In fact Smt. Kusum in a Chapter entitled Matrimonial Adjudication under Hindu Law in the book Fifty years of the Supreme Court of India-its grasp and reach published by the Indian Law Institute has stated as follows:

While expediency demands that no marriage which has completely lost its sanctity and meaning should be kept in vegetative existence simply because under the letter of the law there is no ground available for relief. Caution and fairness demand that the ground should not become on agent of offence and be misused to the detriment of the innocent and the ignorant. Though the existence of the ground on the statute book might facilitate the judge who today seeks alibis under other provisions to grant relief in a really disastrous marriage. It is important that irretrievable breakdown of the marriage as a ground for divorce, if incorporated, should be applied with utmost discretion. In any case, each case needs to be viewed on its peculiar facts and merits

47. We find that the time has come to incorporate irretrievable breakdown of marriage as a ground for granting divorce particularly when viewed on the factual matrix of the Present case. However, as observed above, this court is not empowered to grant relief to the parties on that ground.

48. Accordingly, this appeal is allowed.

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# VIDYA RAMAKRISHNAIAH VERSUS R.N. VIKRAM

**Karnataka High Court**

**Bench : Hon'ble Mr. Justice P. V. Shetty & Hon'ble Mr. Justice S. A. Nazeer**

**ILR 2005 KAR 838, 2005 (3) KarLJ 347**

**Decided on 30 July, 2004**

**This appeal is by the wife. In this appeal she has called in question the correctness of the judgment and decree dated 26th September 2003 made in M.C.No.1173 of 2000 by the Court of Principal Judge, Family Court, Bangalore (hereinafter referred to as the family Court) granting a decree dissolving the marriage that had been solemnized between her and the respondent.**

**Standard of proof required for granting of divorce on the ground of desertion should not be merely on preponderance of probabilities, but proof beyond reasonable doubt.**

**The proceedings of the Trial Court indicate that the appellant did not appear before the Court in spite of several adjournments, Having regard to the facts and circumstances of the case.The very facts set out above, apart from our conclusion reached above that the Family Court was justified in recording with finding that the appellant had treated the respondent with cruelty, we are satisfied that the appellant is not interested in retaining the marriage by living with the respondent in the matrimonial home**

## JUDGMENT

**Hon'ble Mr. Justice S. Abdul Nazeer**

1. This appeal is by the wife. In this appeal she has called in question the correctness of the judgment and decree dated 26th September 2003 made in M.C.No.1173 of 2000 by the Court of Principal Judge, Family Court, Bangalore (hereinafter referred to as the family Court) granting a decree dissolving the marriage that had been solemnized between her and the respondent.

2. Facts in brief, as set out in the petition may be stated as hereunder:

   The marriage between the appellant and the respondent was performed on 20 th June 1999 according to the traditional Hindu rites at Dayananda Sagar Kalyan Mantap, Bangalore. According to the petition averment, the marriage was an arranged marriage; the appellant lived and studied in United States of America where her parents lived; and after obtaining her diploma she got admitted to the Devraj Urs Medical College, Tamaka, Kolar District; she used to accompany her parents to India and spend the summer vacation in India; she is the only daughter for her parents; the appellant was never enthusiastic over the marriage either before or during or after the marriage for the reasons best known to her; the appellant was not at all inclined to come and stay with the respondent at matrimonial home along with his mother and aged grand mother; the respondent is a qualified Doctor; he is also the only son of his parents; he lost his father when he was in infancy and it was his mother and grand mother who brought him up with affection and concern bestowing attention to inculcate good and wholesome family values and higher education which have stood him in. good stead as he had a brilliant academic record: he is a soft-spoken, level headed and considerate to others both by upbringing and by his profession; since the appellant was reluctant to stay with him at the matrimonial home along with his mother and grand mother, the parents of the appellant persuaded him to stay with her with the assurance that she would spend the weekends with his mother and grandmother at the matrimonial home, as a stop-gap arrangement he agreed to live with the appellant as suggested by her parents with a fond hope that the appellant will change her

attitude and eventually come and stay with him along with his widowed mother and grand mother; the said hope was totally belied by the irresponsible, contemptuous attitude and behaviour on the part of the appellant. It is alleged that the appellant is highly temperamental and least concerned towards the sensibility of others; the appellant was never co-operative in her conduct as a newly wedded spouse; very few intimate relationship were there between the spouses; the appellant by nature is quarrelsome and there used to be frequent quarrels at her instance; she used to abuse the respondent and even assaulted him on 8th July 1999, 12th August 1999 and 19th September 1999 without any provocation: the appellant generally displayed scant regard not only for him but also for his mother and grand mother despite their age and status; the appellant had asked him to quit her house On 19th September 1999 alleging that he married her with the sole purpose of going to USA for improving his professional prospects which was false to her knowledge as his professional credentials are sufficient in themselves for him to improve his prospects either in India or abroad. It is further alleged that when -he visited the appellant on 29th January 2000 to deliver some books and booklets left by one Dr.Rajesh as requested by her in her letter dated 10th January 2000, he was insulted and ill-treated by the appellant at her house; when the mother of the respondent visited the appellant on 30th January 2000 at her house to join him at the matrimonial home, she showed scant regard for his mother and insulted her by refusing to let her enter the house; she had not cared to respond to several suggestions made to her to visit matrimonial home at least on festival days like Gowri-Ganesha, Dasara, Deepavali, Sankranthi which show that she is not concerned for either the marital tie or to lead a normal wedded life. The appellant is habituated to pick up quarrels and violently react even in ordinary situations and had abused the respondent his mother and grand mother; the respondent had to suffer insult, humiliation and anguish ever since the marriage and his patience and tolerance have worn thin and if the endless agony continues, he might become a mental wreck; the efforts made by the respondent and the well-wishers of the respondent to repair the damage inflicted on the marital tie by the appellant have not borne fruit and on the other hand the appellant had become more reckless, callous and arrogant which seem to feed her ego to no end; his suffering and misery have served only to make the appellant more of a sadist and unreasonable. It is also asserted in the petition that the respondent caused notice on 18th February 2000 issued to the respondent highlighting her misdeeds, misbehavior and arrogant attitude which was replied by the appellant by her reply notice dated 13th April 2000 making reckless allegations against the respondent, his mother and grand mother. To the said reply notice the respondent caused rejoinder notice dated 19th June 2000; and since the unfortunate marriage between him and the appellant had turned out to be an oppressive yoke and unwanted burden causing great suffering, hardship, worry and humiliation to him, which he was unable to bear any more, he was constrained to file petition seeking for divorce. The respondent filed her objections statement inter alia disputing the assertions made by the respondent and contending that the respondent has not made out any ground for divorce under Section 13 of the Hindu Marriage Act, {hereinafter referred to as 'the Act'}, she has denied the assertion of the respondent that she had assaulted him on 8th July 1999, 12th August 1999 and 19th September 1999. On the other hand, it is her case that on 8th July 1999 the respondent's mother came to her house and started fighting with her parents in front of her relatives who were present and also in the presence of servants.

Thereafter, for nearly one month the respondent, who was staying in her house, used to pick up quarrels every now and then and accused her and her parents unnecessarily. It is claimed by her that on 12th August 1999, the respondent, in order to spoil the pre-planned programme of both the respondent and herself to give surprise to appellant's mother on her birthday that is on 13th August, picked up a quarrel with the appellant in respect of inviting guests for lunch and left her house abruptly in the night. It is also alleged by her that on 15th August 1999, her parents left for USA leaving behind the appellant to complete her M.B.B.S. course and come to America with the respondent after finishing her course and thereafter the appellant and the respondent were living in her house at Jayanagar for some days. When the appellant went to the house of the petitioner on festival day, she saw a girl called Menaka in the house of the respondent who had accompanied the respondent and his mother to Airport while her parents

left to America; and the said girl was a paying guest in the house of the respondent and her access to the respondent's room and his cupboard though seemed to be suspicious, she did not bother; and during the dinner the respondent's mother forced the appellant to sit on the other end of the table and made that girl Menaka to sit beside the respondent. In response to the allegations of the respondent that the appellant assaulted the respondent on 19th September 1999, she had stated that on the said date the respondent came to her house and started quarreling with her on the pretext that some relatives from her side had said that her parents though knowing several politicians and officials in America, have not got the visa done to the respondent even after 2-3 months because they want him to prove his worth to be in their family and they would not get him visa for 2-3 years. It is also asserted by her that on the said date the respondent insisted on the appellant 100 thousand dollars to be deposited in his mother's name and demanded a Ford car and made a suggestion for transfer of their Jayanagar house, where she was living, in his mother's name; when she told him that his demand was unreasonable, the respondent got enraged against her, caught hold her by her hair and pulled her around and he physically assaulted her in the house; he damaged the phone table by smashing the telephone, etc. By this the appellant having been completely depressed, left to her hostel at Kolar on 20th September 1999 to complete her examination and she never returned till 2nd January 2000; she has asserted that there was a demand by the respondent and her mother for dowry and for presentation of car etc., she has denied that she was never co- operative with the respondent and she is by nature quarrelsome and there used to be frequent quarrels at her instance and she used to abuse him, etc.

3. On the basis of the pleadings, the Family Court framed three points for consideration. They read as hereunder:

   1. Whether the petitioner proves that he was subjected to cruelty by the respondent after the solemnization of marriage?

   2. Whether the petitioner proves that respondent has deserted him for a continuous period of not less than 2 years immediately preceding the presentation of the petition?

   3. Whether the petitioner is entitled for decree of divorce as prayed for?

   4. While the Family Court answered points 1 and 3 in favour of the petitioner, answered point No. 2 against the petitioner. The respondent examined himself as PW.l in the course of the proceedings before the Family Court. However, the appellant did not subject herself for cross-examination in the course of the proceedings, though she had filed her affidavit. The Family Court, on consideration of the evidence on record, as noticed by us earlier, found that the respondent had made out a case for dissolution of marriage on the ground that the appellant had treated him with him with cruelty.

   5. Sri M.V. Vedachala, learned Counsel for the appellant, challenging the correctness of the judgment and decree passed by the Family Court strongly submitted that the entire consideration of the evidence by the Family Court to record a finding that the appellant has treated the respondent with cruelty, is totally contrary to law. It is his submission that the Family Court has totally misunderstood and misread the evidence on record and proceeded to pass the impugned decree.

   According to the learned Counsel since the burden was on the respondent to make out a case that the appellant has treated him with cruelty, the Family Court should have assessed and ought to have appreciated the evidence of the appellant on merits without being in fluenced by the consideration that the appellant has not made herself available for cross- examination. He submitted that if the evidence of the respondent is properly appreciated it would be clear that there is no truth in his assertion that the appellant had abused and insulted him, as claimed by him. Alternatively, he submitted that even assuming that the assertion made by the respondent that the appellant had assaulted him on 8th July 1999, 12th August 1999 and 19th September 1999 is true, it will not amount to cruelty within the meaning of Section 13(1)(ia) of the Act. In support of his submission he relied upon a decision in the case of Smt. Nalini

Sunder v. G.V. Sunder , ILR 2002 KAR 4734 in the case of Dr. A.R. Aruna Kumar v. Smt. Nalini , ILR 2003 KAR 238, and in the case of Smt.Prabhavathi v. K.Somashankar ILR 2002 KAR 3505.

6. However, Sri Narayan, learned Counsel appearing for the respondent while strongly supporting the impugned judgment pointed out that the Family Court was fully justified in passing the order on the basis of the evidence available on record. He further submitted that the fact that the appellant has failed to participate in the proceedings before the Family Court in spite of the opportunity made available to her on several occasions, would clearly show that she was not in a position to contest the grievance made by the respondent against her. Therefore, he submits that the Family Court was fully justified in allowing the claim of the husband.

7. In the light of the rival submissions of the learned Counsel appearing for the parties, the only question that would arise for consideration in this appeal is as to whether the conclusion reached by the Family Court that the respondent has made out a case for dissolution of marriage on the ground that the appellant has treated him with cruelty? Section 13(1)(ia) of the Act provides that any marriage solemnized whether before or after commencement of the Act, may, on a petition presented either by the husband or wife, be dissolved by a decree for divorce on the ground that other party has, after the solemnization of the marriage treated the petitioner with cruelty. The ground made out by the respondent for seeking dissolution of marriage is that the appellant treated him with cruelty. The respondent has referred to the several instances where the appellant is stated to have been treated him with cruelty. The instances are, the appellant has assaulted him on three occasions and has abused him and his mother and has failed to live in the matrimonial home immediately after the marriage and as a result he was compelled to stay with the appellant in her house where she had treated him with utter contempt and she was non-co-operative with him as far as the matrimonial life and she has failed to fulfil the aspirations of a husband so far as matrimonial life is concerned. It is also the case of the counsel for the respondent that the averments made in the objections statement making reckless allegations made by the appellant against the respondent and his mother alleging that they are demanding huge dowry and also a car, etc., also amounts to cruelty. The word 'cruelty' has not been defined in the Act. However, the meaning that is required to be attached to the word 'cruelty' employed under Section 13(1)(ia), has been the subject matter of pronouncement by the Apex Court. The Apex Court has taken the view that the mental cruelty referred to under Section 13(1)(ia) of the Act can be broadly defined as a conduct which inflicts upon the other party and such mental pain and suffering as would make it not possible for that party to live with the other. In other words, it is laid down that the mental cruelty must be of such nature that the parties cannot reasonably be expected to live together and while deriving at such conclusion the Courts should require to have regard to the social status, educational level of the parties, the society that they move in, the possibility or otherwise of the parties ever living together, in case they are already living apart and all other relevant circumstances. In a given case either of the spouses has treated the other with cruelty or not, is a matter required to be determined depending upon the facts and circumstances of each case and depending upon the nature of cruelty meted out by one spouse to the other. It is not possible to expect that the nature of cruelty alleged would be different from case to case. While deciding these things, as noticed by us earlier, the Courts must keep in mind the broad view of the entire matter and appreciate pleadings and assess the evidence on record and decide as to whether the cruelty pleaded has been established or not. In this connection, it is useful to refer to the observation made by the Supreme Court in the case of Dr.N.G.Dastane v. Mrs..Dastane , , while considering the question as to whether an order for judicial separation is equired to be made in Section 10(1)(b) of the Act prior to 1976 amendment on the ground of cruelty pleaded by the husband. At paragraph 32 of the judgment it is observed by the Apex Court as follows:

"....The Court has to deal, not with an ideal husband and an 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 a matrimonial court for even if they may not be able to drawn their differences, their

ideal attitudes may help them overlook or gloss over mutual faults and failures. As said by Lord Reid in his speech in Gollins v. Gollins, (1963) 2 All ER 966: "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. In cruelty cases one can hardly ever even start with a presumption that the parties are reasonable people, because it is hard to imagine any cruelty case ever arising if both the spouses think and behave as reasonable people".

8. In the case of V.Bhagat v. Mrs.D.Bhagat , , the Supreme Court at paragraphs 17 and 18 of the judgment has observed as follows:

"17. Mental cruelty is Section 13(1)(ia) can broadly Be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live 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 that the wronged party cannot reasonably by 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 not 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.

18. At this stage, we may refer to few decisions of this Court rendered under Section 13(1)(ia). In Shobha Rani v. Madhukar Reddi (sic) Justice K. Jagannatha Shetty, speaking for the Division Bench, held (at p.123 of AIR):

"Section 13(1)(ia) 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 on 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 as per se unlawful or illegal. Then the impact or the injuries 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. It will be necessary to bear in mind that there has been marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the Court should not search for standard in life. A set of facts stigmatised as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We the judges and lawyers therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties. It would be better if we keep aside our customs and manners. It would be also better if we less depend upon precedents. Because as Lord Denning said in Sheldon v. Sheldon, (1966)2 All.ER 257,259 "the categories of cruelty are not closed". Each case may be different. We deal with the conduct of human beings who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop

up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful (sic) realm of cruelty."

9. Keeping in mind the above principles in mind, now we will proceed to examine the merits of the contentions advanced by the learned Counsel appearing for the parties in this appeal.

10. We have been taken through the evidence of the respondent and also the judgment passed by the Family Court. In our view, there is no merit in this appeal. PW.l in his evidence has stated that his marriage with the appellant was performed as per the Hindu rites at Bangalore on 20th June 1999. In his evidence he has clearly stated that the appellant had assaulted him on 8th July 1999, 12th August 1999 and 19th September 1999. He has also stated that the appellant used to abuse him and insult him and was not co- operating with him to discharge her marital obligations and though he lived with her in her house at Jayanagar with a fond hope that she would amend her ways and co-operate with him to lead a happy matrimonial life, it did not bear any fruit. Though the respondent has been elaborately cross-examined, nothing substantial has been elicited to discredit his evidence with regard to the nature of the treatment given to him by the appellant by way of insult, abuses and the assault made against him. It is also necessary to point out that the appellant has failed to step into the witness box and refute the allegations made against her by the respondent in the petition and also in the course of his evidence. Further, the appellant in her objection statement has made serious allegations against the respondent and her mother alleging that they have demanded huge dowry and a car. As noticed by us earlier also, she not stepped into the witness box and made herself available for cross-examination. Under these circumstances, it is difficult to accept her version that there was a demand made by the respondent and his mother for dowry and for a car, etc. The Family Court, on consideration of the evidence on record, as noticed by us earlier, has accepted the plea of the respondent that the appellant has hit him on three occasions referred to above and abused and insulted him. In the absence of the appellant stepping into the witness box and subjecting herself to cross-examination, we do not find any error on the part of the Family Court in relying upon the evidence of the respondent in respect of the assertion that the respondent has treated him with cruelty. We do not find any inherent improbabilities or contradictions in the evidence of the respondent, which would persuade us to reject his evidence with regard to the grievance made by the respondent against the appellant. Therefore, we are of the view that the judgment and decree passed by the Family Court dissolving the marriage between the appellant and the respondent on the ground of cruelty, does not call for interference in this appeal. In the light of the above conclusion reached by us, we are of the view that none of the decisions relied upon by the learned Counsel for the appellant is of no assistance to him. However, we would proceed to briefly refer to the said decisions. In the case of NALINI SUNDER (supra), the husband filed the petition on the ground that the wife started quarreling with him on the ground that sufficient water was not stored in the house and the second contention was that on one occasion when the husband asked for a cup of Coffee, she replied him that he need not tell her of the duties of a wife. This Court held that those incidents will not constitute cruelty within the meaning of Section 13(1)(a) of the Hindu Marriage Act. The Court had held that mental cruelty must be of a nature that parties cannot be reasonably expected to live together. In that case, the couple continued co-habitation notwithstanding the alleged incident. Therefore, the said decision is not applicable to the facts of this case.

11. In the case of PRABHAVATHI (supra) this Court held that standard of proof required for granting of divorce on the ground of desertion should not be merely on preponderance of probabilities, but proof beyond reasonable doubt. In the said case, the Family Court has rejected the claim for dissolution of marriage on the ground of desertion. The petition is allowed only on the ground of cruelty. Therefore, the said decision is not applicable to the facts of the case.

12. In the case of Dr.A.R. ARUNA KUMAR (supra), this Court has held that the expression "treated the appellant with cruelty" clearly signifies that the opposite party must have been guilty of a conduct as could be said to be something more than ordinary wear and tear of married life. In that case, the wife has accused the husband of being drunkard and drug addict. On the facts and circumstances of the said

case, the Trial Court had held that it was not possible to grant the decree to the husband on the ground that the allegation made by the wife has caused mental cruelty. The said decision is also not applicable to the facts of the case. In the light of the above discussion, we are unable to accede to the submission of Sri Vedachala that the finding recorded by the Family Court that the appellant has treated the respondent with cruelty is not called for on the basis of evidence on record. In our view, as noticed by us earlier, the evidence of the respondent clearly establishes that the appellant, by her conduct of assaulting the respondent on three occasions referred to above and by insulting him as alleged by the respondent, has treated him with such cruelty which makes him impossible to continue in the matrimonial home with the appellant. No doubt, as contended by the learned Counsel for the appellant, the appellant has made very serious grievance against the respondent and his mother alleging that they have demanded dowry and also a car as a condition precedent to perform the marriage. The appellant has not examined herself in the course of the proceedings to speak to the said allegations. Under these circumstances, we are of the view that the said allegations are made against the respondent and his mother without any basis whatsoever. In our view, since the evidence of the respondent itself is sufficient to prove that the appellant has treated him with cruelty, we find it unnecessary to consider that the allegations made by the appellant against the respondent in the objection statement also should be taken into account to support our conclusion that the appellant has treated the respondent with cruelty. The only other question that remains to be considered is whether, as contended by Sri Vedachala, the three instances of assault alleged by the respondent is not sufficient to come to the conclusion that the appellant has treated the respondent with cruelty. The incident regarding the assault has taken within an interval of three months, i.e. on 8th July 1999, 12th August 1999 and 19th September 1999. May be a single instance of assault, either by husband or wife, as a result of outburst or emotion or quarrel, the Courts may not be justified in taking the view that the offending spouse has treated the other with cruelty. But, if the wife who has good education and hails from a good background, from the very day of the marriage makes the life of the husband difficult to have a matrimonial home and refuse to stay with him in matrimonial home and does not co-operate with him to have the happiness or satisfaction of the married life, and as a result, if the husband is compelled to stay with the wife in her house in an attempt to persuade her to change her attitude and join him to lead a happy matrimonial life and in the process if he has to be beaten up by the wife on three occasions for no fault of him, and thereafter if the attitude of the wife has not changed, we find it difficult to accept the submission of Sri Vedachala that the assault by the wife on the husband on three occasions cannot be constituted as cruelty to make a decree for divorce under Section 13(1)(ia) of the Act. Therefore, in the light of the above conclusion, this appeal is liable to be rejected.

13. Further, we find that it is also necessary to place on record as to what has transpired in the course of hearing of this appeal. On 15th March 2004, when the appeal came up for admission, in an effort to settle the dispute amicably between the parties if possible, we verified from Sri Vedachala, whether the appellant would be willing to settle down in the matrimonial home along with the respondent at Bangalore. However, Sri Vedachala submitted before us that while the appellant is willing to take care of her husband at USA, if he was willing to join her, and the appellant was not willing to come and settle down at Bangalore. We find it is useful to extract to the proceedings recorded by us on 15th March 2004. The same reads as follows:

"When this appeal came up for admission, we wanted to know from Sri Vedachala learned Counsel appearing for the appellant whether the appellant would be willing to come and settle down in the matrimonial, home along with her husband. Sri Vedachala today submits before us that the appellant is not willing to come down to Bangalore and settle down in Bangalore, while she is willing to take care of her husband at United States, if he is willing to join her.

The respondent and his mother are present before the Court. Respondent submitted that he is doing his post Graduation in M.D. Pharmacy Course, at Kempegowda Institute of Medical Sciences at Bangalore and he had one more year to complete his course. Though he expressed before us some of the unhappy

events that had taken place on account of the act of the appellant, he submitted that if the appellant is willing to co-operate with and live him by maintaining the matrimonial peace, he has no objection, notwithstanding what was happened earlier, to take her back and live with her. Mother of the respondent who is before us also submitted to that effect.

The proceedings of the Trial Court indicate that the appellant did not appear before the Court in spite of several adjournments, Having regard to the facts and circumstances of the case, list this appeal on 12th April 2004 to explore the possibility of settling the dispute between the parties amicably...."

14. On 13th April 2004 when the matter was again taken up for consideration, a Memo was filed by Sri Vedachala stating that the appellant had agreed to live with the respondent in USA and will take care of him in America. The said memo reads as follows:

" The appellant humbly submits that she has agreed to live with the respondent in the USA and will take care of him to America, in the event of the respondent agreeing to live with the appellant in the USA."

15. On the said date since we felt that one more opportunity should be given to the appellant to make up her mind as to whether she would be willing to live with her husband in India in the matrimonial home, we adjourned the hearing of the appeal to 4th June 2004. However, the appeal was listed thereafter only on 16th July 2004. On the said date on the request made by the learned counsel for the appellant, as a last chance, we adjourned the appeal to 30th July 2004 expecting that the dispute between the parties may be settled. On all these dates, though the respondent and his mother were present before the Court, the appellant was not present though we had directed the appellant also to be present before this Court on 12th April 2004. The Family Court, at paragraph 3 of the judgment, has also observed that after the appearance of the parties, the matter was referred to reconciliation and the reconciliation had failed. As noticed by us earlier, the appellant has not entered the witness box. The very facts set out above, apart from our conclusion reached above that the Family Court was justified in recording with finding that the appellant had treated the respondent with cruelty, we are satisfied that the appellant is not interested in retaining the marriage by living with the respondent in the matrimonial home.

16. In the light of the discussions made above, we are of the view that this appeal is liable to rejected as one devoid of merits. Accordingly, it is dismissed. However, no order is made as to costs.

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# SHILPA VERSUS PRAVEEN

**Karnataka High Court**

**Bench : Hon'ble Mr. Justice H.G.Ramesh and Hon'ble Mrs. Justice Rathnakala**

**MISC.FIRST APPEAL NO.103381/2014 (FC)**

*Shilpa W/O Praveen S R D/O D M ...*
*Versus*
*Praveen S R S/O S P Rameshwaraiah*

**Decided on 20 July, 2016**

**The appellant/wife is aggrieved by the decree of divorce granted by the Principal Judge, Family Court, Bellary (for short 'the Family Court') on his file in Matrimonial Case No.221/2013 dated 30.10.2014 thereby dissolving her marriage with the respondent/husband.**

**The Family Court on overall evaluation of the evidentiary material allowed the petition both on the ground of mental cruelty and also on the ground of incurable unsoundness of mind.**

**The petition is filed under Section 13 of Hindu Marriage Act without specifically quoting the subsections, which deal with various grounds for divorce. However, the pleading would go to make out the following grounds :**

**(1) Cruelty;**

**(2) Incurable mental disorder and**

**(3) Suppression of material fact.**

**However, marriage having consummated, since the relief is for dissolution of marriage under Section 13 of the Act, the Family Court raised points of consideration in respect of first two items of the above and answered both against the wife.**

**In our considered opinion, the Court below was insensitive in branding the wife as suffering with completely incurable paranoid schizophrenia. Very same medical evidence, on which the Family Court was acting upon at the same time, was indicating the possibility of such patients leading normal life with regular medication and family support.**

**We are taken aback by the endeavour made by the Family Court in taking the case to one of violation of Section 5 of the Act, which stipulates conditions of a valid marriage. Without there being any pleading or proof by the husband, the court below comprehends that the wife is unfit either for marriage or procreation of children. The Family Court, we are certain, was unmindful of the untenable and perverse finding it so recorded.**

**We deem it in the fitness of things, to caution the Courts dealing with family matters to be more alive or alert to each case before them.**

**Having held that the husband has failed to make out a case under Section 13(1)(iii) of the Act on the ground of wife suffering with incurable form of Schizophrenia, to the extent that he cannot be reasonably expected to cohabit with her, the impugned judgment and decree needs to be set aside.**

This appeal having been heard and reserved for judgment on 12.7.2016 and coming on for Pronouncement of judgment this day, Rathnakala J., delivered the following:

## JUDGMENT

The appellant/wife is aggrieved by the decree of divorce granted by the Principal Judge, Family Court, Bellary (for short 'the Family Court') on his file in Matrimonial Case No.221/2013 dated 30.10.2014 thereby dissolving her marriage with the respondent/husband.

2. Succinctly stated, the husband filed a petition for divorce before the Family Court under Section 13 of the Hindu Marriage Act, 1955 (for short 'the Act'), alleging that the parties were married as per their customs on 1.12.2011 at Bellary. At the relevant point of time, he was working as Software Engineer at Bangalore and wife had M.C.A. graduation. Marriage was consummated and wife joined him at his parents' house at Bellary. They went out on a honeymoon from 12.12.2011 to 16.12.2011 and stayed at Munnar and Alleppi. On 15.12.2011, husband told the wife to stay at her parents' place for a period of three months, so that he can look out for a house for their stay at Bangalore. Immediately the wife became wild, locked the door from inside and did not open it for more than two hours. When he tried to open the door forcibly, she threatened him to commit suicide. Immediately he contacted her father and only after her father advised her over phone, the wife regained her normal senses. They returned to Bellary on 17.12.2011 via Bangalore. At the Bangalore Bus Stand, the wife started walking with bare feet like a drunken person leaving behind the luggage and footwear. She regained senses only after the husband alerted by shaking her vigorously. After returning to Bellary, at her instance only, she was taken to a lady Doctor since she complained that she has become pregnant but the test for pregnancy proved negative. She was reluctant for sexual intercourse under the pretext that somebody is watching them through the windows. If the windows were closed, then she would start telling that somebody is knocking the door. If he tried to convince her that there is nobody to knock the door, she would start telling that she is hearing some voice asking her not to have sex, as it is sin. She used to behave indifferently in an unusual and irresponsible way. During the first week of January 2012, once she was found standing in front of gas stove by turning on the knob and without lighting the gas. He was working at Bangalore and was visiting Bellary during weekends and Government holidays. When he came to Bellary on 14.1.2012, she expressed her desire to accompany him to Bangalore. When he expressed his inability to shift the house immediately to Bangalore since he did not get a house at Bangalore, she started complaining of his extra-marital relationship with others. She used to get up late in the morning and was not doing any household works. She was expressing that, she has not come to their house to serve as a maidservant. Sometimes she will sleep without taking food in the night but get up in the midnight complaining hunger. On 30.1.2012, in their native village without any provocation, she started throwing vessels, and his mother suffered injury to her eyes during the incident. On 1.2.2012, her father took her to Dr.Chandra's Neuro and Epilepsy Centre, Bellary, where she was diagnosed of "adjustment disorder". She was given medication and advised to observe her behaviour for another 20 days. On 12.2.2013, he took her to the same Hospital and the medication was continued for another 20 days. In the last week of March 2012, she suddenly woke up, closed his nose and mouth with her hands tightly and he had to escape from her clutches with great difficulty. When he informed the incident to her father, he came over to Bellary on 2.4.2012 and disclosed that she is suffering with "Bipolar Adjustment Disorder" and is under treatment since 2002 with Dr.C.Y.Sudarshan, Professor of Psychiatrist, J.J.M.Medical College, Davangere. On 3.4.2012, she was diagnosed with the symptoms of "Auditory Hallucinations" and she was taken to Dr.Sampath Kumar, Psychiatrist, Bellary and then referred to Dr.Y.C.Janardhan Reddy at NIMHANS, Bangalore, for specialized treatment. It was finally revealed that she is suffering with incurable mental disorder and the marriage was performed without disclosing her mental condition and it was performed against the advise of the consulting Doctor. The wife and her family members committed fraud on him by performing her marriage without disclosing her mental disorder. The life of the petitioner has become totally miserable

for no fault of him. He has suffered mental cruelty due to her attitude and he is not in a position to continue his marital relationship with her because of her mental disorder.

3. The wife contested the petition. Her defence was, subsequent to the marriage, she was made to stay along with the parents of the husband at Bellary with an assurance by the husband that he will take her to Bangalore within a short period. Her further defence was, her parents-in-law were not looking after her well and treated her as a maidservant and as a slave, she was made to work without rest. Her mother-in-law used to abuse her and cause mental stress, which was intolerable for her. The allegation of the husband that she is suffering from mental disorder is false and it is only because of the workload and the mental stress caused by his parents, she is put to untold mental stress. To reach his goal, husband has picked up a cock and bull story to take divorce from her.

4. During the trial, the husband examined himself as PW-1 and two Doctors, who had treated the wife, as PW-2 and PW-3 and his mother as PW-4; documents Exs.P1 to P16 were marked. The wife led rebuttal evidence of herself. After completion of trial, she was referred to NIMHANS for evaluation and a report was also received by the Court.

5. The Family Court on overall evaluation of the evidentiary material allowed the petition both on the ground of mental cruelty and also on the ground of incurable unsoundness of mind.

6. Ms.V.Vidya Iyer, learned Counsel appearing for the appellant/wife assailing the impugned judgment submits, subsequent to the marriage, the wife cohabited with the husband only for three months; admitting for a while the entire medical evidence on record as true and correct, then also the husband failed to make out a case of incurable mental disorder, which is the basic requirement of Section 13(1) (iii) of the Act. The wife has passed M.C.A. Degree with distinction and she was boarding in a Ladies' Hostel for six years while prosecuting her studies. If at all she was afflicted with any such mental disorder, she could not have prosecuted her studies and come out with distinction. All the while she is ready and willing to perform her matrimonial obligation. Even the Doctor/PW-3 has stated in his evidence that there is no problem for her to lead her marital life if she takes medicine regularly and has the support of her family. Even the report of the NIMHANS is to the effect that when she was examined during February 2013, she did not have any psychotic symptoms and mood symptoms. Her Paranoid Schizophrenia was in remission.

   Learned Counsel while placing her reliance on the judgment of the Apex Court in the matter of Kollam Chandra Sekhar -vs- Kollam Padma Latha reported in (2014) 1 SCC 225 submits that the husband has failed to prove the existence of serious mental disorder, which would come in the way of the couple leading a normal marital life. The Family Court has overlooked this aspect of the matter and on technical grounds has held that the wife is suffering with incurable mental disorder and has allowed the petition. The wife during the trial before the Family Court had filed an application under Section 24 of the Act. Without passing any order on her application, the Family Court hurried to adjudicate the case on its merits, that has resulted in serious miscarriage of justice. Not granting permanent alimony at the time of granting decree of divorce is another lacuna in the impugned judgment. Hence, same is liable to be set aside in the appellate jurisdiction of this Court.

7. In reply, Sri.S.S.Yadrami, learned Counsel appearing for the respondent/husband while sustaining the judgment of the Family Court submits that PW- 3/Doctor, who had treated the wife ever since 2002, had testified that the mental disorder she is suffering is not curable and can be controlled only with treatment. During her short stay in the marital home, she has inflicted cruelty both physical and mental on her husband and also the mother-in-law. The Apex Court in an identical situation in the matter of Pankaj Mahajan -vs- Dimple Alias Kajalreported in (2011) 12 SCC 1 held that, the acts of the wife amount to cruelty as to create reasonable apprehension in the mind of the husband that it would be harmful or injurious for him to lead life with her, thereby dissolved the marriage with a decree of divorce in favour of the aggrieved husband.

Learned Counsel further continues that, this Court in M.F.A.No.8062/2004 D.D. 11.9.2009 in the matter of Ravikumar -vs- Hema Deshpande, has also taken a similar view where the allegation was, the wife was suffering from Paranoid Schizophrenia. In the present case also, the wife was identified with the ailment of Paranoid Schizophrenia. Under the circumstance, the Family Court has rightly allowed the petition both on the ground of cruelty and also incurable mental disorder and the appeal is liable to be rejected.

8. With above submissions and also on perusal of the evidence placed on record by the parties before the Family Court so also the impugned judgment, it emerges that, the parties were married as per their customs on 1.12.2011. Since the husband was working at Bangalore, he did not take the wife with him to Bangalore since he had not yet set up a rented house and left her in his parents' place at Bellary. However, he was visiting his parents' house but their cohabitation was short lived till 4.4.2012 on which date, she was taken by her father to his place. It is also established by the evidence of the Doctor/PW-3 that the wife was taken to him for treatment in the year 2002 on her complaint of hearing voices and feeling suspicious and she was treated for Schizophrenia form psychosis. After medication, her condition improved. In the year 2005, when she discontinued the medicine, her problems had aggravated. Again she continued with the medication. After the marriage also, she was under constant treatment with PW-3/Dr.C.Y.Sudarshan, Professor of Psychiatry, J.J.M.Medical College, Davangere. In the meanwhile, she was examined as inpatient for five days by PW-2, a private Neuro Psychiatric Medical Practitioner at Bellary. She was taken by her husband to PW-2 for a report. But even after putting her on test for 5 days, the Doctor could not give conclusive report of her condition since it requires long term observation and also examination of both spouses. The husband had not tendered himself for examination. As per the testimony of PW-3 (the Doctor who has been treating her since the year 2002) she has Bipolar affective disorder i.e., disturbances of mood episodically. While under depressed mood, she has decreased appetite and sleep, poor concentration and fearful; during happy mood, she has mild anger and irritability in her behaviour. In his opinion, if she is put on regular check-up and regular treatment, the disease that she is suffering with, can be controlled, but it is not curable.

9. As per the report of the NIMHANS dated 1.4.2014, on her mental state examination, she was found to be asymptomatic. Her diagnosis is "Paranoid Schizophrenia". If she remains symptom-free, she may be able to discharge marital responsibilities. At the end, the report refers PW-3/Dr.C.Y.Sudarshan, Psychiatrist of Davangere, her treating Doctor as the most appropriate person to provide additional information since he has seen her for over a decade.

10. The petition is filed under Section 13 of Hindu Marriage Act without specifically quoting the sub-sections, which deal with various grounds for divorce. However, the pleading would go to make out the following grounds :

    (1) Cruelty;

    (2) Incurable mental disorder and

    (3) Suppression of material fact.

    However, marriage having consummated, since the relief is for dissolution of marriage under Section 13 of the Act, the Family Court raised points of consideration in respect of first two items of the above and answered both against the wife.

11. The marriage was celebrated on 01.12.2011. After a short honeymoon trip, the husband returned to his work at Bangalore and the wife stayed with the in- laws at Bellary. He was shuttling between Bellary to Bangalore during weekends, with this limited co- habitation with his wife, he has come up with story of his encounter with the acts of cruelty exhibited by his wife.

12. The term 'cruelty' more particularly, 'mental cruelty' in reference to matrimonial cases has been the subject matter of judicial interpretations ever since the landmark judgment of the Apex Court in Narayan

Ganesh Dastane -vs- Sucheta Narayan Dastane (AIR 1975 SC 1534). In V. Bhagat -vs- D. Bhagat (Mrs.) [(1994) 1 SCC 337], the observation was "'mental cruelty' as contemplated in Section 13(1)(ia) of the Act 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. To put it differently, the mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together".

13. The judgment in Samar Ghosh v. Jaya Ghosh [(2007) 4 SCC 511] (Larger Bench) listedillustrations (i) to (xiv) of human behaviour which may be relevant in dealing with the cases of 'cruelty'. It was the prologue before the commencement of list of illustrations that they are not exhaustive but illustrative. Out of those illustrations, it suffices for the present to gather that the ill-conduct alleged must be persisted for a long period. It needs to be a sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse. It needs to be a sustained unjustifiable conduct and behaviour of one spouse affecting physical and mental health of the other spouse or leading to apprehension which is grave, substantial and weighty. In the case on hand, alleged acts of cruelty that reflected during the limited cohabitation of the couple since perceived by the husband as a result of incurable mental disorder of the wife, entire weight is on the ground of divorce contemplated under Section 13(1)(iii) of the Act.

14. PW-2/Dr.Srinivas is the Neuro-Psychiatrist from Bellary with whom the husband himself had taken treatment for depression. The wife was taken by the husband not for any treatment but for evaluation of her mental condition. For that purpose, she was admitted as inpatient for five days. But he could not find out with certainty the specific disease she was suffering. As per his sworn testimony to detect the nature of mental ailment it requires a long time observation and also examination of both of them. But the husband did not tender himself for examination. Thus, this Doctor could not come to any conclusion.

15. PW-3/Dr.C.Y.Sudarshan, Professor of Psychiatry, J.J.M.Medical College, Davangere, has given the nature of ailment suffered by the wife ever since she was brought to him for treatment for the first time in 2002. Her symptoms were "hearing voices" and "feeling suspicion". In December 2002, since dosage of medicine was reduced, there was increase in her symptoms. She felt sad, used to cry and had decreased sleep. After restarting the medicines, she improved. Again during March 2005, the symptoms recurred when she discontinued medicine. Again with treatment, she recovered. In September 2006, medicine was to be re- adjusted, due to mild increase in symptoms. During her symptoms, she confides her experience with others. Her behaviour is not disturbing others. His statement "..... the illness the respondent is having can only be controlled only with regular treatment. The disease which respondent is suffering is not curable" weighed more than anything in the mind of the Court, and also played decisive role in dissolving the marriage. On the application moved by the husband to refer the wife for evaluation of her mental condition at NIMHANS, the wife volunteered to submit for evaluation and she is found asymptomatic.

16. Now the question for our consideration is, "whether the evidence of PW.3 testified as supra is sufficient to make out a case under Section 13(1)(iii) of the Act?" Our firm answer is "No", for the foregoing discussion.

17. Fortunately for the wife she falls within the category of those whose schizophrenic condition can be kept under control with regular medication. Her situation is not a "out of control situation". During her symptoms also, she is not wild nor offensive or harmful.

18. The Apex Court in Ramanarayana Gupta Vs. Rameshwari Gupta (1988) 4 SCC 247, interpreting the provision of Section 13(1)(iii) of the Act laid down the law regarding the mental disorder or unsoundness of mind as a ground available for dissolution of marriage. Paras-20 and 33 relevant for the present case read thus:

"20. The context in which the ideas of unsoundness of 'mind' and 'mental-disorder' occur in the section as grounds for dissolution of a marriage, require the assessment of the degree of the 'mental-dis-order. Its degree must be such as PG NO 922 that the spouse seeking relief cannot reasonably be expected to live with the other. All mental abnormalities are not recognised as grounds for grant of Decree. If the mere existence of any degree of mental abnormality could justify dissolution of a marriage few marriages would, indeed, survive in law.

* * * * * *

33. This medical concern against too readily reducing a human being into a functional non-entity and as a negative unit in family or society is law's concern also and is reflected, at least partially, in the requirements of Section 13(1) (iii). In the last analysis, the mere branding of a person as schizophrenic will not suffice. For purposes of Section 13(1)(iii) 'schizophrenia' is what schizophrenia does."

19. As held by the High Court of Judicature of Calcutta in Pramatha Kumar Maity Vs. Ashima Maity, AIR 1991 Cal 123, mental disorder of the wife even if proved cannot by itself warrant a decree of divorce and it must be further proved that it is of such a nature as the husband could not be expected to live with the wife.

20. In Mt.Titli -vs- Alfred Robert Jones (AIR 1934 ALLAHABAD 273), on observing that the wife prosecuted her further education, was cooking and looking after children, the Allahabad High Court did not see merit in the apprehension of the husband that there is danger to his life or his children's life. In Kollam Chandra Sekhar's case (supra), on noticing that the respondent/wife completed her MBBS Degree and Post Graduation and was serving as a Govt. Medical Officer, it was opined that if she was suffering with serious kind of mental disorder/acute type of schizophrenia, it would have been impossible for her to work in that place.

21. Reliance placed for the husband on Pankaj Mahajan's case (supra) stands distinguished from the present case on facts though the complaint was, mental illness of the wife. There was ample evidence before the Court about persistent and grave acts of cruelty inflicted by the wife on the husband. They had lived together under same roof for about 10 months. From the matrix before it, the Apex Court was convinced that the wife was suffering from "mental disorder" and due to her acts and conduct, she caused grave mental cruelty to him and it is not possible for the parties to live with each other. But the parties before us are set apart even before they could settle together for a while and give a try, to work out marital life, the culprit being the fact that she had been under treatment for metal disorder for a long time. As per Ex.P13/the case summary of NIMHANS dated 1.2.2013, she does not have any psychotic symptom/ mood symptom. Relevant portion of the letter dated 1.4.2014 addressed by Dr.Y.C.JanardhanReddy, Professor of Psychiatry of NIMHANS to the Family Court reads thus:

"On mental state examination, she is now asymptomatic. Her daignosis is paranoidschizophrenia. In view of frequent relapses, she has to take medications indefinitely and may be life-long. If she remains symptom-free, she may be able to discharge marital responsibilities. Regular medication and supportive family environment may substantially reduce the risk of a relapse, but it cannot be guaranteed that she will never relapse if she is on regular medication."

22. The acts of cruelty alleged against the wife since do not qualify as cruelty in the eye of law (for our discussions supra), how to sustain the Decree of Divorce on the possibility of relapse of schizophrenic symptoms?

23. For a while let us leave behind the discussion made in preceding paras and go to the relevant provisions of Section 13(1)(iii) of the Act, which reads thus:

"13. Divorce.- (1) Any marriage solemnised, 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) .....

(ii) .....

(iii) has been incurably of unsound mind, or has been suffering continuously 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) . . ."

Thus, the statute demands two elements to be proved to make a ground of divorce:- (a) Incurable unsoundness of mind (in the present case, Schizophrenia) and (b) to the extent of which the petitioner cannot be reasonably expected to live with her. Both factors are missing in the case brought to the Court. Her Schizophrenia condition is under remission. Without giving a breathing time for the relationship to settle and crystallize, husband has hurried to the Court.

24. At this stage, we are reminded of a story of success portrayed by Sylvia Nasar in the Biography, 'A Beautiful Mind' (published by Simon & Schuster, as well as a Film of the same name) of John Forbes Nash Jr., an American Mathematician, born on June 13, 1928. He started showing symptoms of mental illness and spent several years at Psychiatric Hospitals and was treated for paranoid schizophrenia. After 1970, he refused further medication and his condition improved. Thereafter he was never committed to Hospital again. He recovered gradually with the love and care of his divorced wife whom he remarried in 2001. He gradually returned to academic work by mid-1980s. He was awarded the 1994 Nobel Memorial Prize in Economic Sciences for the thesis, which earned him Ph.D. Degree in 1950. He was both a Mathematician and Economist. He made groundbreaking work in the area of real algebraic geometry. He published number of theorems to his credit and was awarded prestigious Abel Prize in 2015.

25. In our considered opinion, the Court below was insensitive in branding the wife as suffering with completely incurable paranoid schizophrenia. Very same medical evidence, on which the Family Court was acting upon at the same time, was indicating the possibility of such patients leading normal life with regular medication and family support. We have living examples of lot many victims of such ailment in our society, who are leading life with the support of regular medication like any other normal members of the society. The appellant/wife, who was present before this Court, looked like any other person present in the Court hall, she is a M.C.A. graduate with 1st class with distinction and it is also the submission at the Bar, she was employed prior to her marriage, even if there is any apprehension of recurring of schizophrenic symptoms, the answer is in re-modeling the medicine, but not in amputing her marital/ emotional life itself.

26. We are taken aback by the endeavour made by the Family Court in taking the case to one of violation of Section 5 of the Act, which stipulates conditions of a valid marriage. Without there being any pleading or proof by the husband, the court below comprehends that the wife is unfit either for marriage or procreation of children. The Family Court, we are certain, was unmindful of the untenable and perverse finding it so recorded. In its enthusiasm to grant relief to the aggrieved husband, the Family Court has condemned the wife. The Family Court has transgressed its propriety and jurisdiction. Our concern is, the negative impact, the finding of the Family Court may have on the sentiments of the young lady before

us. She has a long way to go yet in her life. The finding drawn against her is likely to have caustic effect on her psyche, who is already in struggle with life. We deem it in the fitness of things, to caution the Courts dealing with family matters to be more alive or alert to each case before them. Each case differs on its facts and circumstances. The endeavour of the Court must be to see, whether the case made out flows into the relief sought? If so, under what provision of law? If the Judge sits with a preoccupied mind, he has to extract reasonings from the void, when the record before him is bereft of legal evidence, as in the present case.

27. Having held that the husband has failed to make out a case under Section 13(1)(iii) of the Act on the ground of wife suffering with incurable form of Schizophrenia, to the extent that he cannot be reasonably expected to cohabit with her, the impugned judgment and decree needs to be set aside.

The appeal is allowed. The judgment and decree dated 30th October 2014 passed in Matrimonial Case No.221/2013 by the Principal Judge, Family Court, Bellary, is set aside.

No order as to costs.

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# SMT. HEMAVATHI SHIVASHANKAR VERSUS DR. TUMKUR S. SHIVASHANKAR AND ANOTHER

**Karnataka High Court**

**Bench : Hon'ble Mr. Justice Anand Byrareddy**

*Smt. Hemavathi Shivashankar*
*Versus*
*Dr. Tumkur S. Shivashankar and Another*

**Regular First Appeal No. 702 of 2002**

**Decided on July 5, 2012**

- **There was no real contest between the parties on all the issues that were relevant and it cannot be said that the appellant had voluntarily and unconditionally submitted herself to the jurisdiction of the Foreign Court and had contested the claim or agreed to the passing of the decree.**
- **The mere filing of the reply to claim and her express wish to contest the proceedings on the question of jurisdiction, cannot be considered as a decision on the merits of the case. It was also violative of clause (c) of Section 13, since it is founded on a refusal or complete negation of the law governing the parties and therefore, could not be recognised by the Courts in India.**
- **But, however, having regard to the subsequent events, whereby the appellant has instituted further proceedings before the American Courts over a period of several years and has derived the benefit of the decree of divorce, she had impliedly accepted the decree of divorce and submitted to the jurisdiction of the forum, although, the jurisdiction of that forum was not in accordance with the provisions of the matrimonial law of the parties.**
- **It would clearly fall within the exception to the rule that the jurisdiction assumed by the Foreign Court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law, under which the parties were married. This is one of the exceptions as pointed out by the Apex Court in the case of Y. Narasimha Rao. Therefore, the suit would have to be dismissed, but not for the reasons assigned by the Trial Court, but in the light of the above sequence of events and the circumstances that are evident. Consequently, the validity of the marriage of the respondents also cannot be assailed.**
- **Therefore, the appeal is hereby dismissed. The parties to bear their own costs.**

## JUDGMENT

1. Heard the learned Counsel for the parties. The parties are referred to by their rank before the Trial Court for the sake of convenience.

2. This is an appeal by the plaintiff. It was the case of the plaintiff that she was married to the first defendant at Somwarpet, Kodagu District on 16-5-1966 as per customary Hindu rites. The first defendant was a Medical Practitioner and was employed on various assignments, which required him to travel abroad. In the year 1969, he visited England on an assignment, where he had worked upto the year 1971. Thereafter, he had returned to India. He had again left for the United States of America (hereinafter referred to as the

'USA', for brevity) in the year 1972 on a temporary assignment. The plaintiff had joined him in the USA and three children were born to the plaintiff and the first defendant, namely, Shashikumar, who was 13, Skanda, who was 7 and Shanmuga, who was 5, as on the date of the suit. The plaintiff was the only child to her parents. Her father had died early and her mother had inherited extensive Coffee estates and other properties at Somwarpet and other places. It was the plaintiffs case that the first defendant was keen that the properties be sold and the plaintiff should encash the same, so that it could be better enjoyed by them. But the plaintiff and her mother were opposed to the idea and this lead to discord between the plaintiff and her husband. It was the allegation of the plaintiff that from the year 1980, she and her children were neglected by the first defendant, who was displaying bad temper at all times and had remained withdrawn from the plaintiff. The relationship further degenerated and the plaintiff was physically abused and was even locked out of the house. It is the plaintiff's case that in this background, she was advised by a well-wisher in USA, to go to India with the children. When the plaintiff demanded money for her support and maintenance, the first defendant refused to provide the same. The first defendant had compelled the plaintiff to go to India along with one A.C Basavaraj, though the plaintiff was reluctant to do so. However, the plaintiff did come to India on 5-6-1981. On 6-7-1981, the first defendant had sent a telegram informing her that he would be coming to Bangalore along with the children on 8-7-1981. The two children, Skanda and Shanmuga were accordingly brought to Bangalore by the first defendant. After leaving the two children at Bangalore, the first defendant left for the USA on 19-7-1981. Thereafter, the plaintiff's best efforts to get back to the USA, along with the children, were in vain as the first defendant had refused to provide the air fare.

3. It transpires that on 5-2-1982, the third son Shanmuga was run over by a bus in Somwarpet and suffered multiple fractures and he was hospitalised. Hence, the plaintiff was not in a position to go back to USA until the injured boy was discharged from the hospital.

4. It was the plaintiffs case that in the month of July 1982, she had received a notice containing a divorce petition lodged by the first defendant, but she was unable to go to the USA and answer the notice and she was unable to take further steps as the first defendant did not provide any further financial support nor was he ready to sponsor her visit to USA, which the American Consulate at Chennai required. However, on 22-11-1982, the plaintiff managed to go back to the USA, but she was not allowed to enter her home by the first defendant and she had to seek refuge in a Community Welfare Centre. It is later that she learnt that the first defendant had instituted proceedings for judicial separation before the Twenty-sixth Judicial District Court, Bossier Parish, Louisiana and that an ex parte order had been passed on 28-1-1982, granting judicial separation. It was the plaintiff's case that though the plaintiff had made an attempt to resist the divorce petition that followed, a decree of divorce was granted as on 3-12-1982. The plaintiff had questioned the binding effect of the said divorce decree on the ground that the plaintiff and the first defendant were lingayaths and were governed by the Hindu Marriage Act, 1955 (hereinafter referred to as the '1955 Act' for brevity) and the American Court being a Foreign Court, had no jurisdiction as regards the matrimonial affairs of the parties, as they continued to be Indian citizens on the date of decree of divorce granted by the American Court and hence, it would not bind the parties. Further, the first defendant had taken advantage of the absence of the plaintiff from USA and his sending her to India was with an ulterior motive of obtaining such decree of divorce without resistance from the plaintiff and therefore, he had practised fraud on the American Court. Since the decree had been rendered without recognition of the law of India, which was applicable to the parties and since the proceedings of a Foreign Court were not in conformity with the Hindu Law, the same was opposed to natural justice and was invalid in terms of Section 13 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC' for brevity).

5. It was further alleged by the plaintiff that in January 1983, the first defendant is said to have visited India and had contracted a marriage with the second defendant as per Hindu customary rites, as evidenced by a marriage certificate, which has been produced, which further fortifies the fact that the first defendant

continued to be governed by the Hindu law and therefore, the marital status of the plaintiff was not dissolved in the eye of law and hence, the purported marriage of the first defendant with the second defendant was void. In this regard, the plaintiff had also instituted a criminal case alleging an offence of bigamy against the first defendant and it is in this background that the suit was filed, which was subsequently amended to incorporate the subsequent events, with a prayer for a declaration that the marriage of the first defendant with the second defendant was void and to declare that the judgment and decree dated 3-12-1982 granted by the Twenty-sixth Judicial District Court, Bossier Parish, Louisiana, USA against the plaintiff, as being null and void and not binding on her.

6. It is seen from the record that there are written statements filed by the second defendant dated 4-10-1983 and 26-10-1990 and an additional written statement dated 22-7-1986. The first written statement dated 4-10-1983 is signed by the second defendant, though only on the last page of the written statement and the additional written statement dated 22-7-1986 and the written statement dated 26-10-1990 are signed by the power of attorney holder of the defendants. Therefore, there are no pleadings on behalf of the first defendant. It is to be observed that the judgment of the Court below proceeds on the footing that the written statements had been filed by the first defendant. In any event, the written statements are to the following effect.—

The plaint averments at Paragraphs 2, 3 and 4 were denied while blaming the mother of the plaintiff for having set up the plaintiff to file a suit, as she was opposed to the first defendant going abroad to further his career. It was further denied that the first defendant had forced the plaintiff to leave USA and to go to India. It was alleged that the plaintiff had voluntarily left for India, since she was eager to join her mother and since the children were of tender age and since the first defendant was not in a position to care for their needs, he was compelled to bring them to India, as the plaintiff did not choose to return to USA, immediately. It was further denied that the Foreign Court had no jurisdiction in respect of the matrimonial affairs of Hindus. It was contended that the domicile of the parties at the relevant time, applied in the matter of their judicial separation and the divorce. The same are conclusive and binding on the plaintiff, as the domicile of the plaintiff and the first defendant was within the jurisdiction of the said US Court.

7. The first defendant admits that in the year 1972, the plaintiff and the first defendant were living in the USA and their three children were born there and that the first defendant had been granted citizenship in the year 1983 and till then, the plaintiff and defendant 1 had been granted Immigration Visas and they were Green Card holders. The first defendant had joined the US Air Force service during the year 1979, preceding which, he had worked in various hospitals. From 1979 to 1984, for a period of five years, he was within the jurisdiction of the Twenty-sixth Judicial District Court, Bossier, Louisiana. Since the plaintiff and the first defendant had their residence and were living along with their family, consisting of their three sons till 1981 when the plaintiff came to India supposedly for a short visit and thereafter refused to join the first defendant, inspite of several requests made, and the plaintiff having been served with a notice of the divorce petition in July 1982, she did come back to US and contest the divorce proceedings. Though the plaintiff claimed that there was an ex parte decree of divorce against her, that with the written statement being filed and the defendant 2 having produced documents to substantiate the fact that the plaintiff had tendered evidence before the US Court and had cross-examined the first defendant in the divorce proceedings and it was only thereafter that the decree of divorce having been granted as on 3-12-1982, the plaintiff belatedly claimed that the decree of divorce was null and void. Therefore, the allegation that the first defendant had taken advantage of the absence of the plaintiff from America to obtain divorce and that he had practised fraud on the Court was unfounded. The contention that the proceedings of the American Court were not binding on the parties is not tenable in the light of the plaintiff having contested the proceedings. Added to this, consequent to the grant of divorce, the plaintiff had approached the very Courts in the US seeking partition of the community property apart from other reliefs such as child support, custody of the children and alimony. Hence, the plaintiff was

precluded from questioning the validity of the decree of divorce. The marriage of the first defendant with the second defendant is admitted and it is claimed that it is a valid marriage in the light of the marriage between the plaintiff and the first defendant having been dissolved by the decree of divorce granted by the US Court, which was valid and binding.

8. On the basis of those pleadings, the Trial Court had framed the following issues and additional issues.—

"1. Whether the plaintiff proves that the defendant has obtained a decree of divorce against her by practicing fraud etc., as contended in her plaint and hence it is not binding on her?

2. Whether the decree of divorce passed by a Foreign Court not binding on the plaintiff?

3. Whether the plaintiff is estopped from challenging the said decree as contended in para 9 of the written statement?

4. Whether the marriage of the first defendant with the second defendant is void?

5. Whether the suit is valued property and Court fee paid is correct?

(decided on 20-8-1985)

6. Whether the plaintiff proves that she is entitled to the reliefs claimed?

7. What order and relief? Additional Issue: 1-7-1986:

8. Whether the plaintiff is entitled to the decree that the decree No. 57688, dated 3-12-1982 of the 26th Judicial District Court, Bossier Parish, Louisiana is null and void and not binding on her?

Additional Issues: 26-2-1991:

9. Whether the defendants prove that the suit of the plaintiff is barred by principles of res judicata?

10. Whether the defendants prove that the conduce of the plaintiff to waiver and relinquishment of right to question the validity of the decree of divorce?"

9. Issue Nos. 1, 2, 4 and 8 are answered in the negative and Issue Nos. 3, 9 and 10 are answered in the affirmative.

10. The Court below has considered Issue Nos. 1, 2, 8 and 9 together and had formed an opinion that Section 13(a), 13(b) and 13(c) of the CPC were not applicable since the plaintiff had failed to demonstrate that the decree of divorce was inconsistent with the private international law or in recognition of Indian law in a case where such law was applicable and since it was not the case of the plaintiff that she had no notice of the proceedings before the Foreign Court and she herself had appeared before that Court and had pleaded her case, which was subsequently negatived by the Foreign Court on the ground that she was guilty of deserting defendant 1 continuously for a period of six months after the order of judicial separation was passed and since she was not in a position to satisfy the requirement, that she had rejoined her husband during the period of six months after the order of judicial separation. There was justification in the Foreign Court having applied the law of that State of USA. Therefore, it was the opinion of the Trial Court that the judgment passed by the American Court was in order and that it was final. Insofar as the contention that the judgment of the Foreign Court suffered from an infirmity as it was in breach of the Indian law, since under the Indian law, after an order of judicial separation is passed, the decree of divorce can be granted only after the expiry of two years from the date of order of judicial separation. Therefore, it was opposed to Section 13 of the 1955 Act and would attract Section 13(f) of the CPC. The Trial Court has opined that Section 19 of the 1955 Act provides that a petition for divorce could be instituted where the parties last resided together and since they were ordinarily residing within the jurisdiction of the Foreign Court, the petition having been filed therein, did enable the first defendant to invoke the jurisdiction of the American Court and since the plaintiff has not raised the issue of jurisdiction, that contention was not available to the plaintiff. Further, the Trial Court has formed an

opinion that since the decree of divorce is final and binding on the plaintiff, the present suit filed by the plaintiff was barred by the doctrine of res judicata and has further answered Issue No. 3, while assigning the reason that since the plaintiff did not join defendant 1 within six months from the date of the order of judicial separation and though she had a right of appeal, did not seek to question the decree, on the other hand, had proceeded to seek for maintenance pursuant to the decree of divorce and it was possible only if she had conceded the position that the marriage stood dissolved. The Court has also taken exception to the plaintiff not having examined herself in the case and therefore, has opined that the plaintiff was estopped from challenging the decree granted by a Foreign Court. In answering Issue No. 4, the Court below has held that once the decree of the Foreign Court is upheld, the marriage of defendant 1 with defendant 2 would not be invalid or illegal and further has answered Issue No. 2, holding that since the plaintiff did not question the validity of the judgment passed by the American Court by way of an appeal, she has waived her right to question the same and has also expressed that if the status of the plaintiff in the USA is that of a divorced wife of defendant 1, other countries must also recognise the same. On the other hand, if the Trial Court were to decree the suit of the plaintiff, conversely, the American Court would not recognise the same. This would lead to utter confusion and therefore, has expressed that it is not a fit case where discretion could be exercised in favour of the plaintiff and has accordingly, dismissed the suit. It is that which is under challenge in the present appeal.

11. The learned Counsel for the appellant would submit that having regard to the facts and circumstances, the Court below has failed to address the scope and effect of Section 13 of the CPC, when it was apparent that the case of the plaintiff could not have been negated on the footing that the first defendant had obtained a decree of divorce granted by a US Civil Court, when the sequence of events would indicate that the decree passed by the said Court was in violation of the principles of natural justice and was vitiated by the conduct of the first defendant bordering on fraud and that the said decree was in breach of the personal law governing the parties and in force in India. It was also vitiated for an incorrect application of the international law and the blatant refusal to recognise the personal law applicable to the parties, which rendered the US Court incompetent to dissolve the marriage of the parties, as it had no jurisdiction insofar as the matrimonial relationship was concerned, which was governed exclusively by the provisions of the 1955 Act.

12. It is contended that the Court below has overlooked the glaring circumstance that the Foreign Court has assumed jurisdiction only on the basis of the temporary residence of the parties within its jurisdiction. Assuming that the Foreign Court could exercise jurisdiction on the basis of such domicile, it could not have been exercised to dissolve a marriage governed by the provisions of the 1955 Act, which does not contemplate the exercise of jurisdiction under its provisions by a Court outside the territory of India. It is therefore contended that the decree of divorce by the Foreign Court is void, as it is rendered by a Court, which did not have jurisdiction.

13. It is contended that the reasoning of the Court below that the plaintiff had submitted to the jurisdiction of a Foreign Court and therefore, was estopped from challenging the binding effect of the decree of divorce granted by a Foreign Court, is an incorrect premise. The order of judicial separation was granted ex parte. Notwithstanding that a curator was appointed on behalf of the plaintiff herein before the Foreign Court, the question of initial want of jurisdiction was not raised nor was present to the mind of the Court at that point of time. Though the plaintiff had received the notice of those proceedings it was at a point of time when the plaintiff had to deal with several situations, namely, that she was then back in India and was not enabled to return to America for want of sufficient funds, which again, was a circumstance engineered by the first defendant and the fact that one of her sons was seriously injured and hospitalised and she could not leave his bedside. The plaintiff however, had appeared before the American Court only at the final stage of consideration of the petition for divorce pursuant to the non-compliance with the condition imposed in the order of judicial separation, where she was required to join the society of the first defendant, failing which, he was entitled to a decree of divorce by virtue of such default and it is

that circumstance which has weighed uppermost with the Foreign Court and the Court has proceeded to negate any other contention that was raised, including the protest of the plaintiff that the personal law applicable could not be enforced before the Foreign Court. Therefore, the decree of the Foreign Court was opposed to the principles of natural justice as there was no adequate hearing on the primary issue of jurisdiction at the appropriate time and the application of the local American law in accordance with the settled principles therein has, however, resulted in a miscarriage of justice against the plaintiff, who was entitled to protection of her personal law as an Indian citizen at that point of time. The said decree of divorce therefore, could not be said to be a decision which has decided all the issues that would arise between the parties and hence, the Court below was in error in holding that the suit was barred by res judicata.

14. The decree of the Foreign Court is also not binding even if it is held that the plaintiff had acquiesced and submitted to the jurisdiction of the Foreign Court. Though the ground of divorce was available under the 1955 Act, there being a variation thereof, in the manner in which, divorce could follow an order of judicial separation, as is evident. Insofar as the American Law that has been applied only required a lessor period should elapse from the date of order of judicial separation before the decree of divorce could be granted, clearly in variance with Section 13 of the 1955 Act, which requires 24 months to elapse before a decree of divorce could be granted. Therefore, when the decree of divorce is clearly in violation of the law as applicable in India, the same would clearly be opposed to Section 13 of the CPC.

15. It is further contended that insofar as the subsequent conduct of the plaintiff pursuant to the grant of decree of divorce by the Foreign Court in having approached the very Court for further reliefs, such as, enhancement of child support and other reliefs, would not by itself clothe a decree, which was void in the eye of the Indian law, with validity.

16. The learned Counsel would place reliance on the following authorities in support of his contentions and would seek that the suit be decreed as prayed for:

    1. Sankaran Govindan v. Lakshmi Bharathi1;
    2. Smt. Satya v. Teja Singh2;
    3. Y. Narasimha Rao v. Y. Venkata Lakshmi3;
    4. International Woollen Mills v. Standard Wool (U.K) Limited4;
    5. Deva Prasad Reddy v. Kamini Reddy5;
    6. Smt. Anubha v. Vikas Aggarwal6.

17. The learned Counsel for the respondents, on the other hand, seeks to justify the judgment of the Court below. He would submit that the plaint allegations as to the conduct of the first defendant have not been established, as found by the Court below. The primary contention that the decree of divorce obtained by the first defendant as being null and void on the several grounds urged are not tenable. He would contend that the assertion as to the decree of divorce having been granted by a Foreign Court, which did not have jurisdiction over the matrimonial relationship of the plaintiff and the first defendant is an incorrect premise. It is well-settled, as spelt out by the Apex Court that it is not unknown to the rule of private international law that Indian citizens living abroad, even temporarily, are enabled to invoke the law of a foreign country, which confers jurisdiction on the Court, over the parties by virtue of their domicile, as was the case insofar as the parties to the present proceedings are concerned. It is not in dispute that the plaintiff and the first defendant were residing as husband and wife within the jurisdiction of the Twenty-sixth Judicial District Court, Bossier Parish, Louisiana and the law of that State in the USA did provide that a person could petition the Court for judicial separation and divorce, by virtue of his residence within the jurisdiction of that Court. Secondly, the ground on which the relief of judicial separation and divorce were claimed, was that of desertion, by the plaintiff of defendant 1. This is a ground, which is also

available under the 1955 Act, which is the personal law of the parties. Therefore, there is no inconsistency insofar as the law applicable or the ground on which such relief was sought before the Foreign Court. The variance in the procedural particulars as to the period prescribed from the date of order of judicial separation, in order to enable a party to seek a decree of divorce, are clearly procedural. As long as the substantive law or the ground on which the divorce was sought was in consonance with the Indian law, it cannot be said that there was want of jurisdiction or the relief granted by the Foreign Court was without recognition of the Indian law.

18. It is further contended that the claim of the plaintiff as to there being want of notice insofar as the proceedings for judicial separation and divorce is concerned, is incorrect. It is not denied by the plaintiff that she was absent from the USA and was in India, at the relevant point of time. Even then she had been represented by a Curator before the Foreign Court. The contention of the plaintiff that she was deliberately prevented from returning to US, since the first defendant failed to provide the necessary funds, is also not a tenable contention, as it is the plaintiff's own case that she, along with her mother, had inherited vast properties and therefore, was well-provided for in her own right and ultimately, she has returned to the US, apparently at her own cost. This would belie the allegation that the plaintiff was prevented at the relevant point of time from returning to the US and contesting the proceedings for judicial separation. In any event, the plaintiff had, in fact, participated in the proceedings for divorce and had effectively cross-examined the first defendant and had also tendered evidence before the Foreign Court. More significantly, after the grant of decree of divorce on 3-12-1982, the petitioner did not choose to challenge the same by way of an appeal before a higher Court in the US, which she was entitled to do. On the other hand, there were several proceedings whereby the plaintiff had sought for division of the properties belonging to the first defendant in the USA, as also the relief of enhancement of child support and for alimony. These proceedings were clearly initiated, on the footing that there was a divorce, by which the marriage of the plaintiff and the first defendant stood dissolved and such petitions were filed over a period of several years between 1983 and 1988. Further, in the year 1990, the plaintiff had chosen to file a petition to annul the judgment of the District Court and on dismissal of the same, an appeal was filed before the Court of Appeal, Second Circuit, State of Louisiana. That appeal was disposed of by a judgment dated 28-2-2001 and the Court of Appeal has observed as follows.—

"Alternatively, and assuming arguendo that Hema was improperly determined to be an absentee and that, resultantly, service of process on the curator ad hoc was, therefore, invalid, we believe that Hema acquiesced in the separation judgment and is precluded from attacking its validity.

Hema argues that the Separation Judgment should be annulled pursuant to La. C.C.P Article 2002, which states, in pertinent part, as follows.—

**A. A final judgment shall be annulled if it is rendered:**

(2) Against a defendant who has not been served with process as required by law and who has not waived objection to jurisdiction, or against whom a valid judgment by default has not been taken.

However, such an attack pursuant to Article 2002, is limited pursuant to La. C.C.P art. 2003, which states as follows.—

A defendant who voluntarily acquiesced in the judgment, or who was present in the parish at the time of its execution and did not attempt to enjoin its enforcement, may not annul the judgment on any of the grounds enumerated in Article 2002.

We acknowledge that Hema's actions soon after the Separation Judgment was rendered would indicate that initially Hema may not have totally acquiesced in the Separation Judgment. Although she never previously filed any pleading attacking the validity of the Separation Judgment, she did verbally voice her objection to the separation during the trial

of the divorce proceedings. On March 3, 1983 she filed her Petition for Custody, Child Support and Alimony, wherein she admits the existence of the Separation Judgment, but claims that she had no knowledge of the Separation Proceedings until after the Separation Judgment was rendered.

Nonetheless, the pleadings filed by Hema following the finality of the couple's divorce, indicates ultimately her voluntary acquiescence in the Separation Judgment. We note that in that same March 3rd pleading, Hema claimed a one-half interest to the community property belonging to the couple, which community property regime was terminated retroactive to the date of filing of the Separation Proceedings upon the finality of the Separation Judgment. Her allegation specifically acknowledges that her claim arose as of November 4, 1981 — the date Shiva commenced the Separation Proceedings. Obviously, this claim for relief would indicate that Hema is availing herself of the Separation Judgment, which gave her the right to make such a demand upon the dissolution of the community property regime. On the same date, Hema filed a Petition for Partition of Community Property, wherein she notices the Separation Judgment and acknowledges its effect on the community property regime, seeking the partition of all community property affected by the judgment. Again, she availed herself of the Separation Judgment. Then, on or about June 6, 1984, Hema filed her Petition for Rule to Show Cause to Increase Child Support and for Additional Relief, which additional relief included a claim for an accounting of all property that had previously belonged to the community, but which had become jointly owned as an ultimate result of the Separation Judgment. Again, she specifically acknowledges November 4, 1981 as the date upon which the community property regime terminated. Finally, in the years following the divorce, Hema filed various proceedings relating to the custody and support of the couple's children, which we believe further evidence her acquiescence in the Separation Judgment. See, Bergman v. Bergman, 425 So. 2d, 833 (La. App. 5th Cir. 1982) (a wife's attack of five years old divorce judgment was null, because she had acquiesced in the judgment when she asserted its validity in a Pennsylvania Court, and recognised her status as a tenant in common with her previous husband).

Resultantly, we conclude that even if Hema intended to attack the validity of the Separation Judgment for a vice of form pursuant to La. C.C.P Article 2002 (A)(2), such a claim is precluded by her subsequent voluntary acquiescence in the judgment.

Finally, Shiva argues that Hema's claim is barred by the one year prescriptive period set forth in La. C.C.P Article 2004, because her claim is better characterised as an action for annulment based on a vice of substance (i.e, the misrepresentation by Shiva of her absence). We note that the one-year period is peremptory and dates from the discovery of the alleged fraud or ill-practice. Here, Hema was aware of the Separation Judgment, at least by 1982. However, based on our findings as discussed, this issue need not be reached.

## CONCLUSION

Therefore, for the foregoing reasons, we affirm the judgment of the Trial Court and assess all costs of the appeal to Hema".

Therefore, the learned Counsel would submit that even if the Foreign Court did lack jurisdiction, by her participation and acquiescence, pursuant to the decree of divorce and having proceeded to seek further reliefs on the basis of such divorce, was estopped from denying the validity and binding nature of the decree of divorce and therefore, the learned Counsel would submit that the reasons assigned by the Trial Court in dismissing the suit, cannot be faulted. If the position that there was a valid decree of divorce is accepted, the subsequent marriage of defendants 1 and 2 is valid in law. Therefore, the plaintiff was

not entitled to any relief as held by the Court below. The learned Counsel would place reliance on the following judgments.—

1. V.S Subramania Iyer v. Ramasami Pillai1;
2. Smt. Satya's case;
3. Y. Narasimha Rao's case;
4. Nemi Chand v. Onkar Lal2;

6. In the light of the above, the points that arise for consideration before this Court are the following.—

   (a) Whether the District Court of Bossier Parish in the State of Louisiana, USA, had jurisdiction to entertain the proceedings for judicial separation and divorce at the instance of defendant 1, who was married to the plaintiff, according to Hindu religious rites in India, and were governed by the Hindu Marriage Act, 1955, and continued to be Indian citizens at the relevant point of time, though residing within the jurisdiction of that Court, for several years prior to the institution of the proceedings?

   (b) Whether the decree of divorce granted by the Foreign Court was in violation of the several clauses of Section 13 of the CPC?

   (c) Whether the plaintiff was estopped from questioning the decree of divorce before the Court of the City Civil and Sessions Judge, Bangalore, by virtue of the implied acceptance of the decree of divorce in the plaintiff having approached the American Courts for further reliefs such as partition, child custody, child support and alimony pursuant to the decree of divorce and in view of the judgment rendered in an appeal filed by the plaintiff, before the Court of Appeal in the USA?

19. To answer the first point for consideration, it would be useful to keep in view the settled legal position applicable to cases, such as the present one, having due regard to the facts and circumstances. The discussion on the legal provisions involved by the Apex Court in the case of Smt Satya, may be usefully noticed.

20. The facts leading upto that case were as follows.—

Satya, the appellant married Teja Singh in the year 1955 according to Hindu rites. Both were Indian citizens and were domiciled in India at the time of their marriage. The marriage was performed at Jullundur in the State of Punjab. Two children were born to them, a boy in the year 1956 and a girl in 1958. In January 1959, Teja Singh, who was a Forest Range Officer at Gurdaspur left for the United States of America for higher studies. He spent a year in a New York University and then joined the Utah State University, where he studied for about four years for a Doctorate. On completion of his studies, he secured a job in Utah and during the five years of his study, Satya continued to live in India with the children. She did not ever join Teja Singh in America, since he had promised to return to India after completion of his studies. In January, 1965, Satya had moved an application under Section 488 of the Code of Criminal Procedure, 1973, alleging that Teja Singh had neglected to maintain her and her children. She claimed maintenance at Rs. 1,000/- per month. Teja had appeared through Counsel and claimed that the marriage stood dissolved as on 30-12-1964 by a decree of divorce granted by the Second Judicial District Court of the State of Nevada, USA. He contended that Satya had ceased to be his wife by virtue of that decree and therefore, he was not liable to maintain her.

21. The Judicial Magistrate, Jullundar by a judgment dated 17-12-1966 held that the decree of divorce was not binding on Satya as Teja Singh had not permanently settled in the State of Nevada and the marriage could be dissolved only under the Hindu Marriage Act, 1955 and directed payment of maintenance. This was confirmed in revision by the Sessions Judge, Jullundur reiterating that the marriage could be

dissolved only under the Hindu Marriage Act, 1955. The High Court of Punjab, at the instance of Teja Singh, held that at the commencement of the proceedings for divorce before the Court in Nevada, Teja was domiciled within that State in the USA and applying the old English rule, that during marriage, the domicile of the wife, without exception, follows the domicile of the husband and for this conclusion, relied on decisions of the Privy Council, of which the leading case was Le Mesurier v. Le Mesurier1 and other cases, which had followed the same, wherein it was held that according to the International Law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. The Apex Court opined that since the decision rested on Le Mesurier Doctrine, the real point in controversy was not answered and therefore, framed the following question for decision - "Is the decree of divorce passed by the Nevada Court, USA, entitled to recognition in India?"

22. The Apex Court opined that the answer to the question would depend principally on the rules of Private International Law and further took note that it was a well-recognised principle that Private international Law is not the same in all countries. There is no system of Private International Law which could claim universal recognition, which was the opinion expressed by most celebrated writers including, Graveson, Dicey and Morris and Martin Wolff. It was observed that there exists an English Private International Law as distinct from a French, a German or an Italian Private international law. The rules on the conflict of laws in the various countries differ nearly as much from each other as do those on internal (municipal) law. The rules of Private international law evolved by other countries could not be adopted mechanically since they vary greatly and are moulded by the distinctive social, political and economic conditions obtaining in those countries. As for instance, the question relating to the personal status of a party depend in England and North America upon the law of his domicile, but in France, Italy, Spain, and most of the other European countries, upon the law of his nationality. Principles governing matters within the divorce jurisdiction are so conflicting in the different countries that not unoften a man and a woman are husband and wife in one jurisdiction, but treated as divorced in another jurisdiction, which is termed as a 'limping marriage'.

23. Considering the State of law in USA, it was observed that the USA has its own peculiar problems of the conflict of the laws arising from the co-existence of 50 States, each with its own autonomous legal system. The domestic relations of husband and wife constitute a subject reserved to the individual States and does not belong to the USA under the American Constitution. The validity of divorce decree passed by a State Court is in other States tested as if it were a decree granted by a Foreign Court. The Apex Court took note of the principles on which the American Courts grant or refuse to grant recognition to divorce decrees passed by the Foreign Courts, including the Courts of sister States. A foreign decree of divorce would be denied recognition in American Courts if the judgment is without jurisdiction or is procured by fraud or if treating it as valid would offend against public policy except where the issue of jurisdiction was litigated in the foreign action or the defendant appeared and had an opportunity to contest it, a foreign decree may be collaterally attacked for lack of jurisdiction, even though jurisdictional facts are recited in the judgment. Therefore, a foreign divorce decree may be rendered invalid by proof that neither party had domicile or bona fide residence in the State or country where the decree was rendered or if there was a fraudulent representation, designed and intended to mislead and resulting in damaging deception. The English Courts have by and large, come to adopt the same criteria as the American Courts for denying validity to foreign decrees of divorce, though recent legislative changes have weakened the authority of archaic rules of English Law. The Apex Court also expressed that the principles of American and English conflict of Laws are not to be adopted blindly by Indian Courts, but an awareness of foreign law in a parallel jurisdiction would be a useful guidelines. Insofar as the case that the Apex Court was dealing with, was concerned, it was observed that the Nevada Court had assumed jurisdiction on the basis that Teja Singh was a bona fide resident of and was domiciled in Nevada. This was a jurisdictional fact on which the decree was open to collateral attack, on the ground that Teja was not a bona fide resident of Nevada and the recital in the judgment to that effect was not conclusive and could be contradicted

by satisfactory proof. The Apex Court had found as a fact, from the material available that Teja Singh never lived in Nevada. He had made a false representation only for the purpose of obtaining a decree of divorce and he had immediately left Nevada. He was therefore a "bird of passage" and resorted to the Court there solely to find jurisdiction and had procured a decree of divorce on a misrepresentation that he was domiciled in Nevada and therefore, concluded that the Le Mesurier doctrine, on which the High Court drew, loses its relevance and found that the Nevada Court had no jurisdiction to pass the decree of divorce and upheld the order of maintenance in favour of Satya and further observed that unhappily, the marriage between the appellant and the respondent therein would "limp", in that, the couple will be treated as divorced in Nevada but, their bond of matrimony will remain unsnapped in India, the country of their domicile. It was for the Legislature to find a solution to such schizoid situations as the British Parliament had to a large extent done by passing the Recognition of Divorces and Legal Separations Act, 1971 and hoped that the scheme for relieving the confusion caused by differing systems of conflict of laws as contained in the International Hague Convention of 1970 would serve as a model.

24. Similarly, the case of Y. Narasimha Rao, could also be usefully referred to.

25. Rao and Lakshmi were married at Tirupati in February 1975. They had separated in July 1978. Rao filed a petition for dissolution of marriage in the Circuit Court of St. Louis County, Missouri, USA. Lakshmi sent a reply from India under protest. The Circuit Court passed a decree of dissolution of marriage in February 1980 in her absence. Rao had earlier filed a petition for dissolution of marriage in the Sub-Court of Tirupati. In that petition, he filed an application for dismissing the same as not pressed in view of the decree passed by the Circuit Court of St. Louis County, Missouri. In August 1981, that petition was dismissed. In November 1981, Rao married another woman. Hence, Lakshmi filed a criminal complaint against Rao and his second wife for the offence of bigamy. Rao and another filed an application for their discharge in view of the decree of dissolution of marriage passed by the Foreign Court. The Magistrate discharged the appellants, namely Rao and another in October 1996. Lakshmi preferred a criminal revision petition to the High Court. The High Court by its decision in April 1987, set aside the order of the Magistrate holding that a photostat copy of the judgment of the Foreign Court was not admissible in evidence to prove the dissolution of marriage and directed the Magistrate to dispose of the petition filed by Rao afresh. It is that order which was questioned before the Apex Court. The Apex Court observed from the record that the Foreign Court assumed jurisdiction on the ground that Rao had been a resident of the State of Missouri for 90 days next preceding the commencement of the action. Secondly, that the decree had been passed on the ground that there was no requisite likelihood that the marriage between the parties could be preserved and that it was irretrievably broken. Thirdly, Lakshmi had not submitted to the jurisdiction of the Court. Lakshmi had filed replies before the Foreign Court and she had specifically pleaded that the reply was filed without prejudice to the objection that Lakshmi was submitting to the jurisdiction of the Court and there was, inter alia, an objection that the parties were Hindus and governed by the Hindu law and were married in India according to the Hindu law. She was an Indian citizen and was not governed by the laws in forces in the State of Missouri and therefore, the Court had no jurisdiction. Further, the dissolution of the marriage between the parties was governed by the Hindu Marriage Act, 1955 and the Court had no jurisdiction to enforce the foreign laws and none of the grounds pleaded in the petition for divorce were sufficient to grant any divorce under the Hindu Marriage Act, 1955. And after noting the other factual particulars observed that the decree dissolving the marriage passed by the Foreign Court was without jurisdiction. Neither the marriage was celebrated nor the parties last resided together nor the respondent resided within the jurisdiction of that Court, as required under the provisions of the Hindu Marriage Act, 1955 and the decree was granted on the ground which was not available under the Hindu Marriage Act. The decree was obtained by Rao on his representation that he was a resident of Missouri State, whereas he was only a bird of passage and was ordinarily resident of the State of Louisiana and therefore, the Apex Court observed that the it was possible for it to dispose of the case on the narrow ground that the appellant had played

fraud on the Foreign Court, applying the ratio of the decision in Smt. Satya's case. But however, the larger question that was present was, whether in many such cases, the Courts in India could recognise the foreign divorce decrees, prompted the Court to discuss the legal principles further. It was observed that the rules of Private International Law in India are not codified and are scattered in different enactments such as the Contract Act, 1872, Indian Succession Act, 1925, Divorce Act, 1869, the Special Marriage Act, 1954, etc. In matters of status or legal capacity of natural persons, matrimonial disputes, custody of children, adoption, testamentary and intestate succession etc., the problem is complicated by the fact that there exist different personal laws and no uniform rule can be laid down for all citizens. The distinction between matters which concern personal and family affairs and those which concern commercial relationships, civil wrongs etc., is well-recognised in other countries and legal systems. This fact of national life had been recognised both by the Hague Convention of 1968 on the Recognition of Divorce and Legal Separations as well as by the Judgments Convention of the European Community of the same year. Article 10 of the Hague Convention expressly provides that the contracting States may refuse to recognise a divorce or legal separation if such recognition is manifestly incompatible with their public policy. The Judgments Convention of the European Community expressly excludes from its scope: (a) status or legal capacity of natural persons; (b) rights in property arising out of a matrimonial relationship; (c) wills and succession; (d) social security; and (e) bankruptcy. A separate convention was contemplated for the last of the subjects. It was further observed that the Courts in India have tried to follow the English rules of Private International Law insofar as the matrimonial law is concerned, and that the dependence on English law even in matters which are purely personal, was regrettable as nothing was done to remedy the situation and that the labours of the Law Commission reflected in its 65th Report on the very subject had not fructified at all even as late as 1991 when the judgment was rendered, though the report was of the year 1976. Therefore the Apex Court ventured to lay down the minimum rules of guidance for securing certainty, awaiting the legislative initiative and expressed that the relevant provisions of Section 13 of the Code of Civil Procedure, 1908 was capable of being interpreted to secure the required certainty and expounded on the scope of the several clauses of Section 13 of the CPC and laid down the following rule, as follows.—

"15. Clause (a) of Section 13 states that a foreign judgment shall not be recognised if it has not been pronounced by a Court of competent jurisdiction. We are of the view that this clause should be interpreted to mean that only that Court will be a Court of competent jurisdiction which the Act or the law under which the parties are married recognises as a Court of competent jurisdiction to entertain the matrimonial dispute. Any other Court should be held to be a Court without jurisdiction unless both parties voluntarily and unconditionally subject themselves to the jurisdiction of that Court. The expression "Competent Court" in Section 41 of the Indian Evidence Act has also to be construed likewise.

16. Clause (b) of Section 13 states that if a foreign judgment has not been given on the merits of the case, the Courts in this country will not recognise such judgment. This clause should be interpreted to mean (a) that the decision of the Foreign Court should be on a ground available under the law under which the parties are married, and (b) that the decision should be a result of the contest between the parties. The latter requirement is fulfilled only when the respondent is duly served and voluntarily and unconditionally submits himself/herself to the jurisdiction of the Court and contests the claim, or agrees to the passing of the decree with or without appearance. A mere filing of the reply to the claim under protest and without submitting to the jurisdiction of the Court, or an appearance in the Court either in person or through a representative for objecting to the jurisdiction of the Court, should not be considered as a decision on the merits of the case. In this respect the general rules of the acquiescence to the jurisdiction of the Court which may be valid in other matters and areas should be ignored and deemed inappropriate.

17. The second part of clause (c) of Section 13 states that where the judgment is founded on a refusal to recognise the law of this country in cases in which such law is applicable, the judgment will not be recognised by the Courts in this country. The marriages which take place in this country can only be under either the customary or the statutory law in force in this country. Hence, the only law that can be applicable to the matrimonial disputes is the one under which the parties are married, and no other law. When, therefore, a foreign judgment is founded on a jurisdiction or on a ground not recognised by such law, it is a judgment which is in defiance of the law. Hence, it is not conclusive of the matters adjudicated therein and, therefore, unenforceable in this country. For the same reason, such a judgment will also be unenforceable under clause (f) of Section 13, since such a judgment would obviously be in breach of the matrimonial law in force in this country.

18. Clause (d) of Section 13 which makes a foreign judgment unenforceable on the ground that the proceedings in which it is obtained are opposed to natural justice, states no more than an elementary principle on which any civilised system of justice rests. However, in matters concerning the family law such as the matrimonial disputes, this principle has to be extended to mean something more than mere compliance with the technical rules of procedure. If the rule of audi alteram partem has any meaning with reference to the proceedings in a Foreign Court, for the purposes of the rule it should not be deemed sufficient that the respondent has been duly served with the process of the Court. It is necessary to ascertain whether the respondent was in a position to present or represent himself/herself and contest effectively the said proceedings. This requirement should apply equally to the appellate proceedings if and when they are filed by either party. If the Foreign Court has not ascertained and ensured such effective contest by requiring the petitioner to make all necessary provisions for the respondent to defend including the costs of travel, residence and litigation where necessary, it should be held that the proceedings are in breach of the principles of natural justice. It is for this reason that we find that the rules of Private International Law of some countries insist, even in commercial matters, that the action should be filed in the forum where the defendant is either domiciled or is habitually resident. It is only in special cases which is called special jurisdiction where the claim has some real link with other forum that a judgment of such forum is recognised. This jurisdictional principle is also recognised by the Judgments Convention of the European Community. If, therefore, the Courts in this country also insist as a matter of rule that foreign matrimonial judgment will be recognised only if it is of the forum where the respondent is domiciled or habitually and permanently resides, the provisions of clause (d) may be held to have been satisfied.

19. The provision of clause (e) of Section 13 of which requires that the Courts in this country will not recognise a foreign judgment if it has been obtained by fraud, is self-evident. However, in view of the decision of this Court in Smt. Satya v. Teja Singh, (1975) 1 SCC 120 : AIR 1975 SC 105, it must be understood that the fraud need not be only in relation to the merits of the matter but may also be in relation to jurisdictional facts.

20. From the aforesaid discussion the following rule can be deduced for recognising a foreign matrimonial judgment in this country. The jurisdiction assumed by the Foreign Court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married. The exceptions to this rule may be as follows.—

    (i) where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married;

    (ii) where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests the claim which is based on a ground available under the matrimonial law under which the parties are married;

(iii) where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties".

26. Reliance is also placed on International Woollen Mills case. This was a case where the appellant had placed an order with the respondent for purchase of greasy fleece wool. The goods were shipped to Mumbai in September 1996. The appellant claimed the goods from Mumbai and took them to Ludhiana. The appellant did not pay the price of the goods on the ground that upon taking delivery, it was found that the goods were of an inferior quality. The respondent issued a notice in October 1997. The appellant relied to the same in November 1997. In January 1998, the respondent filed a case in Central London County Court in the United Kingdom and the respondent claimed that the appellant was served with the summons of that case. The appellant claimed that he had not been served. In April 1998, an ex parte decree came to be passed by that Court. In August 1998, the respondent filed an execution application in the Court of the Civil Judge, Ludhiana. On receipt of the summons, the appellant filed an application praying for dismissal of the execution application as it was filed without following the procedure prescribed under the CPC. In reply, the respondent contended that the execution was under Section 44-A of the CPC and as such there was no requirement to observe the provisions of Sections 38, 39 and 40 of the CPC. The appellants, therefore, filed another application stating that the decree was not on merits and as per the provisions of Section 44-A read with Section 13(b) of the CPC. The Court had to refuse to execute the decree. Both the applications were heard and by two separate orders, both the applications were dismissed. A revision petition was filed, which also came to be dismissed by the High Court which found that the decree was not on merits, but it still dismissed the revision on the ground that the second application was barred by the principle of Constructive res judicata. It is against that order that the appeals were filed before the Supreme Court. In that, both the appellant and the respondent had preferred the appeals. Insofar as the respondent was concerned, he was questioning the judgment whereby it was held that the decree was not on merits. The Apex Court posed for itself two questions. The first question was whether the High Court was right in holding that the second application was barred by the principles of res judicata? The Apex Court answered the same by holding that the appellant, instead of filing the second application, could have amended their first application and taken the very pleas in the second application. Therefore, if that be so, was not understandable as to how the second application was barred by the principles of res judicata, since the orders were passed after hearing the arguments on both the applications. Therefore, there being any res judicata or constructive res judicata did not arise. Insofar as the second question whether the decree of the English Court could be executed in India, after discussing the case-law on the point, the Apex Court agreed with the following principles:

The decision of a Court not given on examination of the points at controversy between the parties, but given ex parte on the basis of the plaintiff's pleas and documents tendered by the plaintiff, without going into the controversy between the parties since the defendant had not appeared at the time of hearing of the suit to defend the claim, the judgment could not be a judgment on the merits of the case. Even an ex parte judgment in favour of the plaintiff may appear to be a judgment even on merits. If some evidence adduced on behalf of the plaintiffs and the judgment however brief is based on a consideration of that evidence. Where however, no evidence is adduced on the plaintiffs side and his suit is decreed merely because of the absence of the defendant, either by way of penalty or in a formal manner, the judgment may not be one passed on the merits of the case. Section 13 of the CPC prescribes the conditions to be satisfied by a foreign judgment in order that it may be accepted by an Indian Court as conclusive between the parties thereto or between the parties under whom they or any one of them litigate under the same title. One such condition was that the judgment must have been given on the merits of the case. Whether the judgment is one on the merits must be apparent from the judgment itself. It is not enough if there is a decree or a decision by the Foreign Court. In fact, the word 'decree' does not find a place anywhere in the section. What is required is that there must have been a judgment. What the nature of that judgment should be is also indicated by the opening portion of the section where it is stated that the judgment must

have directly adjudicated upon questions arising between the parties. The Court must have applied its mind to that material and must have considered the evidence made available to it in order that it may be said that there has been adjudication upon the merits of the case. It cannot be said that the said decision on merits is possible only in cases where the defendant enters appearance and contest the plaintiffs case. Even where the defendant chooses to remain ex parte, it is possible for the plaintiff to adduce evidence in support of his claim. The decision on merits involves application of mind of the Court to the truth or falsity of the plaintiffs case and therefore, though a judgment passed after the judicial consideration of the matter by taking evidence may be a decision on the merits, even though passed ex parte, a decision passed without evidence of any kind or passed only on its pleadings cannot be held to be a decision on merits.

27. Reliance was placed on Deva Prasad Reddy's case, which is a defendant's appeal arising out of a suit for declaration and consequential reliefs. The Trial Court had decreed the suit filed by the respondent-plaintiff holding that she was the legally wedded wife of the appellant and their daughter was their only legal heir. It was also declared that the marriage between the appellant and the second respondent was a nullity. The findings of fact by the Trial Court were as follows.—

That the appellant and respondent 1 had married as per the Roman Catholic Rites at Madras in January 1992. That after their marriage, they resided at Bangalore till May 1992. A child was born to them in October 1992. The appellant had changed his name from Deva Prasad Reddy to Salman Dev. The appellant had married respondent 2 according to the Muslim rites. A son was born to the appellant and respondent 2. The controversy was whether a decree of divorce granted by the American Court was valid as it was contended that it was a nullity as argued by the appellant. On the question of jurisdiction of the Foreign Court, it was held that neither the appellant nor the first respondent were domiciled within the jurisdiction of that Court and therefore, the Court lacked jurisdiction to grant the decree. Referring to the exception carved out by the Apex Court in Y. Narasimha Rao's case, which pertains to a situation where the respondent has consented to the grant of relief though the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties and that the Apex Court has recognised the principle that if the respondent has consented to the grant of relief before a Foreign Court, the judgment and decree granted by any such forum would be conclusive, no matter the jurisdiction of the Court was not in accordance with the provisions of the matrimonial law of the parties. In other words, the consent to the grant of relief in matters relating to matrimonial laws and a decree granted by a Foreign Court was taken to be sufficient to cure the defect in the jurisdiction of the Court. The further argument that though the consent may cure the defect in the jurisdiction of the forum, it would however not authorise the forum to pass an order contrary to the provisions of the matrimonial law applicable to the parties, since the decree in that case was passed on a ground not available to the parties, as per their personal law, since no divorce by mutual consent was envisaged by the Indian Divorce Act, till it was amended to incorporate the same. The Division Bench of this Court rejected that argument for two reasons. If consent can cure the defect of jurisdiction of the forum, which grants the decree, by the same logic, it should also place a decree granted by such a forum beyond challenge on the ground that the relief granted was not available to the parties as per the personal law prevalent in the country of their origin. Secondly, that as on the date the question whether the foreign decree was valid as per the personal law applicable to the parties, was not a ground available on the date the American Court dissolved the marriage, but as on the date the decree was being adjudicated upon, such a ground was available by virtue of the amendment introduced in the Act. Therefore, the Division Bench held that the divorce could not be declared as invalid.

28. Reliance is also placed on a decision of the Delhi High Court in Smt. Anubha's case. That was a case where both the husband and wife were Hindus and the wife had filed a suit for judicial separation and maintenance in Indian Court. During the pendency of which, the husband had obtained the decree of divorce from the Court in the United States of America. On facts, it was found by the Court that

the wife had not submitted to the jurisdiction of the Foreign Court nor had she consented for grant of divorce by the Foreign Court. Thus, the decree obtained by the husband in the Foreign Court was neither recognisable nor enforceable in India.

29. The Counsel for the respondents has also placed reliance on Smt. Satya and Y. Narasimha Rao's cases, apart from a decision of the Madras High Court in V.S Subramanya Iyer's case, for the proposition that in regard to proceedings pending in Foreign Courts, a party is not entitled to declaratory relief as of right. The Court would not and should not give a declaration as it had no jurisdiction in regard to the properties situated in foreign countries as if such a declaration were to be given, it would infringe upon the undoubted rights of the Foreign Tribunal to decide cases pending before it and that it would be improper and highly derogatory to the prestige of the Foreign Court if it is held that the decision of the Foreign Court was wrong for one reason or the other. Even if a Court did, it would be brutum fulmen as the Foreign Court would certainly ignore the decision of a local Court.

30. The learned Counsel has also produced an extract of the Louisiana Divorce Laws, said to have been downloaded from the Internet, to demonstrate that the proceedings for judicial separation and divorce instituted by the respondent before the Foreign Court was in accordance with law, as he was then residing within the jurisdiction of the said Court.

31. He has also drawn attention to the Hague Convention on the Recognition and Enforcement of Divorces and Legal Separations, 1970, the important features of which have been extracted in the book — Conflict of Laws by Atul Setalvad, which convention has been adopted by 18 countries and implemented inter alia in Australia and the United Kingdom.

32. With the above legal principles in view, the sequence of events before the Foreign Court can be culled out from the record as follows.—

A petition for separation was filed by the first respondent before the Foreign Court, alleging that the appellant had abandoned him and returned to India in June 1981. That petition was filed on 4-11-1981. The Court had appointed a curator to represent the appellant. On 28-1sent the notice by registered post to the appellant, but had received no response and he had formally denied the allegations in the petition. The case went to trial and judgment was rendered awarding judicial separation. In June 1982, a petition for divorce was filed by the first respondent and again, a curator was appointed to represent the appellant. In November 1982, the case was taken up for trial and judgment was rendered. It is to be noticed that the notice of the proceedings had been served on the appellant, who had returned to Louisiana shortly before the hearing of the matter and had testified at the trial. A decree of divorce was granted as on 3-12-1982. In March 1983, the appellant had petitioned the Court for partition of community property and also had petitioned for custody, child support and alimony. On 17-3-1983, a judgment was entered by agreement granting provisional custody and child support to the appellant pending trial. The judgment was rendered on 13-5-1983 and though a date was set for the trial, no trial was held. There were further proceedings relating to custody of one of the children between June 1983 and May 1984. There was a further petition for increase in child support and for additional relief, which went to trial and a judgment was granted in favour of the appellant in July 1987. In July 1988, there was a further petition for increase in child support, which was dismissed as there was failure to allege a change in circumstances. Thereafter, in October 1990, a petition to annul the judgment was filed, which was dismissed by a judgment dated 5-1-2000 and the same was challenged by way of an appeal before the Court of Appeal, Second Circuit, State of Louisiana, which in turn, was dismissed by a judgment dated 28-2-2001. Parallely, the suit in which the impugned judgment is rendered was filed before the Court of the City Civil Judge, Bangalore, as on 11-7-1983. The evidence was recorded from 21-10-1994, by which time, the plaint had been amended to incorporate the changed circumstances and the judgment has been rendered on 2-4-2002.

33. There are copies of proceedings before the Foreign Court. The pleadings on behalf of the appellant before that Court, apparently, are filed without regard to the Indian law and absence of jurisdiction, which

would be apparent going by the admitted circumstances, in that, as on the date of the grant of decree of divorce by the Foreign Court, the plaintiff and the first defendant who were married according to Hindu religious rites in India and continued to be governed by the 1955 Act, was a clear bar of jurisdiction insofar as their marriage being adjudicated by a Foreign Court. The appellant had appeared before the Foreign Court and had even tendered evidence at the final stages of the divorce proceedings. Insofar as the clear legal bar in the Indian law in respect of the adjudication of their matrimonial dispute was concerned, from Page 208 (marked in red ink) of the Court Records, the exchange between the Foreign Court and the appellant is recorded verbatim. The appellant in her halting English, has tried to explain to the Court that it had no jurisdiction and the same is reproduced here to demonstrate that in her own words, she has attempted to bring to the attention of the Court that she seeks to resist the grant of divorce:

"A I'm sorry, sir, I don't want to give him divorce.

THE COURT I know you don't. And I understand that. But the fact is that you have in this case a separation from bed and board which was obtained……

A But I didn't hold myself in separation…. my baby in hospital….

THE COURT I know it, but he had obtained that. And I don't know-how….

A ……. I'm not going to marry again, one life is one time to marrying.

THE COURT I don't quarrel with you on that. I have no answer to that because I — that's your belief and I don't disagree with it. But under our law he is entitled to the divorce based on what evidence I've heard. And this does not mean, as I have stated, that you have done anything that is wrong, but it is just the fact of your non-reconcilation.

A I was in hospital, how can I come here at that time, with baby with me at that time, how can I come at that time, and baby had,

THE COURT See, what you feel like is there has to be some fault on the part of somebody or somebody has done something wrong. But the fact is, under our law if you live separate and apart for this period of time it entitles them to the divorce, and that's the reason this divorce was granted. There is a separation in the record and you have had no reconciliation since that time and that is the basis of our law, that it entitles him to a divorce.

A I don't know Louisiana law".

34. It was present to the mind of the Foreign Court that there was a personal law which governed the parties and the Foreign Court could not have assumed jurisdiction in the light of Section 19 of the 1955 Act. The Court below was clearly wrong in holding that the petition for divorce could have been filed before the Foreign Court. If further proceedings had stopped at that stage, it was clearly a case where the decree of divorce granted by the Foreign Court could have been held not binding on the appellant. Therefore, the Foreign Court did lack jurisdiction as the parties were clearly governed by the provisions of the 1955 Act and therefore, the marriage, to which the 1955 Act applied, could not have been dissolved by a Court without jurisdiction, notwithstanding the local law under which the proceedings may have been instituted. The judgment of the Foreign Court was also violative of clause (a) of Section 13 of the CPC, as the Foreign Court cannot be considered as a Court of competent jurisdiction, since the law under which the parties were married could not recognise it as a competent jurisdictional Court to entertain the matrimonial dispute in terms of clause (a) of Section 13 of the CPC.

35. It would also be bad as there was no real contest between the parties on all the issues that were relevant and it cannot be said that the appellant had voluntarily and unconditionally submitted herself to the jurisdiction of the Foreign Court and had contested the claim or agreed to the passing of the decree. The mere filing of the reply to claim and her express wish to contest the proceedings on the question of

jurisdiction, cannot be considered as a decision on the merits of the case. It was also violative of clause (c) of Section 13, since it is founded on a refusal or complete negation of the law governing the parties and therefore, could not be recognised by the Courts in India. Therefore, as the position stood on the date the decree of divorce was granted in favour of the respondent, points (a) and (b) framed for consideration by this Court, as above, would certainly have to be answered in favour of the appellant. But, however, having regard to the subsequent events, whereby the appellant has instituted further proceedings before the American Courts over a period of several years and has derived the benefit of the decree of divorce, she had impliedly accepted the decree of divorce and submitted to the jurisdiction of the forum, although, the jurisdiction of that forum was not in accordance with the provisions of the matrimonial law of the parties. It would clearly fall within the exception to the rule that the jurisdiction assumed by the Foreign Court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law, under which the parties were married. This is one of the exceptions as pointed out by the Apex Court in the case of Y. Narasimha Rao. Therefore, the suit would have to be dismissed, but not for the reasons assigned by the Trial Court, but in the light of the above sequence of events and the circumstances that are evident. Consequently, the validity of the marriage of the respondents also cannot be assailed.

36. Therefore, the appeal is hereby dismissed. The parties to bear their own costs.

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# P.V.PRAKASH VERSUS R.BINDU

**Kerala High Court**

**Bench : Hon'ble Mr. Justice Antony Dominic**

*P.V.Prakash*
*Versus*
*R.Bindu*

**Mat.Appeal.No. 324 of 2013 (C)**

**Decided on 16 August, 2013**

**The Family Court has referred to the evidence adduced and found that maintaining a relationship with another person during the subsistence of the marriage with the husband has caused mental cruelty to the husband.**

**The evidence clearly indicated that the conduct of the wife rendered it impossible for the husband to live with her without mental agony, torture or distress. It is true that the couple have twin daughters and it is unfortunate that their parents fell apart and that too for reasons which are not only stigmatic to the parents, but also to the children. However, the wife is an educated lady and she having maintained an illicit relationship cannot avoid the consequences nor can the husband be expected to suffer on the ground that he has two children.**

**JUDGMENT**

**Hon'ble Mr. Justice Antony Dominic**

Mat.Appeal No.324/13 and Mat.Appeal No.385/2013 are filed by the petitioner and respondent respectively in OP No.256/11 on the file of the Family Court, Thalasserry. For convenience, the appellant in Mat.Appeal No.324/13 is referred to as the husband and the appellant in Mat.Appeal No.385/13 is referred to as the wife.

2. OP No.256/11 was filed by the husband seeking a decree of divorce urging grounds under Section 13(1)(i) and (ia) of the Hindu Marriage Act. From the evidence, it is seen that the husband and wife are the children of brothers and were in love for a period of 10 years. Thereafter, much to the dislike of the members of their family, their marriage was solemnized on 29/1/2001 at Sree Krishna Temple, Guruvayoor. It is also stated that after considerable treatment, the wife gave birth to twins, two female children, who are aged about 6 years now. The relationship between the couple became strained during 2008 Mat.Appeal Nos.324 & 385/13 : 2. : February, and since then, the wife and the kids are residing in her paternal house.

3. The OP was filed alleging that the wife was living in adultery with the 2nd respondent and was guilty of cruelty towards the husband. Before the Family Court, on behalf of the husband, himself and another witness were examined as PWs 1 and 2 and the wife and her father were examined as RWs 1 and 2. Exts. A1 to A9 were marked on behalf of the husband and Exts.X1 and X1 (a) are the court exhibits. By its judgment dated 28th of February, 2013, the Family Court declined to accept the case of adultery urged by the husband but however held that the evidence proved that the attitude of the wife towards the husband was cruel in nature. Thereafter, instead of granting a decree of divorce, Family Court ordered judicial

separation. It is challenging this judgment of the Family Court that the husband filed MA No.324/13 and the wife has filed MA No.385/13.

4. Before the Family Court, the 2nd respondent, the alleged adulterer remained ex parte and though notice issued in MA No.324/13 was served on him, the 2nd respondent did not choose to enter appearance before this Court also. Mat.Appeal Nos.324 & 385/13 : 3. :

5. Learned counsel for the husband contended that the Family Court having accepted that the attitude of the wife was cruel to him, he was entitled to have been granted a decree of divorce instead of judicial separation. On the other hand, learned counsel for the wife contended that except that the wife had made certain phone calls, there was absolutely no evidence to accept the case of cruelty canvassed by the husband. According to him, the Family Court also concluded that the totality of the evidence of Rws 1 and 2 proved that they had no acquaintance with the 2nd respondent, the alleged adulterer and that it was the husband who had foisted such allegations against her in order to have a divorce. He therefore contended that in the light of these findings, the only course which was open to the Family Court was to dismiss the petition.

6. We have considered the submissions made and have also gone through the pleadings and the evidence adduced by the parties.

7. Evidence of PW1 shows that at the time of marriage and even now, he is employed in Saudi Arabia. While the relationship between the couple was cordial and peaceful, he Mat.Appeal Nos.324 & 385/13 : 4. : started receiving anonymous phone calls from a person claiming that he had illicit relationship with his wife. When he received such calls during August, 2007, he made enquiries about the caller and came to know that it was a person from Pappinissery, which is near to Pazhayangadi, where the wife's parental house is situated. He says that he was surprised when the caller revealed some private matters which is known only to the husband and wife and that he also used to reveal the details about the matters which took place in the bed room of the couple.

8. During November 2007, the husband came on leave and was in his house till February, 2008. At that time, the wife had two mobile phones with Nos.9895296217 and 9447690214. The husband found that most of the calls received by the wife and most of the outgoing calls were to a specific number and when he asked about it, the wife had no reasonable explanation except stating that the person concerned was a staff of the school where she is employed. He also stated that during February to May, 2005, the wife stayed with his mother in his parental home. During that period, the telephone bills were very high and therefore his brother obtained call details from the BSNL, which Mat.Appeal Nos.324 & 385/13 : 5. : revealed that most of the outgoing calls were to a particular number viz., 9447371797. The details thus obtained also revealed that most of the calls continued for long and were made during mid night and odd hours.

9. It is stated that during February, 2008, the husband used to get anonymous calls repeatedly. When he informed this to his brother and also told him about the nature of the messages that he used to get, his brother gave him the call details obtained by him during 2005. Thereupon the husband made enquiries about the holder of phone number 9447371797 and it was revealed that it was the number of the 2nd respondent. At that time, the husband asked the wife about the 2nd respondent and the wife confessed that they were in good relationship for several years and that the relationship started from their school days. According to the husband, it was thereupon that he realised that his wife was still maintaining illicit relationship with the 2nd respondent and that it was she who was sharing the details of their relationship between the husband and wife. This according to the husband caused great mental pain and disgrace. The call details received from BSNL has been produced before the Family Mat.Appeal Nos.324 & 385/13 : 6. : Court as Ext.A2 and Ext.A3 is the reply obtained from the BSNL under the Right to Information Act regarding the name and address of the owner of mobile phone bearing No.9447371797.

10. PW2 Sreekanth is a neighbour and a friend of the husband. Both of them have worked together in Saudi Arabia. He has deposed that during 2007 August, they were together in Damam. At that time, the husband had received anonymous phone calls and that the husband had informed him about the same. According to him, he advised him to ignore the phone calls. He has also stated that husband was surprised that the caller used to describe about what took place in the bed room of the husband and that the husband had shown him Ext.A2 call details during 2008 February, when he reached his house. He has also stated that both Sreekanth and the husband and his relatives had gone to meet the 2nd respondent and enquired about the details of the phone calls. Thereupon the 2nd respondent revealed that he was in love with the wife since from school days. He also stated that even after the marriage, their relationship continued and that recently the wife started keeping distance from him giving rise to enmity in him. He stated that it was therefore that he called to her Mat.Appeal Nos.324 & 385/13 : 7. : husband and disclosed the details. PW2 also stated that when the details of what was revealed by the 2nd respondent were revealed to the wife, the wife admitted her relationship with the 2nd respondent and requested the husband to apologize her.

11. However, the case of RW1, the wife was that after marriage only she came to know that the husband was a selfish man who did not even like her talking to other men or her relatives. She also stated that he is not providing any maintenance to her or the children and that when he constructed a house, her relatives had contributed lakhs and lakhs of rupees and had given entire wooden articles necessary for the house. She alleged that after accepting lakhs and lakhs of rupees and her 50 sovereigns of gold ornaments, husband filed this petition for dissolution of marriage to marry another lady. According to her, the 2nd respondent is a close acquaintance of the husband and they colluded together to file this petition for dissolution of marriage.

12. In general, the above was the evidence that was available before the Family Court and evaluating the evidence available, the Family Court held that although the husband and Mat.Appeal Nos.324 & 385/13 : 8. : PW2 were subjected to detailed cross examination, there was nothing to discredit either their testimony or to conclude that they fabricated a case for getting the marriage dissolved as alleged by the wife.

13. As far as the ground of cruelty urged by the husband is concerned, the Family Court has referred to the evidence adduced and found that maintaining a relationship with another person during the subsistence of the marriage with the husband has caused mental cruelty to the husband. In so far as this case is concerned, Exts.A2 and A3 and the oral evidence of PW1 and PW2 proved the subsistence of an illicit relationship between the wife and the 2nd respondent or else she would not have made calls to him for long durations and at odd hours and he would not have come to know the details of the sexual acts between the husband and the wife.

14. As far as the case of selfishness of the husband pleaded by the wife is concerned, his evidence amply demonstrated his concern for the wife and children. As far as the allegation that after obtaining lakhs and lakhs of rupees, husband has now fabricated a case for getting divorce is concerned, there Mat.Appeal Nos.324 & 385/13 : 9. : again, the evidence of wife herself disproves this case. She has admitted before the Family Court that the husband used to send money to her account in SBI, Kannur from which she and her father used to withdraw substantial amounts. The husband had deposited `3,00,000/- in the Post Office, Pazhayangadi in her name from which she was getting `3,000/- per month. She also admitted that in Madayi Co-operative Bank, there is a Fixed Deposit of `5,00,000/- in her name made by the husband. She has also admitted that her children's birthday used to be celebrated in an extravagant manner. She has confessed that her mother-in-law and the sister-in-law were cordial to her. Her evidence also showed that the husband had given her 14 sovereigns of gold and that the children were given chains weighing 1 sovereigns each at the time of their birthday. This therefore showed that the husband was a generous man and a loving and affectionate father.

15. It is true that the counsel for the wife referred to the observations of the Family Court that "from a totality of the evidence of RW1, it can be seen that it was PW1 who has foisted such allegations against her in order to have a divorce". He also Mat.Appeal Nos.324 & 385/13 : 10. : referred to the sentence "a totality of the evidence of RWs 1 and 2 proved that they have no acquaintance with the 2nd respondent." 16. According to him, in view of these findings, the Family Court could not have granted any relief to the husband.

However, if these findings are read in the context in which these observations are made, it can very well be seen that all that the Family Court was trying to convey was that this was the version of RWs 1 and 2 and were not findings arrived at by the Family Court.

17. This is a case where mental cruelty is pleaded and found by the Family Court. Concept of mental cruelty and the standard of proof that is required has come up for consideration of the Apex Court in Jayachandra v. Aneel Kaur (2005(1) KLT 26) and in para 10 to 13 of the judgment, the Apex Court has held thus; 10. The expression "cruelty" has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is aground for dissolution of marriage may be defined as willful 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. Mat.Appeal Nos.324 & 385/13 : 11. : Cruelly, as noted above, includes mental cruelly, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of his 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 delicate human relationship like matrimony, one has to see the probabilities of the case. The concept, a proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, Courts are required to probe into the mental process and mental effect of incidents that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial disputes.

11. The expression `cruelty' 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. The cruelty may be menial or physical, intentional or unintentional. If it is physical, the Court will have no problem in determining it. It is a question of fact and degree. If it is mental, the problem presents difficulties. First, the enquiry must begin as to the nature of 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 Mat.Appeal Nos.324 & 385/13 : 12. : conduct and its effect on the complaining spouse. However, there may be a case where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or 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 {See Sobh Rani v. Madhukar Reddi (AIR 198.SC 121)).

12. To constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse, It must be something more serious than "ordinary wear and tear of married life". The conduct, taking into consideration the circumstances and background has to be examined to

reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such an extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of S. 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

13. The Court dealing with the petition for divorce on the ground of cruelty has to bear in mind that the problems before it are those of human beings and the Mat.Appeal Nos.324 & 385/13 : 13. : psychological changes in a spouse's conduct have to be borne in mind before disposing of the petition for divorce. However, insignificant or trifling, such conduct may cause pain in the mind of another. But before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the Court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it. It has to be considered whether the complainant should be called upon to endure as a part of normal human life. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non- violent.

18. If the evidence in this case is appreciated in the light of the principles laid down by the Apex Court, we are satisfied that the evidence clearly indicated that the conduct of the wife rendered it impossible for the husband to live with her without mental agony, torture or distress. It is true that the couple have twin daughters and it is unfortunate that their parents fell apart and that too for reasons which are not only stigmatic to the parents, but also to the children. However, the wife is an educated lady and she having maintained an illicit relationship cannot avoid the consequences nor can the husband be expected to suffer on the ground that he has two children. Mat.Appeal Nos.324 & 385/13 : 14. :

19. In our view, the ground of cruelty having been proved, there was no reason for the Family Court to have declined divorce as prayed for by the husband.

20. In the result, MA No.324/13 filed by the husband will stand allowed. The judgment of the Family Court to the extent judicial separation is allowed is set aside. OP No. 256/11 will stand allowed and the marriage between the husband and wife solemnized on 29/1/2001 will stand dissolved by a decree of divorce with effect from today. Mat.Appeal No.385/13 filed by the wife will stand dismissed.

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# VIJAYAMMA P.M. VERSUS RADHAKRISHNAN

**Kerala High Court**

**Bench : Hon'ble Mr. Justice Kurian Joseph & Hon'ble Mr. Justice Harun-Ul-Rashid**

*Vijayamma P.M., D/o. P.U.Mohandas, ... Petitioner*
*Versus*
*Radhakrishnan, S/o. P. Kesavan, ... Respondent*

**Mat.Appeal.No. 174 of 2007()**

**Decided on 23 July, 2008**

- **The parties are living separately since July, 2004. In the facts and circumstances discussed above, we do not agree with the view taken by the Family Court to the effect that the petitioner has not succeeded in proving the grounds alleged in the petition for divorce. The parties were living away from Kerala in places like Uttar Pradesh, Uttaranchal, Punjab etc. Hence, the court below was not correct in observing that there was no independent evidence to show that the respondent/husband treated the petitioner/with cruelty and manhandled her. In the peculiar facts and circumstances of the case, it is very difficult to cite witnesses in proof of the physical and mental cruelty alleged in the petition. The incidents happened in the house where the parties resided. 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. After going through the oral testimony of PW.1 and the pleadings in her petition, we are of the view that the petitioner is entitled to get a decree of divorce as prayed for byher. In the result, the order under challenge is set aside. The petition filed under section 13(1)(i-a) of the Hindu Marriage Act is allowed. The marriage between the petitioner and the respondent is dissolved with effect from today.**

## JUDGMENT

**Hon'ble Mr. Justice Harun-Ul-Rashid**

The appellant herein is the petitioner in O.P. No.384 of 2004 on the file of the Family Court, Kottayam at Ettumanoor. The Original Petition is filed by the wife for divorce under Section 13 B of the Hindu Marriage Act. The respondent herein is her husband. By the impugned order, the court below dismissed the Original Petition. Hence, this appeal. The parties are hereafter referred to as petitioner and respondent as in the Original Petition.

2. The marriage between the parties was solemnised on 16.5.1991 as per the religious rites prevalent in the community. At the time of marriage, the petitioner was working as Military Nurse at Uttar Pradesh and the respondent was a teacher working at Gujarat. They resided together after marriage and two children were born in the wedlock. It is the case of the petitioner/wife that the respondent is a drunkard and he is not interested in looking after the affairs of the petitioner and the children. According to her, the respondent used to manhandle her and that throughout the period of their married life the respondent continued to ill treat her. She also narrated an incident that happened on 3.7.2004 on which day the respondent manhandled and sent her out of the house. On coming to know of the incident, the parents of the petitioner came and took her to their house and on 5.7.2004, the petitioner filed the complaint before the police.

3. The respondent filed objection denying all the allegations levelled against him. According to him, he is not a drunkard and he had been leading a peaceful life with the petitioner and the children. He also contended that the petitioner filed the complaint using her influence as a military officer and that the petitioner is living separately with the children for no reason.

4. The petitioner/wife was examined as PW.1 and the respondent was examined as RW.1. Ext.A1 is the marriage certificate issued by the Sub Registrar, Ettumanoor. As PW.1, the petitioner testified before the court below that her husband is a drunkard, that his conduct and behaviour are not befitting to a teacher and that of the head of the family and that he never took care of her and the children. She further testified that the respondent abused her in the presence of others and ill treated her mentally and physically. She also stated that the entire money received by the respondent by way of salary during the period he was employed as a teacher was spent for taking liquor and he also extracted money from her by intimidating her and the same was also spent for consumption of alcohol. According to the petitioner, the respondent is a habitual drunkard. She also stated that due to the mental and physical cruelty suffered by her, she has deserted the respondent and has started living separately and that she lost her mental peace during her stay with him. The respondent who was examined as RW.1, denied the above allegations. He denied the suggestion that he is a drunkard, but admitted that he used to consume alcohol. He also denied the allegation that he lost his job due to drinking.

5. The parties are well placed in the society. The pleadings and evidence would go to show that the parties did not live happily during the period they lived as husband and wife. The scuffle and bickering started from the early months of the marriage and the parties are fighting each other from the very beginning. The incident narrated by the wife would go to show that she was subjected to physical and mental cruelty and this resulted in filing a petition under Section 498 A I.P.C. If the version of PW.1 is to be believed, the mental torture continued while the parties co- habited, making her life with the respondent extremely intolerable, miserable and overbearing and such cruel harassment reached intolerable proportions. We also had occasion to interact with the parties. We had also appointed mediators to settle the dispute between the parties. The petitioner/wife expressed her desire to live separately. According to her reconciliation is out of the question. The nature of the allegations levelled against the respondent/husband shows her intense hatred and animosity towards him. The parties appeared before us on 8.7.2008 and agreed to file a joint petition under Section 13 B of the Hindu Marriage Act, 1955.

6. When the matter was taken up on 9.7.2008, it was submitted at the Bar that the respondent refused to sign the joint petition and left the place. Going by the versions of the petitioner as PW.1, we find that she was subjected to physical and mental cruelty, making it impossible for her to live with the respondent/ husband. The situation is that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. The facts pleaded and proved by the petitioner/wife have to be appreciated and evaluated differently from the facts pleaded by the respondent/husband. The versions of RW.1 cannot be believed for the reason that he does not appear to be a trustworthy person. He is not looking after his children, nor providing for them or protecting them. Hence, we are of the view that the petitioner is entitled to a decree of divorce on the ground of cruelty.

7. In the decision of the Supreme Court reported in Naveen Kohli v. Neelu Kohli, 2006(2) K.L.T. S.N. 29 (Case No.41)(SC) = (2006) 4 S.C.C. 558), the Supreme Court observed that once the parties have separated and the separation has continued for sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has been broken beyond repair and that it would be unrealistic for the law not to take notice of that fact and it would be harmful to the society and injurious to the interests of the parties.

8. The parties are living separately since July, 2004. In the facts and circumstances discussed above, we do not agree with the view taken by the Family Court to the effect that the petitioner has not succeeded in proving the grounds alleged in the petition for divorce. The parties were living away from Kerala in

places like Uttar Pradesh, Uttaranchal, Punjab etc. Hence, the court below was not correct in observing that there was no independent evidence to show that the respondent/husband treated the petitioner/with cruelty and manhandled her. In the peculiar facts and circumstances of the case, it is very difficult to cite witnesses in proof of the physical and mental cruelty alleged in the petition. The incidents happened in the house where the parties resided. 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. After going through the oral testimony of PW.1 and the pleadings in her petition, we are of the view that the petitioner is entitled to get a decree of divorce as prayed for by her. In the result, the order under challenge is set aside. The petition filed under section 13(1)(i-a) of the Hindu Marriage Act is allowed. The marriage between the petitioner and the respondent is dissolved with effect from today.

The Matrimonial Appeal is allowed as above.

There will be no order as to costs.

**(KURIAN JOSEPH, JUDGE)**

**(HARUN-UL-RASHID, JUDGE)**

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# ANTHONICHAMY VERSUS RANI @ EZHILARASI

**Madras High Court**

**Bench : Hon'ble Mrs. Justice V. Bhavani Subbaroyan**

*Anthonichamy*
*Versus*
*Rani @ Ezhilarasi*

**C.M.A.(MD)No.650 of 2007**

**Decided on 15 November, 2017**

**The learned Principal District Judge, Tuticorin, after hearing the appellant/petitioner and the respondent and analysing the evidence let in by both the parties, had dismissed the said divorce petition that the appellant has not proved his case, as per the allegations in his petition.**

**The normal wear and tear of day-to-day life, simple misunderstanding has been blown up to this level and this proves the perception of a husband, who always has suspicious mind. The wives are not machines just to work and abide by the dictum of a husband, but they are having their own self-respect and they also need a caring life to lead a normal matrimonial life. The mere allegation that the husband would have caused mental cruelty to the wife and not the vice versa, the appeal has to be dismissed on the ground of failure of the husband to prove the cruelty and act of adultery.**

**The appellant has not proved his case of adultery by the wife or the mental cruelty by the wife by any clinching evidence.**

RESERVED ON : 26.10.2017

PRONOUNCED ON : 15.11.2017

PRAYER:- Civil Miscellaneous Appeal is filed under Section 55 of the Divorce Act, 1869, against the fair and decreetal order, made in I.D.O.P.No.175 of 2000, dated 22.01.2007 on the file of the Principal District Court, Thoothukudi.

## JUDGMENT

This Civil Miscellaneous Appeal has been filed by the appellant, who is the husband of the respondent, against the fair and decreetal order, made in I.D.O.P.No.175 of 2000, dated 22.01.2007 on the file of the Principal District Court, Thoothukudi.

2. The brief facts of the case of the appellant are as follows:-

The appellant got married with the respondent - Rani @ Ezhilarasi, on 21.11.1990, as per the Christians Custom in St.Joseph's Roman Catholic Church and was registered under the Christian Marriage Act. After the said marriage, the appellant/husband and the respondent/wife lived together for seven years and had no issues. The respondent conceived, after seven years and gave birth to a male child. It is the further case of the appellant that the respondent/wife was living happily only for two years with him and after that, the respondent/wife started harassing the appellant for various issues even for trivial matters and used to quarrel with him always and started beating him and also insulted him. The respondent has also behaved in a very strange manner in public, in the presence of close relatives by abusing him. The respondent instigated her parents and family members to assault the appellant with deadly weapons. After the child birth, the respondent/wife did not come back to the matrimonial home and started living

only with her parents. When the appellant invited the respondent to live with him, the respondent's father and brothers supported the stand of the respondent and foisted a false complaint against the appellant in the All Women Police Station at Kovilpatti. The appellant took all efforts to live with the respondent, but the respondent refused to live him and the respondent did not allow the appellant to see his child.

(ii) The further case of the appellant that the respondent was close to her sister's husband and she would always comment that the appellant is not a good match for her, which made the appellant to undergo mental agony and also inflicted mental cruelty by the respondent. The appellant would also submit that she had a clandestine relationship with her brother-in-laws and inspite of that, he requested her to come and live with him. Since the respondent did not bother to live with the appellant, even after much persuasions and Mediations, he sent a legal notice to the respondent on 10.07.2000 that he would file a petition for judicial separation and calling upon her to handover the baby, but she did not reply to the notice. Hence, the appellant had no other option except to file a divorce petition for dissolving the marriage of the appellant and the respondent on 21.11.1990.

3. The respondent/wife filed counter-affidavit denying all the averments as false and accusation that she is having a clandestine relationship with her brother-in-law is only a false statement. It is not the respondent, who used to avoid living with the appellant, but it is the appellant, who used to avoid the respondent and used to find fault with the respondent on trivial matters and picked up quarrel with her and the appellant had beaten the respondent and threw her into the street in a dreadful night with her child and that is the reason why, the respondent is residing with her parents and further contended that the appellant only with an intention to escape from the clutches of law, possibly if steps taken by the respondent for maintenance and for other reliefs, the appellant has come out with this false case and the same caused mental agony to the respondent and prayed for dismissal of the petition.

4. The learned Principal District Judge, Tuticorin, after hearing the appellant/petitioner and the respondent and analysing the evidence let in by both the parties, had dismissed the said divorce petition that the appellant has not proved his case, as per the allegations in his petition.

5. The learned counsel for the appellant would submit that adultery was proved beyond reasonable doubt and would further submit that the learned Principal District Judge, Tuticorin has not gone in detail regarding the cruelty alleged by the appellant.

6. This Court has perused all the evidences and the materials available on record and finds that the ground of the appellant that the respondent has committed adultery and had deserted the appellant for two years and treated the appellant with cruelty and it is harmful for the appellant to live with the respondent is not proved. Regarding the adultery, the appellant's submission that the respondent/wife did not come to the matrimonial home, after child birth and the appellant went to her house and requested her to come back to his house went in futile and at that time, the parents of the respondent had beaten him and they accused his parents in filthy language and had given complaint against him to the police and the same was not proved, since there was no evidence let in or any materials produced regarding such police complaint.

7. On perusing the evidence, while in the cross-examination, the appellant had deposed that he saw the respondent and one Tamilarasan together was not proved and one of his relative viz., Mookiah, also saw his wife and the said Tamilarasan, who were coming out of their house, around 11.00 a.m., was not substantiated by any evidence that he saw them inside their house in any compromising state. The evidence would show that the respondent/wife lived in a joint family with her mother, father, brothers and sisters and there is no separate room and it is only a single room house and that too, she had delivered a baby at that point of time. In the evidence, the appellant has stated that he has not shared this affair to his parents or to any one regarding the illicit relationship and further stated that the respondent had given complaint only to his community people about the dispute and they called the appellant and respondent and enquired them and advised them. From his evidence, it is an admitted fact that even at that point of

time he had not informed about the illicit relationship, would also prove that it is only an allegation and not proved. If he had really suspected about his wife's character, he would have informed this either to his parents or to the parents of the respondent. The appellant relied upon the evidence of one Mookiah-P.W.2, who had deposed that he and P.W.3 had went to the parental house of the respondent, after the delivery and at about 04.00 p.m. in the evening, at that time, the respondent and the brother-in-law of the respondent had come out from their house and that P.W.2 did not step inside the house and they do not know whether any other person were inside their house or not and what these two were doing was not known to them, but they had a doubt that they would have had some illicit relationship, cannot be accepted. The mere allegation that they were together is not sufficient to make allegation of cruelty and adultery which is going to spell the character of the wife. It is only an assumption, on the basis of allegation made against the wife by some one without any sufficient proof, the allegation has to be rejected. The appellant making an allegation against his wife that she had an affair with her sister's husband ought to have included the other person as a party to the proceedings. Failure to make such person as a respondent, the petition deserves to be dismissed for non-joinder of necessary party and the learned Principal District Judge, Tuticorin, has rightly dismissed the petition filed by the appellant, which in the considered opinion of this Court, is correct and the same does not require any interference.

8. The appellant has not proved his case of adultery by the wife or the mental cruelty by the wife by any clinching evidence. The normal wear and tear of day-to-day life, simple misunderstanding has been blown up to this level and this proves the perception of a husband, who always has suspicious mind. The wives are not machines just to work and abide by the dictum of a husband, but they are having their own self-respect and they also need a caring life to lead a normal matrimonial life. The mere allegation that the husband would have caused mental cruelty to the wife and not the vice versa, the appeal has to be dismissed on the ground of failure of the husband to prove the cruelty and act of adultery.

9. In view of the above, this Court is of the considered opinion that there is no infirmity or irregularity in the order passed by the learned Principal District Judge, Tuticorin. Therefore, this Civil Miscellaneous Appeal deserves to be dismissed.

10. In the result, this Civil Miscellaneous Appeal is dismissed and the fair and decreetal order, made in I.D.O.P.No.175 of 2000, dated 22.01.2007 on the file of the Principal District Court, Thoothukudi, is hereby confirmed. No costs.

To

1. The Principal District Judge, Thoothukudi.

2. The Record Keeper, V.R.Section, Madurai Bench of Madras High Court, Madurai.

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# S.VALLI VERSUS N.RAJENDRAN

**Madras High Court**

**C.M.A. NO.3352 OF 2004**

*S.Valli*
*Versus*
*N.Rajendran*

**Bench : Hon'ble Mrs. Justice R.Banumathi and Hon'ble Mr. Justice M.M.Sundresh**

**Decided on 12 February, 2010**

**This appeal has been filed by the wife challenging the decree granted on the file of I Additional Family Court, for divorce in favour of the husband under Section 13(1)(ia) of the Hindu Marriage Act, 1955.**

**The respondent filed the petition for divorce under Section 13(1) (ia) of the Hindu Marriages Act, 1955 on the ground of cruelty which was caused by the desertion of the appellant in view of her objections about the presence of her sister-in-law in her matrimonial home.**

**It is not the case of the respondent that his marriage was solemnised out of force on the ground that his refusal to marry the appellant would result in strained relationship between his sister and brother-in-law. Therefore the statement made by the respondent that the appellant created trouble to his sister after his sister's marriage cannot be accepted.**

**The onus is heavily on the respondent being the petitioner before the Court below seeking divorce to prove the allegations made in the petition filed by him. Except the evidence of the respondent and the appellant no other evidence either oral or documentary is available on record. If the respondent was prevented from seeing the child after the child birth and the appellant had refused to come and join him then proper steps should have been taken by the respondent in that regard. Even the evidence of the respondent would show that he has not taken any sufficient steps. He has also stated that he had not asked the appellant to come and live with him.**

**An incident once happened long time back even assuming as true cannot be a determining factor for seeking divorce.**

**In order to consider mental cruelty the social status of the parties, their customs and traditions, educational level and the environment, in which they have been living will have to be looked into. The Court will have to draw inference and decide on the basis of the probabilities of the case having regard to the effect on the mind of the spouse.**

**In fine, the judgment and decree of the Court below passed in O.P.No.326 of 2001 dated 23.07.2004 on the file of the I Additional Family Court is hereby set aside and the appeal is allowed. The respondent is also directed to pay a sum of Rs.1,00,000/- (Rupees One Lakh Only) to the appellant within a period of 8 (eight) weeks from the date of receipt of a copy of this order.**

## JUDGMENT

**Hon'ble Mr. Justice M.M.Sundresh**

This appeal has been filed by the wife challenging the decree granted on the file of I Additional Family Court, for divorce in favour of the husband under Section 13(1)(ia) of the Hindu Marriage Act, 1955.

2. The brief facts of the case in a nutshell are as follows:

i. The appellant and the respondent are wife and husband. The marriage was solemnised as per the Hindu Rites and Custom on 29.08.1999 at Ananda Kalyana Mandapam, Chrompet, Chennai. The marriage was an arranged marriage between the parties. Prior to the marriage between the appellant and the respondent, the marriage between the appellant's brother and the respondent's sister was also solemnised on 24.05.1999. After the marriage the appellant became pregnant and went to her parents home.

ii. Thereafter a male child was born between the parties on 29.08.2000. Alleging that the appellant has left the matrimonial home on her own will and thereafter refused to come back from her parental home, the respondent filed the petition for divorce under Section 13(1) (ia) of the Hindu Marriages Act, 1955 on the ground of cruelty which was caused by the desertion of the appellant in view of her objections about the presence of her sister-in-law in her matrimonial home.

iii. It is the case of the respondent who was the petitioner in O.P.No.326 of 2001 which was filed for divorce on the ground of mental cruelty that the appellant had a disliking for the respondent's sister. It is further stated that the appellant was instrumental for the problems of the petitioner's sister. The appellant used to go to her parents house situated in the same city even without informing the respondent. When the respondent questioned the appellant she used to threaten him stating that she would commit suicide and implicate him and his parents.

iv. It is further stated that on 03.01.2000 the respondent's sister came to his house, since she was ill-treated by the brother of the appellant and her family. On 18.01.2000, the appellant picked up a quarrel with the respondent and took her belongings with her. Thereafter she did not visit the matrimonial home and she was eight weeks pregnant at that point of time. A male child was born on 29.08.2000. The respondent visited the appellant at the hospital but he was not treated well. Neither the appellant nor his family members were invited for the ceremonies conducted on the first year of the child. The above said actions of the appellant would amount to mental cruelty and hence he has filed the petition for divorce.

v. A counter affidavit and written submissions were filed on behalf of the appellant stating that she never left her matrimonial home on her own but she was brought to her parents house by her father-in-law for delivering the child. It is not true to state that she created trouble for sister-in-law and if that is the case she would not have married the respondent. Therefore there was no misunderstanding between them. The present petition was filed in view of the petition filed by the sister of the respondent in O.P.No.337 of 2001. She never went to her parents home on her own accord and she only went to the said home on 13.09.1999 during Vinayagar Chathurthi, on 25.09.1999 with her father-in-law to see her sister-in-law, on 03.10.1999 with her husband while she was pregnant for taking rest and 06.11.1999 for Deepavali festival. In fact during the absence of the respondent his mother once locked the door and refused to allow her inside. The issue was kept quite at the request of the respondent. The appellant has never quarrelled with the respondent. The respondent has never visited the appellant and the child after child birth.

vi. It is further stated that only on 19.01.2000 she went to her parents home, since she was suffering from morning sickness to take care of her health. Only on her in-laws she was taken to her parents home by her brother with consent. She never picked up any quarrel on 19.01.2000 and took her belongings. It is nothing but natural for a lady suffering from morning sickness due to the early stage of pregnancy to go to her parents home situated in the same city for taking rest. The appellant was not at all responsible for the problems faced by the respondent's sister and the appellant's brother. She never threatened to commit any suicide as alleged in the petition.

vii. In the written arguments it has been stated that the appellant has always been ready and willing to join and live with the respondent. The petition for divorce has been filed in view of the strained relationship between the sister-in-law and the brother of the appellant. It is the respondent who has refused to take the appellant and the appellant has been waiting for the respondent to take her back into the matrimonial home with the male child. It was also prayed that inasmuch as the appellant is always ready and willing suitable orders will be passed directing the respondent to take her back into the matrimonial home.

viii. Before the Trial Court the respondent has examined himself as PW-1 and the appellant has examined herself as RW-1. Two documents have been marked in Ex.A-1 to A-2 by the respondent. Ex.A-1 is the Marriage Invitation dated 29.08.1999 and Ex.A-2 is the Joint Account standing in the name of the parties in the Indian Bank Branch. The Court below after the consideration of the materials available on record has granted a decree for divorce by holding that mental cruelty caused by the appellant has been proved as against the respondent. Challenging the said judgment and decree of the Court below, the appellant has filed the present appeal.

3. PW-1 who is the respondent herein in his evidence has stated that there has been a problem between his sister and brother-in-law and there is a talk of settlement between the parties. In view of the said dispute his sister came to his house and stayed with him which was objected to by the appellant as a result of the same she went to her parental home on her own and she also made a threat to commit suicide. His sister came to his house on 03.01.2000 and on 18.01.2000 the appellant left the matrimonial home on the ground of health. She was eight weeks pregnant at that point of time and child was born on 29.08.2000 which was not informed. The respondent went to see the child on his own and thereafter he was not allowed to see the child and therefore he did not go to see her. From 18.01.2000 the respondent has not joined the appellant. Since the respondent threatened the appellant by stating that she would commit suicide, refused to see the child and also living separately from 18.01.2000 a decree for divorce is to be granted on the ground of mental cruelty.

4. In his cross-examination he has stated that the appellant left on 18.01.2000 after quarrelling with him in view of the presence of his sister. It is further stated that he saw the appellant after the child birth only once and he did not ask the appellant to live with him. When his father and others asked the appellant to live with him but she refused. It was also denied that the petition was filed in view of the fact that his sister and brother-in-law are living separately.

5. RW-1 in her evidence has stated that she has used to go to her parental home along with the respondent. She has further stated that even now she wants to live with the respondent. In her cross-examination she denied that there was any strained relationship between herself and her sister-in-law after the marriage of her brother.

6. It is further stated that the respondent visited the appellant during her pregnancy at her parents home. The birth of the child was informed to the respondent by her father over phone, the appellant used to talk to the respondent very often over phone. There was no celebration of the first birthday of the child, since the parties have been living separately. The respondent has asked the appellant to come to his home. Since the delivery was done by way of a cesarian operation and she was advised by the Doctor to take five months rest and she took rest. Since her father also died she could not join with her husband immediately and when she was about to join she received the notice from the Court. It is further stated that in view of the valaikappu function proposed in the month of June 2000 all her belongings along with the certificates were taken by her brother. However since the respondent has refused to come for the same no function was conducted. The respondent has not seen the child after seeing him at the time of birth.

7. A reading of the petition filed by the respondent would show that the marriage between his sister and brother-in-law took up earlier on 24.05.1999 and thereafter the marriage between the appellant and the respondent took place on 29.08.1999. Therefore it cannot be said that right from the marriage between

the appellant's brother and her sister-in-law there was a strained relationship between the appellant and her sister-in-law. If that is the case then the subsequent marriage between the appellant and the respondent would not have happened.

8. It is not the case of the respondent that his marriage was solemnised out of force on the ground that his refusal to marry the appellant would result in strained relationship between his sister and brother-in-law. Therefore the statement made by the respondent that the appellant created trouble to his sister after his sister's marriage cannot be accepted. The further allegation that the appellant picked up the quarrel with him on 18.01.2000 and left the matrimonial home on her own has also not been substantiated by the respondent. The appellant has also denied the said fact. The respondent has given further evidence that she used to visit her parents home during festival times.

9. It is further seen from the evidence of PW-1 that the appellant has informed the respondent on 18.01.2000 that she was leaving the matrimonial home due to her health. If it is the specific case of the respondent that the real reason is the objection of the presence of his sister then sufficient evidence should have been let in other than his own evidence particularly in the teeth of the specific denial by the appellant. When the respondent himself states that he was informed by the appellant about the reason for leaving the home on the basis of ill-health, it is a duty cast upon the respondent to substantiate and prove his case that the real reason was something else.

10. The evidence of PW-1 would make it clear that he has not asked the appellant to come and live with him. His further evidence that the appellant has threatened him by stating that she would commit suicide and she prevented him from seeing the child has not been proved with any other corroborating evidence particularly in view of the denial made by the appellant. Further the alleged dispute between PW-1's sister and the appellant has also not been proved.

11. A perusal of the evidence of RW-1 read with the counter affidavit would show that she has always been ready and willing to live with the respondent. The respondent has not issued any notice seeking the restitution of conjugal rights and no other evidence in the form of the letters or mediation made by the third parties was available in support of his case. No attempt was made to see the child and seek custody. The appellant has clearly stated that the valaikappu function was not conducted and the first birthday was also not conducted by her family.

12. The above said facts would show the strained relationship between the families. Therefore the onus is heavily on the respondent being the petitioner before the Court below seeking divorce to prove the allegations made in the petition filed by him. Except the evidence of the respondent and the appellant no other evidence either oral or documentary is available on record. If the respondent was prevented from seeing the child after the child birth and the appellant had refused to come and join him then proper steps should have been taken by the respondent in that regard. Even the evidence of the respondent would show that he has not taken any sufficient steps. He has also stated that he had not asked the appellant to come and live with him. Even though he has stated that others made attempts to bring the appellant back the said statement was not supported by the evidence of any third party and no particulars have been given.

13. It is also seen that the respondent's sister also filed a petition in O.P.No.337 of 2001 before the very same Court seeking divorce against her husband on the ground of mental cruelty. A reading of the petition filed in O.P.No.337 of 2001 would also show that the petitioner therein had requested her husband to take a separate house for their leaving out his other family members. The said fact would clearly show that the appellant's sister-in-law wanted to live separately with her husband. Hence in view of the above said pleadings, the appellant cannot be found fault for the misunderstanding between her brother and sister-in-law particularly in the absence of any evidence other than PW-1 to prove the same. The above facts also prove that the respondent was not ready and willing to take the appellant back.

14. Mrs.S.Nagasailu, learned counsel appearing for the appellant submitted that the Court below has committed an error in granting a decree for divorce on the ground of cruelty by holding that the appellant had left on her own to her parental home and has refused to come back after three months after delivery when the respondent requested her to come back. The learned counsel further submitted that it is nothing but natural for a lady to go to her parental home during delivery and she could not come back after delivery in view of the death of her father. Even prior to that her father was terminally ill and that is the reason the appellant could not come back. The learned counsel submitted that the above said actions would not constitute mental cruelty.

15. The learned counsel for the appellant submitted that the child was born on 29.08.2000 and the appellant's father died on 03.02.2001. The divorce petition was filed on 05.03.2001. On the very same day another divorce petition was filed by the respondent's sister. The learned counsel further submitted that the respondent was said to have been remarried on 31.10.2004 after obtaining a decree for divorce on 23.07.2004 whereas the second wife Mrs.R.Kalaimani delivered a male child at Smith Hospital, Peelamedu, Coimbatore on 25.02.2004 itself. According to the learned counsel, the appeal was filed on 01.11.2004 and therefore the respondent ought to have remarried much prior to 31.10.2004. Hence the learned counsel strenuously contended that the alleged second marriage of the respondent would amount to abuse of the process of law and in view of the conduct of the respondent in remarrying within the period of limitation suitable orders will have to be passed against the respondent.

16. The learned counsel for the appellant further submitted that a suit was filed on 06.12.2004 by the respondent in O.S.No.4322 of 2004 on the file of District Munsif Court, Coimbatore for permanent injunction restraining appellant and her brother from disturbing his peaceful possession and enjoyment of the suit property stating that the appellant and her brother are pressurizing the brother to get herself remarried to the respondent and there was no mention about the remarriage.

17. The learned counsel relied upon Section 15 and 23 of the Hindu Marriage Act, 1955 and submitted that the second marriage is totally illegal and the same cannot be a fait accompli to hold that the divorce granted is in order. In support of her contention the learned counsel has relied upon the judgments reported in 1995 SUPP (4) SCC 642 [PRAKASH CHAND SHARMA v. VIMLESH], (1997) 11 SCC 159 [YALLAWWA v. SHANTAVVA]; (2001) 4 SCC 250 [CHETAN DASS v. KAMLA DEVI]; (2002) 2 SCC 73 [SAVITRI PANDEY v. PREM CHANDRA PANDEY] and submitted that the appeal filed by the appellant will have to be allowed both on merits and also taking into consideration of the conduct of the respondent.

18. Per contra, M/s.Sheila Jayaprakash, learned counsel for the respondent submitted that the petition for divorce was filed as per the Family Courts Act, 1984. Section 19 of the said Act, gives 30 days time to file an appeal. The respondent has remarried after the expiry of the said time and between the Section 28 of the Hindu Marriage Act which provides for an appeal allowing a period of 90 days and Section 19 of the Family Courts Act providing a period of 30 days for filing the appeal the later would prevail in view of the non-obstante clause contained therein.

19. The learned counsel further submitted that the factum of birth of the child born to the respondent and his second wife on 25.02.2004 for the marriage conducted on 31.10.2004 cannot be gone into since the birth certificate of the child has not been marked. The learned counsel also submitted that the evidence of PW-1 and RW-1 would show that the appellant has not joined the respondent for a long time and therefore the said decision has caused mental cruelty on the respondent. The learned counsel further submitted that the appellant has not taken any steps to live with the respondent and the appellant has also filed subsequent proceedings for restitution of conjugal rights which has also pending. Therefore the learned counsel prayed for the dismissal of the appeal.

20. In this connection it is useful to refer the judgment of the Apex Court reported in (2002) 2 SCC 73 [SAVITRI PANDEY v. PREM CHANDRA PANDEY], wherein the Hon'ble Supreme Court was pleased

to hold that a decree for divorce cannot be granted on the ground of desertion in the absence of pleadings and proof. The Trial Court has committed a grave error in shifting the entire responsibility and burden on the appellant to prove the case of the respondent. The respondent being the petitioner seeking divorce on the ground of cruelty is duty bound to substantiate the allegations and averments made in the petition filed for divorce. The Trial Court has granted a decree for divorce on the ground that there was strained relationship between the parties in view of the presence of the respondent's sister in their matrimonial home which was occasioned due to the strained relationship between her and her husband. Even if the same is true the appellant cannot made solely responsible for that.

21. The Trial Court has failed to consider the evidence of PW-1 who himself has stated in the chief examination that the appellant has left the matrimonial home by stating that she was sick due to her pregnancy. The Trial Court has merely accepted the case of the respondent and granted a decree for divorce. The Trial Court has not considered the fact that the appellant has deposed that no valaikappu was conducted and no function was also conducted after the birth of the child in view of the refusal of the respondent to attend the said functions.

22. Another important factor to be noted is that on 05.03.2001 itself both the respondent and his sister filed petitions before the same Court seeking divorce on the ground of cruelty. It is further to be noted that the Trial Court has presumed certain things by accepting the case of the respondent without any evidence whatsoever. In the present case on hand both the parties have let in evidence in support of their case. A decree for divorce cannot be granted for the mere asking. The Court below has to give a clear finding that mental cruelty has been made out by the continued conduct of the party as against the other. The evidence of RW-1 is to the effect that she left the matrimonial home due to ill-health and the delay in joining was due to the ill-health and the consequential death of her father. The said evidence ought to have seen in the proper perspective by the Trial Court especially considering the desire of the appellant to rejoin. The respondent has not made any attempt to see his child after seeing in the hospital at the time of delivery. It is the evidence of the appellant that the respondent was talking to her over phone.

23. The Trial Court has committed a further error in stating that the appellant has not made any attempt to rejoin the respondent. There is also no evidence to show that after the birth of the child the appellant has caused any mental agony to the respondent by criticizing her sister-in-law and also made any continuous threat of committing suicide. An incident once happened long time back even assuming as true cannot be a determining factor for seeking divorce. Quarrels are common in any relationship more so in a relationship between husband and wife. Therefore the Trial Court has committed an error in taking into consideration of the incidents alleged to have happened by merely accepting the case of the respondent. It is also to be seen that the appellant's brother has not filed any application for divorce but the same was filed only by the respondent's sister and she has stated in the said petition that she wanted to live separately with her husband. When such is the case of the respondent's sister herself in her petition for divorce then the Court below was not right in stating that it is the appellant who has refused to come and join the respondent.

24. The reasons assigned by the Court below in holding that the appellant conduct in taking the jewels and the certificates would show that she was not interested in joining the respondent also cannot accepted. It is the specific case of the appellant that along with the dress and jewels the entire materials were taken by her brother. Since admittedly she was staying in her parental home during her pregnancy period she would have thought fit to take those materials with her. From the said evidence it cannot be said that the appellant did not want to live with the respondent.

25. The word cruelty has not been defined and the Hindu Marriage Act,1955. In order to define cruelty, the conduct of a party should be so dangerous, so that a spouse is unable to live with the other. It is not the isolatory incident which is relevant but the whole matrimonial life that will have to be seen. A marriage is a meeting and union of two minds. There will always be difference between two persons who come from

different background having different behaviors, thoughts, attitude, conduct and values. The above said factors are determined by the environment in which a person is brought up. Therefore, mere bickerings in a marital life cannot be a ground for cruelty. In order to make out cruelty, the intensity and gravity of one's action will have to be seen.

26. In order to consider mental cruelty the social status of the parties, their customs and traditions, educational level and the environment, in which they have been living will have to be looked into. The Court will have to draw inference and decide on the basis of the probabilities of the case having regard to the effect on the mind of the spouse. The Hon'ble Apex Court in the judgments reported in (2002) 2 SCC 296 [G.V.N.KAMESWARA RAO v. G.JABILLI] and (2005) 2 SCC 22 [A.JAYACHANDRA v. ANEEL KAUR] have taken the view that cruelty will have to be seen by applying the above said principles.

27. There cannot be any specific definition mental cruelty. The mental cruelty cannot be put in a strait-jacket formula. The concept of mental cruelty cannot remain static. Therefore, no uniform standard can be laid down and Courts will have to prudent and have a practical approach in adjudicating a case based upon its own facts. A sustained course of abusive and humiliating treatment rendering the life of spouse is one of the factum to decide the mental cruelty. However, mere trivial irritations, quarrels, normal wear and tear of the married life would not amount to mental cruelty. If by the continued ill conduct of a spouse the relationship deteriorates then such an action alone amount to mental cruelty.The Hon'ble Supreme judgment in SAMAR CHOSH v. JAYA GHOSH (2007 (3) ALT 62) has observed as follows:-

"97.Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in our definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

98. Apart from this, the concept of mental cruelty cannot remain static. It is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. what may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

99. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instance 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 lock of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish. disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, sustained and weighty.

(vii) Sustained reprehensible conduct, studied neglect in difference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent of knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent of 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.

Applying the said principles to the facts of the case, we are of the opinion that the respondent has not made out a case for both mental and physical cruelty.

28. The above said judgment of the Apex Court was also followed by subsequent judgment reported in (2009) 1 SCC 422 [SUMAN KAPUR v. SUDHIR KAPUR] wherein the Hon'ble Supreme Court has observed as follows:

"39.Mental cruelty has also been examined by this Court in Parveen Mehta v. Inderjit Mehtathus: (SCC pp.716-17, para21) "21.Cruelty for the purpose of Section 13(1)(i-a) is to be taken as a behaviour by one spouse towards the other, which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behaviour or behavioural pattern by the other. Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be

appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehaviour in isolation and then pose the question whether such behaviour is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other."

40.In A.Jayachandra v. Aneel Kaur the Court observed as under: (SCC pp.29, para 10) "10.The expression 'cruelty' has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of the spouse same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In a delicate human relationship like matrimony, one has to see the probabilities of the case. The concept, proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, courts are required to probe into the mental process and mental effect of incidents that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial disputes."

41.In Vinita Saxena v. Pankaj Pandit the Court said: (SCC pp.796-97, paras 31-32) "31.It is settled by a catena of decisions that mental cruelty can cause even more serious injury than the physical harm and create in the mind of the injured appellant such apprehension as is contemplated in the section. It is to be determined on whole facts of the case and the matrimonial relations between the spouses. To amount to cruelty, there must be such wilful treatment of the party which caused suffering in body or mind either as an actual fact or by way of apprehension in such a manner as to render the continued living together of spouses harmful or injurious having regard to the circumstances of the case.

32. The word 'cruelty' has not been defined and it has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct and one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. There may be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted."

42.It was further stated: (Vinita Saxena case, SCC pp.797-98, paras 35-36) "35.Each case depends on its own facts and must be judged on these facts. The concept of cruelty has varied from time to time, from place to place and from individual to individual in its application according to social status of the persons involved and their economic conditions and other matters. The question whether the act complained of was a cruel act is to be determined from the whole facts and the matrimonial relations between the parties. In this connection, the culture, temperament and status in life and many other things are the factors which have to be considered.

36.The legal concept of cruelty which is not defined by the statue is generally described as conduct of such character as to have caused danger to life, limb or health (bodily and mental) or to give rise to reasonable apprehension of such danger. The general rule in all questions of cruelty is that the whole matrimonial relation must be considered, that rule is of a special value when the cruelty consists not of violent act but of injurious reproaches, complaints, accusations or taunts. It may be mental such as indifference and frigidity towards the wife, denial of a company to her, hatred and abhorrence for wife, or physical, like acts of violence and abstinence from sexual intercourse without reasonable cause. It must be proved that one partner in the marriage however mindless of the consequences has behaved in a way which the other spouse could not in the circumstances be called upon to endure, and that misconduct has caused injury to health or a reasonable apprehension of such injury. There are two sides to be considered in case of apprehension of such injury. There are two sides to be considered in case of cruelty. From the appellant's side, ought this appellant to be called on to endure the conduct? From the respondent's side, was this conduct excusable? The court has then to decide whether the sum total of the reprehensible conduct was cruel. That depends on whether the cumulative conduct was sufficiently serious to say that from a reasonable person's point of view after a consideration of any excuse which the respondent might have in the circumstances, the conduct is such that the petitioner ought not be called upon to endure."

29.Applying the above said principles to the facts of the case, we are of the opinion that the respondent has not made out a case for mental cruelty. We are also find that in the present case on hand, the respondent has acted in a haste in filing the petition for divorce. The marriage was solemnised on 29.08.1999. The child was born on 29.08.2000. The appellant's father died on 03.02.2001 and the divorce application was filed on 05.03.2001. The above said facts by themselves would indicate the haste in much the divorce petition was filed. It is seen that just one month after the death of the father of the appellant and seven months after the birth of the child the respondent has filed the petition for divorce. The petition for divorce was filed by the respondent as well as his sister on the same day. The said fact would clearly show that the petitions have been filed primarily because of the strained relationship between appellant's brother and her sister-in-law. The strained relationship of such nature cannot be a ground for a petition seeking divorce on the ground of cruelty between the appellant and the respondent.

30.In so far as the other contention of the learned counsel for the appellant regarding the conduct of the respondent in remarrying after the decree for divorce granted by the Court and before the disposal of the appeal certain facts will have to be looked into. The Court below has granted a decree for divorce on 23.07.2004. The appellant's counsel made the copy application on 31.07.2004. The copy was made ready on 19.08.2004. The marriage between the respondent and his second wife was alleged to have been conducted on 31.10.2004. The appeal was filed on 09.09.2004. From the above said facts, it is clear that the appeal was filed within the period of 30 days as provided under Section 19 of the Family Courts Act, 1984 which will have preference over Section 28 of the Hindu Marriage Act, 1955. Section 19 of the said Act provides for 30 days period of limitation to file an appeal whereas Section 28provides for a period of 90 days. The petition having been filed under the Family Courts Actand appeal was also having filed under Section 19 of the said Act, we are of the considered view that the provisions of Family Court Act, 1984 alone would be applicable, more so, in the light of the non-obstante clause mentioned under Section 19 of the Family Courts Act. However the question to be considered is as to whether the second marriage was consummated before the expiry of the 30 days as provided under Section 19 of the Family Courts Act, 1994.

31.A reading of the Section 19 of the Family Courts Act, 1984 would show that the period of 30 days as mentioned in Section 19(3) would only mean from the date on which the judgment and decree was made ready. That is a reason why the appeal filed by the appellant was taken on file without an application for condonation of delay as one filed within the period of limitation. Section 15 of the Hindu Marriage Act, 1955 provides for the divorce persons to get remarried. The said section is extracted hereunder:

"15.Divorced persons when may marry again:-When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again."

32.A reading of the above said section would show that only on the grounds mentioned therein a party who obtained a decree can get remarried. Accordingly when the time for appealing has expired or when an appeal has been preferred but has been dismissed only then it would be lawful for either party to the marriage to marry again. Applying the above said section in the present case on hand admittedly the time for appealing has not expired when the appeal was presented on 09.09.2004. When the alleged marriage was conducted on 30.10.2004, the appeal was already presented on 09.09.2004. What the section contemplates is the presentation of the appeal. When the appeal is filed the same would amount to the presentation of the appeal. Applying the said principle, we are of the view that the second marriage of the respondent is per se illegal and unauthorised.

33. In this connection it is useful to refer the judgment of the learned Division Bench reported in 2004 (5) CTC 724 [P.RAMADOSS AND ANOTHER v. THE REVENUE DIVISIONAL OFFICER SIVAKASI AND OTHERS] wherein the Division Bench has observed as follows:

"6.We find from the Xerox copy of the order of the Revenue Divisional Officer, Sivakasi, though the orders are dated 18.11.2003, the Personal Assistant has signed the same on 10.12.2003 and there is an endorsement made by the appellants for the receipt of the order on 23.12.2003. It is clear that if the date of signature of the Personal Assistant, namely, 10.12.2003 is taken into account, the appeals which were filed on 30.1.2004 are within time. As per Section 47-A of the Indian Stamps Act, 1899 read with Rule 9 of the Tamil Nadu Stamps (Prevention of Under Valuation of Instruments) Rules, it is open to the appellants to file an appeal within two months from the date of the order. The 3rd respondent has proceeded on the basis of the date of the order is the date which the order bears. But, it is well settled that for the purpose of computing the limitation in preferring the appeals the date of service of the order is relevant and not the date which the order bears. In Harish Chandra v. Dy. L.A. Officer, AIR 1961 S.C. 1500 the Supreme Court construed the expression, 'the date of the award' found in Section 18(2) of the Land Acquisition Act, 1894 to mean the date when the award is either communicated to the party or known to him either actually or constructively. The Supreme Court after considering earlier decisions held as under:

"A similar question arose before the Madras High Court in Annamalai Chetti v. Col. J.G. Cloete, ILR 6 Mad 189. Section 25 of the Madras Boundary Act XXVIII of 1860 limited the time within which a suit may be brought to set aside the decision of the settlement officer to two months from the date of the award, and so the question arose as to when the time would begin to run. The High Court held that the time can begin to run only from the date on which the decision is communicated to the parties. 'If there was any decision at all in the sense of the Act,' says the judgment, 'it could not date earlier than the date of the communication of it to the parties; otherwise they might be barred of their right of appeal without any knowledge of the decision having been passed'. Adopting the same principle a similar construction has been placed by the Madras High Court in Swaminathan v. Lakshmanan Chettiar, ILR 53 Mad. 401: AIR 1930 Mad.490 on the limitation provisions contained in Ss.73(1) and 77(1) of the Indian Registration Act XVI of 1908. It was held that in a case where an order was not passed in the presence of the parties or after notice to them of the date when the order would be passed the expression 'within thirty days after the making of the order' used in the said sections means within thirty days after the date on which the communication of the order reached the parties affected by it. These decisions show that where the rights of a person are affected by any order and limitation is prescribed for the enforcement of the remedy by the person aggrieved against the said order by reference to the making of the said order, the making of the order must mean either actual or constructive communication of the said order to the party concerned."

We, therefore, hold that the date of the order under Section 47-A for the purpose of deciding the limitation for filing appeals should be construed to mean the date of the service of the order. Hence, the date of order under Rule 9 of the said Rules shall be construed to mean the date of service of the order for the purpose of determining the time limit to prefer the appeals.

7.Moreover, in the instant case, the Personal Assistant has signed the order on 10.12.2003 for despatch to the appellants and the orders could not have been despatched prior to 10.12.2003. It is apparent that if 10.12.2003 is taken into account, the appeals preferred would be within time. The orders suffer from other infirmities as the third respondent without giving an opportunity to explain as to how the appeals preferred were within time, rejected the appeals. In our view, it is not necessary to quash the orders on the ground that they were passed in violation of the principles of natural justice as we hold that the view entertained by the third respondent that the date of order means the date which the order bears, and not the date of service of the order to determine the time limit for preferring the appeals is not legally sustainable. Hence, the orders of the 3rd respondent holding that the appeals preferred were beyond the period prescribed under Section 47-A of the Stamps Act are not sustainable. Consequently, the orders challenged in both the appeals are set aside and the matters are remitted back to the 3rd respondent to consider the same on merits."

34. Hence on a consideration of the ratio laid down by the Division Bench of this Court, we are of the opinion that the period of limitation would start from the date on which the order copy was received.

35. Section 23 of the Hindu Marriages Act, 1955 provides that a party to a proceedings cannot take advantage of his or her own wrong for the purpose of getting the relief sought for by the said party. The scope of Section 23 has been considered by the Hon'ble Supreme Court in the judgment reported in 1995 SUPP (4) SCC 642 [PRAKASH CHAND SHARMA v. VIMLESH] wherein the Apex Court has observed as follows:

"4.However, Mr.Pramod Swarup, the learned counsel for the appellant-husband, vehemently submitted that having regard to the fact that both the parties have drifted from married life the marriage must be taken as irretrievably broken, more so because the husband has remarried and has a child through the second marriage and, therefore, this Court should grant a divorce. We do not think that in the facts and circumstances of the case such a view can be taken. From the very beginning the wife has been saying that she is ready and willing to live with the husband. It is the husband who is denying her access. If the husband remarried in hot haste after the institution of the second appeal which was delayed by only three days, we cannot see how that fact can come to his rescue. That is clearly opposed to Section 15 of the Hindu Marriage Act which in terms states that when a marriage is dissolved by a decree of divorce and there is no right of appeal against the decree or where there is such a right, the time for filing an appeal has expired or an appeal has been presented and has been dismissed, it shall be lawful for either party to the marriage to remarry. In the instant case no doubt the second appeal was delayed by three days but the fact is that it was instituted and was pending on the date of the second marriage. Therefore, the husband acted in disregard of Section 15 and cannot get the benefit of his own wrong"

36. A similar view has been taken in the judgment by the Hon'ble Supreme Court reported in (2001) 4 SCC 250 [CHETAN DASS v. KAMLA DEVI] wherein it has been held as follows:

"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 marriage occupies an important place and role to play in the society, in general. Therefore, it would not be appropriate to apply any submission of "irretrievably broken marriage" as a straitjacket formula

for grant of relief of divorce. This aspect has to be considered in the background of the other facts and circumstances of the case."

37. It is further observed as follows:

"18.Learned counsel for the respondent submits that in certain situations, relief would be denied to the petitioner where it is found that he is taking advantage of his own wrong for the purposes of making out a case to obtain the decree. He had drawn our attention to Section 23(1) clauses (a),(b) and (c) of the Hindu Marriage Act which are quoted below:

"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 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, and

(b) where the ground of the petition is the ground specified in clause (i) of sub-section (1) of Section 13, the petitioner has not in any manner been accessory 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)-(d) * * *

(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."

19.In the present case, the allegations of adulterous conduct of the appellant have been found to be correct and the courts below have recorded a finding to the same effect. In such circumstances, in our view, the provisions contained under Section 23 of the Hindu Marriage Act would be attracted and the appellant would not be allowed to take advantage of his own wrong. Let the things be not misunderstood nor any permissiveness under the law be inferred, allowing an erring party who has been found to be so by recording of a finding of fact in judicial proceedings, that it would be quite easy to push and drive the spouse to a corner and then brazenly take a plea of desertion on the part of the party suffering so long at the hands of the wrongdoer and walk away out of the matrimonial alliance on the ground that the marriage has broken down. Lest the institution of marriage and the matrimonial bonds get fragile easily to be broken which may serve the purpose most welcome to the wrongdoer who, by heart, wished such an outcome by passing on the burden of his wrongdoing to the other party alleging her to be the deserter leading to the breaking point."

38. The said judgment of the Apex Court was followed in the subsequent judgment reported in (2002) 2 SCC 73 [SAVITRI PANDEY v. PREM CHANDRA PANDEY] wherein it has observed as follows:

"14.For upholding the judgment and decree of the Family Court, Shri Dinesh Kumar Garg, the learned counsel appearing for the appellant submitted that as after the decree of divorce the appellant had remarried with one Sudhakar Pandey and out of the second marriage a child is also stated to have been born, it would be in the interest of justice and the parties that the marriage between them is dissolved by a decree of divorce. In support of his contention he has relied upon judgments of this Court in Anita Sabharwal v.Anil Sabharwal, Shashi Garg v. Arun Garg, Ashok Hurra v. Rupa Bipin Zaveri and Madhuri Mehta v. Meet Verma."

15.To appreciate such a submission some facts have to be noticed and the interests of public and society to be borne in mind. It appears that the marriage between the parties was dissolved by a decree of divorce vide the judgment and decree of the Family Court dated 8.7.1996. The respondent-husband filed appeal against the judgment and decree on 19.1.1997. As no stay was granted, the appellant solemnised the

second marriage on 29.5.1997, admittedly during the pendency of the appeal before the High Court. There is no denial of the fact that right of at least one appeal is a recognised right under all systems of civilised legal jurisprudence. If despite the pendency of the appeal, the appellant chose to solemnise the second marriage, the adventure is deemed to have been undertaken at her own risk and the ultimate consequences arising of the judgment in the appeal pending in the High Court. No person can be permitted to flout the course of justice by his or her overt and covert acts. The facts of the cases relied upon by the learned counsel for the appellant are distinct having no proximity with the facts of the present case. In all the cases relied upon by the appellant and referred to hereinabove, the marriage between the parties was dissolved by a decree of divorce by mutual consent in terms of application under Section 13-B of the Act. This Court while allowing the applications filed under Section 13-B took into consideration the circumstances of each case and granted the relief on the basis of compromise. Almost in all cases the other side was duly compensated by the grant of lump sum amount and permanent provision regarding maintenance."

39. Similarly in a recent judgment reported in (2009) 1 SCC 422 [SUMAN KAPUR v. SUDHIR KAPUR] the Hon'ble Supreme Court after dismissing the Special Leave Petition filed by the wife challenging the divorce granted in favour of the husband has come down heavily on the husband who remarried within 60 days of the decree of divorce confirmed by the High Court and without waiting for the expiry of the period of 90 days provided for filing a Special Leave Petition. The Hon'ble Apex Court has imposed a cost of Rs.5,00,000/- even while confirming the decree for divorce. On a consideration of the above said legal principles laid down by the Hon'ble Supreme Court, we are of the opinion that the conduct of the respondent is clearly unacceptable and it was an attempt to prevent the appellant from getting the decree of the Trial Court reversed by depriving her statutory right of an appeal. Therefore while setting aside the judgment and decree of the Court below, we are of the considered opinion that the respondent herein will have to be directed to pay a sum of Rs.1,00,000/- to the appellant.

40. In fine, the judgment and decree of the Court below passed in O.P.No.326 of 2001 dated 23.07.2004 on the file of the I Additional Family Court is hereby set aside and the appeal is allowed. The respondent is also directed to pay a sum of Rs.1,00,000/- (Rupees One Lakh Only) to the appellant within a period of 8 (eight) weeks from the date of receipt of a copy of this order. No costs.

**R.BANUMATHI, J.**

**AND**

**M.M.SUNDRESH, J.**

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# DAVID CHRISTOPHER VERSUS DR.JAYANTHI

**Madras High Court**

**Bench : Hon'ble Mrs. Justice R. Banumathi and Hon'ble Mr. Justice B. Rajendran**

*David Christopher*
*Versus*
*Dr.Jayanthi*

**O.S.A.No.355 of 2006**

**Decided on 11 October, 2011**

**This appeal is preferred against the order dated 13.04.2006 made in O.M.S.No.15 of 2001 allowing the Petition filed by Respondent-wife and dissolving the marriage between the Appellant and the Respondent which was solemnised on 11.12.1984.**

**The facts are not in dispute. Love marriage between the Appellant and the Respondent was solemnised on 11.12.1984. For the purpose of marriage, Respondent got converted to Christianity. After getting over the initial obstacles of love marriage, the spouses lived happily till 1994. In 1995, Appellant was detained under COFEPOSA for allegedly smuggling gold from Singapore. He was released on bail on 21.04.1996.**

**Respondent alleges that Appellant had developed friendship with another co-detenu Padmakumar who was released earlier than the Appellant**

**The question whether the act complained of was a cruel act is to be determined from the whole facts and the matrimonial relations between the parties. In this connection, the culture, status in life, background of parties and many other things have to be considered.**

**Yet another point to be considered is the maintainability of Petition under Section 10 of Divorce Act on the ground of cruelty. Under Divorce Act 1869, wife is not entitled to maintain Petition for divorce on the ground of cruelty alone, it should be coupled with adultery. This Original Petition No.15 of 2001 was filed on 09.02.2001 under Section 10 of Indian Divorce Act. Indian Divorce Act, 1869 was amended under Act 51 of 2001. Under Amended Act, Petition for divorce could be maintained either by the husband or wife for dissolution of marriage on the ground of adultery [Section 10 (1)(i)]; on the ground of cruelty [Section 10(1) (x)]. Under the Amended Act, it is not necessary both should be coupled together.**

**In the facts and circumstances of the case, the learned Judge has rightly proceeded to consider the Petition for dissolution of marriage on the ground of "cruelty" alone.**

## JUDGMENT

**Hon'ble Mrs. Justice R. Banumathi:—** This appeal is preferred against the order dated 13.04.2006 made in O.M.S.No.15 of 2001 allowing the Petition filed by Respondent-wife and dissolving the marriage between the Appellant and the Respondent which was solemnised on 11.12.1984.

2. Briefly stated case of Respondent-wife is that Appellant and his family migrated from Sri Lanka to India and Appellant joined in Madras Medical College and Respondent was also a student in the same college. Both of them loved each other. Respondent was a Hindu and Appellant was a Christian. Respondent got converted to Christianity and the name of the Respondent has been changed to "Mary Jayanthi" and the marriage was solemnised at Velankanni Church, Besant Nagar, Chennai. After getting over the initial difficulties of love marriage, both Appellant and the Respondent set up a matrimonial house and

Respondent started her practice as Doctor in 1986. Out of the wedlock, first daughter Krithi was born on 29.09.1987 and second daughter Shruthi was born on 14.01.1994. In 1993, Appellant began an export business and in the course of his export business, Appellant was detained at Trivandrum for a period of 14 months for allegedly smuggling gold. Appellant agreed to mend his ways and Respondent and her mother took all possible steps to take him out on bail. On 21.04.1996, bail was granted and Appellant returned to Madras.

3. Appellant is alleged to have developed friendship with another detenu who had been released earlier than the Appellant. But the Appellant was suspicious about the conduct of the Respondent-wife that she had developed relationship with the said Padmakumar and ill-treating her on that suspicion. On 26.05.1996, Appellant attempted to strangulate the Respondent. Fearing for her life and safety of the children, Respondent left the house to live with her parents. Appellant again agreed to change his ways and that on 05.06.1996, an agreement was entered into between the parties and Respondent returned to the matrimonial house. After a few months, Appellant again physically and verbally abused the Respondent and on 28.01.1997, Respondent returned to her parents house. Appellant forcibly entered into the Respondent's parents house and took away the children and put them in a Boarding School in Ooty, even though the younger child was only 3 years old. Only on the orders of the Court dated 16.06.1997, Respondent was able to get back the custody of the children. In the said order, Appellant was permitted to visit the children once in a week in the Respondent's house.

4. The above arrangement continued till February 2000, when the younger daughter fell ill and needed to have her tonsils surgically removed. Appellant began visiting the children more often and began interacting with the Respondent and Appellant requested the Respondent to give him one more chance to mend his ways. Keeping in mind the future of the children, Respondent rejoined the Appellant and they moved into No.54, First Main Road, Indira Nagar, Chennai-20 in October 2000.

   After a short while, Appellant reverted to his old ways and began accusing the Respondent having affairs and Appellant physically abused the Respondent. In November 2000, again problem arose and Respondent returned to her parental house on 03.12.2000. On 09.12.2000, Appellant alleged to have broken into the Respondent mother's Flat M-48-B, L.B.Road, Adyar, Chennai and re-occupied the same for which a police complaint was also lodged. According to Respondent, inspite of all chances given to the Appellant, he continued to abuse the Respondent and manhandled her and therefore, Respondent was forced to leave the matrimonial house on 03.12.2000. In February 2001, Respondent filed O.P.No.15 of 2001 under Section 10 of Indian Divorce Act seeking for dissolution of the marriage solemnised between her and the Appellant on 11.12.1984.

5. Admitting the marriage and resisting all other allegations in the Petition, Appellant filed counter-statement contending that Respondent was insisting to join her father's MARC II Clinic and Appellant was not permitting the Respondent to join MARC II Clinic and therefore, Respondent was always quarrelling with the Appellant. It is alleged that in anxiety to go and join in MARC II Clinic, the Respondent voluntarily left the matrimonial home on 26.05.1996. Appellant has alleged that again Respondent voluntarily left for her parents house in January 1997 leaving the children with the Appellant and Appellant took care of the children and admitted them in a Boarding School at Ooty. It is alleged that Appellant visited the children several times whereas the Respondent never visited Ooty to see the children.

6. Appellant has further alleged that on 29.09.2000, he received an information from his mother-in-law about the admission of the Respondent in Chennai Kaliappa Hospital and he came to know that the diagnosis was "incomplete abortion". Appellant is alleged that he did not have any sexual connection with the Respondent and that the conceivement is not due to him. However, the Appellant as true Catholic pardoned the Respondent and was prepared to take her home in the interest of the minor children and he did not want the name of the Respondent to be spoiled.

Thereafter, at the instance of the Respondent, they took house for rent at No.54, First Main Road, Indira Nagar, Chennai-20. Respondent wanted to attend a conference to be held on 01.12.2000 at Vellore along with her father and because of her physical condition, Appellant insisted that Respondent should not go to Vellore to attend the conference. Thereafter, Respondent wanted to attend another conference on 03.12.2000 at GRT Hotel, Chennai and thereafter, inspite of insistence, Respondent did not return home. According to Appellant, in 2003 even during the pendency of O.P., both Appellant and the Respondent went together for a marriage and stayed in a hotel at Bangalore. Appellant has denied causing any mental cruelty to the Respondent and alleged that Respondent left the matrimonial house voluntarily on 03.12.2000 and therefore, the Petition is not maintainable.

7. On the above pleadings, two issues were framed. Respondent examined herself as PW1 and her mother-Thillainayagi Rajsekaran was examined as PW2. On the side of Respondent, Exs.P1 to P10 were marked. Appellant examined himself as RW1 and Exs.R1 to R6 were marked.

8. Upon consideration of oral and documentary evidence, learned single Judge held that the allegations expressing doubts about fidelity and chastity of the wife would amount to mental cruelty. Placing reliance upon 2003-4-LW 609 (Vijayakumar Rachandra Bhate v. Neela Vijaykumar Bhate), the learned single Judge held that levelling accusations of unchastity and indecent familiarity with a person outside wedlock is a grave assault on the character of the wife and the allegations are per se cruel in nature. Pointing out that from October 2000 both the Appellant and Respondent were living together and that Appellant must be the cause for conceivement, the learned single Judge held that "to allege that Appellant is not the cause for conceivement" would amount to mental cruelty. Accepting the evidence of PW1 that she was subjected to physical cruelty, learned Judge held that because of ill-treatment and unbearable torture given by the Appellant, Respondent was compelled even to go to the Police Station seeking protection. Learned single Judge held that " .... assuming that the physical cruelty is not made out, there is no reason to negative the claim of the Respondent regarding the "mental cruelty" which is proved by attending circumstances and that the marriage life has irretrievably broken down ....". On those findings, the learned Judge allowed the Petition dissolving the marriage between the Appellant and the Respondent.

9. Challenging the impugned order of the learned single Judge, Mr.A.R.Nixon, learned counsel for Appellant has contended that learned Judge has failed to note that from the date of marriage Appellant has sacrificed his life for the sake of Respondent and that the learned Judge did not keep in view that the parents of the Respondent were responsible for the differences between the spouse and the learned Judge has arrived at a wrong conclusion that Appellant has caused mental cruelty to the Respondent. It was further submitted that no convincing proof was produced to establish that Appellant inflicted cruelty to cause reasonable apprehension in the mind of the Respondent. On the other hand, the conduct of the Respondent would clearly show that even after filing of the Petition, the spouses were in good terms and together going to Bangalore to attend a marriage. It was further submitted that the learned Judge erred in relying upon the interested testimony of PW2-mother of the Respondent. It was further argued that even though the learned Judge has come to the conclusion that there was no physical cruelty, erred in granting divorce on the ground of mental cruelty.

10. Ms.Chitra Sampath, learned counsel appearing for Respondent has submitted that inspite of many opportunities given to the Appellant to mend his ways, Appellant has not mended himself and that he continuously inflicted mental cruelty upon the Respondent. Reiterating the findings, learned counsel would further submit that upon analysis of the evidence and materials, learned Judge rightly held that the allegations levelled against the Respondent would certainly amount to mental cruelty and that the marriage life has gone to the extent of "no point of return", granted decree of divorce and the impugned order cannot be interfered with.

11. The facts are not in dispute. Love marriage between the Appellant and the Respondent was solemnised on 11.12.1984. For the purpose of marriage, Respondent got converted to Christianity. After getting over

the initial obstacles of love marriage, the spouses lived happily till 1994. In 1995, Appellant was detained under COFEPOSA for allegedly smuggling gold from Singapore. He was released on bail on 21.04.1996. Respondent alleges that Appellant had developed friendship with another co-detenu Padmakumar who was released earlier than the Appellant. Per contra, Appellant alleges that Respondent became very close to the said Padmakumar and that she had developed acquaintance with the said Padmakumar.

12. In Paragraph (14) of his counter Appellant has alleged that ".... Respondent developed illegal connection with the said Padmakumar". In Paragraph (4) of the counter-affidavit filed by the Appellant in O.P.No.382 of 1997, the Appellant has also reiterated the same. In Paragraph (23) of the order, the learned Judge inextenso extracted Paragraph (14) of the counter-affidavit wherein the Appellant has levelled accusations against the Respondent.

13. Elaborating upon the alleged friendship between the Respondent and Padmakumar in Paragraph (14), Appellant has alleged that ".... he will submit more details and particulars regarding the relationship of the Respondent along with the said Padmakumar; but he does not want to divulge all the matters now taking into consideration of the future of the children". Asserting that Respondent is living in adultery, the Appellant has alleged that ".... if necessity arises for the Appellant to file a Petition for divorce, he will give more particulars". In Paragraph (15) of the counter-affidavit, Appellant has alleged that "... it is clear that Petitioner/Respondent had been having illegal connection with the Padmakumar". In Paragraph (16) of the counter, the Appellant has alleged that ".... even now the Petitioner/Respondent is having close contact with Padmakumar by correspondence over phone calls".

14. When the Appellant/RW1-David Christopher was in the witness box, he had disowned the above allegations made in the counter filed by him. In his evidence, RW1 has denied having made any allegations that the Respondent was having any illicit relationship with anybody. Denying the suggestion that he doubted the integrity of the Respondent, in his evidence, Appellant-RW1 has stated as under:-

" .... I never suspected that the petitioner had any relation with the said Padma Kumar. It is not correct to state that after I came out on bail, I doubted the integrity of the petitioner and suspected that she had relation with the said Padma Kumar."

When he was confronted with the allegations made in Paragraph Nos.(14) and (15), Appellant has stated that "those averments made in Paragraph Nos. (14) and (15) are not correct". Per contra, in her evidence, Respondent-PW1 has categorically stated that "Appellant was always suspected about her". In her evidence, Respondent had also deposed that "..... Appellant suspected that the Respondent had developed relationship with co-detenu and on 25.6.1996, Appellant picked up a quarrel with her and tried to strangulate her". In her evidence, Respondent has reiterated that "....

Appellant has been abusing her physically and verbally and that she could not tolerate the physical abuse". PW2-mother of the Respondent had also reiterated that Appellant had abused the Respondent.

15. From the evidence of Pws.1 and 2, the Respondent has proved that Appellant had sustained the conduct of making false accusations. In his cross-examination, Appellant sought to disown the allegations. His persistent conduct in making such accusations would certainly amount to mental cruelty affecting the physical and mental health of the spouse.

16. Appellant and Respondent rejoined in August 2000 and after residing in PW2's flat for a while, they moved to a separate flat in Indira Nagar, Chennai-20. On 28.09.2000, Respondent was admitted in Chennai Kaliappa Hospital with complaints of bleeding PV since 1= months and discharged on 29.09.2000. In her evidence, PW1 has stated that she had gynaecological problem and had to undergo treatment. To show that she had gynaecological problem, Respondent had produced Ex.P6-scan report in which it is stated that Uterus bulky and that hypoechoic lesion in the cervix Nabothian cyst and normal appearance of ovaries. Though the Respondent has denied having had any incomplete abortion, from Ex.P7-Discharge summary it is seen that Respondent was diagnosed "incomplete abortion".

17. While referring to the admission of the Respondent in Chennai Kaliappa Hospital, in Paragraph (21) of the counter-affidavit, the Appellant alleged that " the Respondent last resided together on 27.01.1997 and thereafter, the Appellant did not have any sexual connection with the Respondent".

    In Paragraph (22), Appellant further alleged that ".... Respondent (Appellant) as a true Catholic pardoned the Petitioner (Respondent) and was prepared to take her home in the interest of minor children". In Paragraph (24) of the counter-affidavit, Appellant asserted that ".... Appellant pardoned the Respondent and never spoke anything about abortion". By saying that Appellant and Respondent last resided together on 27.01.1997 and thereafter, Appellant did not have any sexual connection with the Respondent, the Appellant thereby indirectly alleges that if the Respondent had conceived, he is not responsible for the same and that it must be due to adulterous conduct of the Respondent.

18. As pointed out earlier, Appellant and Respondent were living together in Respondent's mother's house from August 2000 and in the month of October 2000, they moved to a separate flat along with the children and the same is not seriously challenged. As rightly pointed out by the learned Judge, the averment in the counter-affidavit that there was no connection between the Appellant and the Respondent from 27.01.1997 to 04.10.2000 is false. In fact, in his evidence, RW1 has stated that ".... in October 2000, he has resumed cohabitation with the Respondent at 54, First Main Road, Indira Nagar". Therefore, as rightly held by the learned Judge assuming that there was "incomplete abortion", Appellant must be the cause for conceivement.

19. During his cross-examination, Appellant has sought to disown the averments in Paragraph Nos. (21) and (22) of the counter saying that Appellant has denied having doubts about the fidelity of the Respondent. In his evidence, Appellant has stated that ".... If there had been a pregnancy, obviously it would have been cause by me ....". Such volte-face during cross-examination would not in any way dilute the gravity of the allegations levelled in the counter. Even though, the allegations are sought to be denied, the accusations doubting the chastity is very much on record.

20. It is settled by a catena of decisions that "mental cruelty" can cause very serious injury than the physical harm and create apprehension in the mind of the spouse so as to render continued living together of spouses harmful or injurious. The word "cruelty" has not been defined and it has to be examined in the facts and circumstances of each case. The question whether the act complained of was a cruel act is to be determined from the whole facts and the matrimonial relations between the parties. In this connection, the culture, status in life, background of parties and many other things have to be considered.

21. Observing that if by the continued ill conduct of a spouse the relationship deteriorates then such an action alone would amount to "mental cruelty'. In (2007) 4 SCC 511 [Samar Ghosh v. Jaya Ghosh], the Supreme Court held as under:-

    "99. Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in our definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

    100. Apart from this, the concept of mental cruelty cannot remain static. It is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instance 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 lock of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish. disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, sustained and weighty.

(vii) Sustained reprehensible conduct, studied neglect in difference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent of knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent of 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 above judgment was followed by a subsequent judgment reported in (2009) 1 SCC 422 [Suman Kapur v. Sudhir Kapur].

22. Considering the scope of mental cruelty under Section 13(1)(i-a) of Hindu Marriage Act in (2009) 1 SCC 422 [Suman Kapur v. Sudhir Kapur], the Supreme Court held as under:-

"39.Mental cruelty has also been examined by this Court in Parveen Mehta v. Inderjit Mehta thus: (2002) 5 SCC 706: (2002) 3 MLJ 82, thus at p.89 of MLJ:

"21.Cruelty for the purpose of Section 13(1)(i-a) is to be taken as a behaviour by one spouse towards the other, which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behaviour or behavioural pattern by the other. Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehaviour in isolation and then pose the question whether such behaviour is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other."

23. Applying the ratio of the above decisions, the cruel act alleged has to be determined from the facts of the case and evidence. While so, the mental cruelty, matrimonial relationship, status of parties, their educational and family background must be considered. Respondent being the Doctor by profession converted herself to Christianity and married the Appellant. Respondent endured all the initial obstacles of love marriage and that the spouses lived together for about 10 years, till 1995 when the Appellant was detained under COFEPOSA and it was thereafter differences arose between the spouses and that Appellant making allegations against the Respondent. The attempt of the parents to separate her from the Appellant ended in vain. As pointed out by the learned Judge, Respondent was able to withstand all the initial obstacles and problems till 1997 and thereafter, she was unable to continue to live with the Appellant. In her evidence, Respondent has categorically narrated about the conduct of the Appellant which compelled her to leave the matrimonial house. Based upon the evidence and circumstances, the learned Judge arrived at the conclusion that "only due to unavoidable compulsion, Respondent left the matrimonial house because of the cruelty inflicted by the Appellant". In his counter as well as in the counter filed in O.P.No.382 of 1997 [Ex.R4], Appellant has narrated his love and affection towards the Respondent and out of love to his wife, Appellant converted to Hinduism. Levelling of false accusations and doubting her chastity and integrity would certainly amount to causing mental cruelty.

24. After the Respondent left the house, Appellant broke open the flat of Respondent's mother in L.B. Road, Adyar and he continues to be in occupation of the said house till date. Appellant had also filed O.S.No.7790 of 2000 on the file of City Civil Court, Chennai for injunction restraining the Respondent's mother from disturbing Appellant's possession of the house at L.B. Road, Adyar.

25. In 2003-4-L.W. 609 [Vijayakumar Rachandra Bhate v. Neela Vijaykumar Bhate], the Supreme Court held that "character assassination of the wife by the husband in the written statement certainly constitutes mental cruelty for sustaining her claim for divorce under Section 13 (1)(i-a) of Hindu Marriage Act.

26. Applying the ratio of the said decision, the learned Judge granted divorce on the ground of mental cruelty. There were also certain allegations of physical cruelty. Based upon the evidence of PW1, learned Judge held that there was ill-treatment by the Appellant which compelled the Respondent to go to the Police Station seeking protection. Regarding physical cruelty, evidence of PW1 is not strengthened by other evidence. Learned Judge also observed that ".... assuming that the physical cruelty is not made out, there is no reason to negative the claim of the Respondent regarding mental cruelty". We endorse the views of the learned Judge.

27. Re:contention Maintainability of the Petition under Indian Divorce Act:-

In 1990, both Appellant and Respondent converted to Hinduism. Ex.P10 is the certificate issued by Arya Samaj (Central) Madras that both Appellant and Respondent converted to Hinduism. Appellant was not reconverted to Christianity. In the grounds of appeal, contention has been raisedthat Appellant and Respondent converted themselves as Hindus and therefore, Respondent has no right to get the relief under Indian Divorce Act.

28. Contending that to obtain the relief under Indian Divorce Act, both parties must be Christian, learned counsel for Appellant has placed reliance upon AIR 1934 Bombay 230 (Special Bench) [Mary Geraldine Rooke v. John William Rooke]. It was further contended that the requirement for seeking relief under Divorce Act, one of the party must be Christian, reliance was placed upon AIR 1979 Delhi 78 [Mrs. Pramilla Khosla v. Rajnish Kumar Khosla]. Per contra, learned counsel for Respondent has drawn our attention to (2010) 9 SCC 712 [M.Chandra v.M.Thangamuthu and another] where the Supreme Court while considering the election dispute considered the scope of conversion/re-conversion and the matters to be considered.

29. In the facts and circumstances of the case, in our considered view, issue of conversion of both Appellant and Respondent to Hinduism need not be elaborately gone into. Nodoubt, Appellant and Respondent converted as Hindus and Appellant was not reconverted to Christianity. But in his evidence, Appellant has categorically stated that "..... he is professing only Christianity". By perusal of deposition, it is seen that while deposing in Court, Appellant has described himself as "Christian". In fact in his counter in Paragraph No.(22), Appellant has stated "... as a true Catholic pardoned the Petitioner (Respondent) and was prepared to take her home in the interest of minor children". In our considered view, no serious objection could be taken for maintainability of the Petition under Section 10 of Indian Divorce Act.

30. In fact, this point was not the issue before the learned single Judge. While so, in the Appellate Court, Appellant cannot raise objection as to the maintainability of Petition under Section 10 of Indian Divorce Act. Since Appellant acquiesced by subjecting himself to the jurisdiction of the Court under Indian Divorce Act, we do not propose to delve into this aspect any further.

31. Yet another point to be considered is the maintainability of Petition under Section 10 of Divorce Act on the ground of cruelty. Under Divorce Act 1869, wife is not entitled to maintain Petition for divorce on the ground of cruelty alone, it should be coupled with adultery. This Original Petition No.15 of 2001 was filed on 09.02.2001 under Section 10 of Indian Divorce Act. Indian Divorce Act, 1869 was amended under Act 51 of 2001. Under Amended Act, Petition for divorce could be maintained either by the husband or wife for dissolution of marriage on the ground of adultery [Section 10 (1)(i)]; on the ground of cruelty [Section 10(1) (x)]. Under the Amended Act, it is not necessary both should be coupled together. Under Section 6 of the Act, all suits and proceedings in causes and matters matrimonial, which when Divorce Act comes into operation are pending in any High Court, shall be dealt with and decided by such Court, so far as may be, as if they had been originally instituted therein under Divorce Act. Under Section 7 of Amendment Act 51 of 2001, Court to act on principles of English Divorce Act [Omitted by Indian Divorce Act (Amendment) Act 2001 (51 of 2001), Section 4, (w.e.f. 3.10.2001)]. Even though Petition was filed on 09.02.2001, Amendment Act 51 of 2001 came into force on 03.10.2001 enabling "cruelty" as

one of the ground for divorce. In the facts and circumstances of the case, the learned Judge has rightly proceeded to consider the Petition for dissolution of marriage on the ground of "cruelty" alone.

32. In the result, this appeal is dismissed. Consequently, connected M.P. is closed. No costs.

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# RAJU @ AROKIA JESURAJ VERSUS MRS.V.VICTORIA

**Madras High Court**

**Bench : Hon'ble Mrs. Justice R. Banumathi & Hon'ble Mrs. Justice S. Vimala**

*Raju @ Arokia Jesuraj*
*Versus*
*Mrs.V.Victoria*

**C.M.A.No.614 of 2005**

**Decided on 1 March, 2012**

- **The lower Court came to the conclusion that the allegation of cruelty alleged by the appellant against the respondent has not been proved and therefore, the relief of divorce has been negatived.**
- **Contention of the appellant that the respondent caused mental cruelty to him,**
  - **a) by preferring false complaint against him and his family members;**
  - **b) by expressing her desire to postpone the pregnancy and also by not informing the pregnancy when she became pregnant; and**
  - **c) by compelling him to live along with her parents, so that she can utilise the income of herself and her husband to her parents family.**
- **Whether the acquittal of the accused persons in a criminal case would automatically lead to the irresistible conclusion that the complaint is false. By the mere acquittal, one cannot come to a definite conclusion that the complaint must be false.**
- **The appellant and the respondent got married on 12.6.2000. Therefore, it is evident that within one year of the marriage, the wife has delivered the child. The respondent became pregnant within two months of her marriage. Therefore, the contention that the respondent-wife went to the extent of postponing the conjugal relationship for the purpose of extending financial support to her family, especially when her family has been proved to be financially sound does not merit acceptance. Therefore, the allegation of cruelly as levelled by the husband against the wife is not proved. The finding of the trial court that appellant has not proved the cruelty also does not warrant any interference.**

## JUDGMENT

**Hon'ble Mrs. Justice S.Vimala**

The petition for divorce filed by the husband under Section 10(1) (x) of Indian Divorce Act, was dismissed by the Family Court, Coimbatore, in I.D.O.P.No.4 of 2002. Aggrieved over the dismissal of the petition, present appeal has been filed by the appellant/husband.

2. The case of Appellant/Petitioner are as follows:-

The marriage between the appellant and the respondent took place on 12.6.2000, according to Christian Customs. After the marriage, they lived as husband and wife at R.S.Puram, Coimbatore, i.e., at the residence of the appellant. The respondent wanted postponement of birth of the child on the ground that she wanted to give her salary to her parents. The husband also agreed for the request. Later, the respondent wanted to live with her parents with the plan in mind that income of both the appellant

and the respondent would go to her parents. The appellant was not agreeable to her suggestion. The respondent was reluctant to do any house hold activity. She did not inform about her pregnancy to the appellant and her family. Therefore, the appellant was put to shock and mental agony. The appellant felt deeply hurt by her conduct. The appellant advised the respondent not to go for the job as she was weak, but the wife wanted to continue the job in order to provide financial support to her parents.

3. On 11.10.2000, the respondent wanted the appellant to give six signed blank cheques to her father. When they went to the respondent's father's house, as the respondent's father was found in a drunken stage, the appellant enquired about the financial position. The parents of the respondent felt offended because of the enquiry and abused the petitioner. On the next day, when the appellant went to respondent's house to take her back, she refused to come. The respondent's parents were trying through the authorities functioning in the church and relatives of the petitioner to make the appellant to live in their house. But, the appellant was not ready for that proposal.

4. The respondent preferred complaint before All Women Police Station, R.S.Puram, on the allegation of dowry harassment. The respondent demanded return of her certificates, jewels and other articles. It was accordingly returned. Again, on 29.12.2000, the petitioner was arrested by All Women Police and the news regarding arrest was also published in newspapers. The respondent falsely implicated the whole family of the appellant.

5. The respondent's father gave a false complaint alleging that the appellant, his brother and his father made an attempt to kill him. The police registered the case and found the complaint to be false. The respondent demanded only money, when the mediators wanted her to come and live with the appellant. The respondent always threatened that she would prefer police complaint. There is no possibility of re-union. There is constant harassment and it amounts to mental cruelty. The marriage has broken down irretrievably. Hence, the marriage must be dissolved.

6. Case of the respondent:-

The respondent never wanted to postpone the birth of the child, as alleged by the appellant. There was no necessity to render financial support to her parents. The father of the respondent is a Government Servant, earning a good salary. After the marriage, respondent gave the salary only to the husband. The appellant deserted the respondent without any valid reason. It is the husband, who took the respondent to Doctor-Seeniammal and the Doctor after check-up informed the pregnancy to both the appellant and the respondent. It is only the appellant, who left the respondent in her parents' house. The respondent demanded a sum of Rs.2,00,000/- by way of dowry, in order to help her sister-kala to construct a house in Tuticorin. The respondent made repeated request, to return the dress and other articles. The behaviour of the appellant was not like that of a cultured person and he firmly told that he will not return the articles unless Rs.2,00,000/- is given by way of dowry. Only when the efforts for settlement failed, finally, she had to approach the police for assistance. The police advised the appellant to live with the respondent and only as a last resort, the police registered the case. There was no financial hurdle to the father of the respondent and therefore, there is no need for the respondent to request the appellant to sign in six blank cheques.

The appellant did not make any efforts to get her back much less through one Jayanthi. The respondent never requested the appellant to come and live with her parents. Hence, the petition must be dismissed.

7. Before the lower Court, PW1 to PW3 have been examined and Ex.P1 to Ex.P7 have been marked. On side of the respondent, respondent alone has been examined.

8. On the consideration of oral and documentary evidence, the lower Court came to the conclusion that the allegation of cruelty alleged by the appellant against the respondent has not been proved and therefore, the relief of divorce has been negatived. As against the fair and decretal order, the present appeal has been filed.

9. The appeal has been filed on the grounds raised are as follows:

   (i) The act of the respondent in preferring the false police complaint against the appellant and allowing the husband to suffer imprisonment for one week amounts to mental cruelty;

   (ii) In spite efforts taken by the appellant and his parents, it is only to the respondent, who refused to live with the appellant. The act of the respondent in not informing the news regarding her pregnancy amounts to causing mental cruelty to the appellant;

   (iii) The lower court is not correct in dismissing the petition.

10. Now the point for consideration is whether the order of the lower court refusing the relief of divorce on the ground that the allegation of cruelty is not proved is justifiable or not.

    Section 10(x) of Divorce Act, 1869 (4 of 1869) dealing with the grounds for dissolution of marriage reads as follows:-

    "Any marriage solemnized whether before or after the commencement of Indian Divorce (Amendment) Act, 2001, may, on a petition presented to the District Court either by the husband or the wife be dissolved on the ground that since the solemnization of the marriage, the respondent;

    i to ix. .....

    (x) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent".

    The legislature has not defined the word 'cruelty'. The idea, the meaning and the concept of cruelty changes from time to time, varies from place to place and differs from individual to individual. It is settled law that what constitutes cruelty depends upon circumstances of each particular case and it has to be judged on the totality of the circumstances. In this case, both the appellant and the respondent mutually allege cruelty against each other.

11. It is the contention of the appellant that the respondent caused mental cruelty to him,

    a) by preferring false complaint against him and his family members;

    b) by expressing her desire to postpone the pregnancy and also by not informing the pregnancy when she became pregnant; and

    c) by compelling him to live along with her parents, so that she can utilise the income of herself and her husband to her parents family.

12. On the other hand, the contention of the wife is that:

    a) The desertion and neglect and indifferent attitude exhibited by the husband in not taking her back, amounts to desertion and desertion itself caused mental cruelty to her.

    b) The complaint preferred was neither a false complaint nor a motivated complaint. The compelling circumstances created by the appellant had driven her to seek the assistance of police.

    c) the appellant never took any steps to take back the respondent.

13. Now it is for this Court to consider whether the conduct on the part of the respondent as alleged by the appellant would amount to mental cruelty.

14. It is the contention of the appellant that as the trial of case relating to dowry harassment ended in acquittal, the complaint of the wife is a false complaint and therefore, the conduct in preferring false complaint amounts to mental cruelty. According to the appellant, the act of the wife in preferring complaint of dowry harassment against the entire family members also amounts to cruelty. No doubt, allegation of false complaint by the wife preferred against the husband, if true, amounts to cruelty. But, mere preferring

of the complaint alone cannot be construed to be an act of cruelty. If that interpretation is given, then the very purpose of the law, which provides for protection of the society would become a mockery. If the complaint is found to be false, then naturally, it causes mental cruelty to the sufferer. Whether the complaint is true or not can be ascertained only by consideration of the holistic circumstances of the entire case. The contention of the husband is that the criminal court before which trial was conducted has acquitted the husband and their family members and therefore, the complaint preferred by the wife is false.

15. Now, the question is whether the acquittal of the accused persons in a criminal case would automatically lead to the irresistible conclusion that the complaint is false. By the mere acquittal, one cannot come to a definite conclusion that the complaint must be false. A case registered as per law may meet the fate of acquittal due to several reasons, i.e., procedural lapses (while registering the case, during investigation, incompetent presentation of the case, ineffective arguments etc.) not discharging burden of proof, technical defects and witnesses turning hostile etc. Therefore, only if the copy of the judgment is produced, then, it would be helpful to ascertain whether the complaint is false or not. Mere acquittal of the criminal case will not lead to the automatic conclusion that the accused persons are not guilty or that the complaint is false. But, in this case the appellant has not chosen to file the copy of the judgment, despite a specific question being put to the husband during cross-examination with regard to non-production of judgment. Moreover, the standard of proof required in a civil case is different from a criminal case. Preponderance of probability is the standard expected in the civil case, whereas proof beyond reasonable doubt is the standard expected in the criminal case. Therefore, unless, copy of the judgment is produced, this Court will not be in a position to find out the grounds for acquittal and whether the complaint of the wife is false or not. It is the duty of the appellant to produce the copy of the judgment especially, when he has taken a plea that the complaint is false. The non-production of the Judgment compels the Court to draw adverse inference that if the judgment is produced, it would be against the case of the husband. Therefore, the contention of the husband that the wife preferred false complaint is not proved. Consequently, the contention that the wife treated the petitioner with cruelty is also not proved.

    a. It is the case of the respondent that the appellant demanded a sum of Rs.2,00,000/- as dowry. It is the case of the appellant that the respondent lived with her father only to support him financially. As the respondent's father was a teacher, earning sufficiently there is no need for the respondent to support him. In the absence of valid reason, a newly married wife need not remain away from the husband. When the reason alleged by the appellant-husband is proved to be not correct, then the reason alleged by the respondent-wife must be true. Moreover the evidence available on record indicate that only when the appellant went to the extent of returning back to the dress materials, certificates and other articles , the respondent has chosen to prefer the complaint. Therefore, prima facie there are materials and circumstances for the respondent to prefer the police complaint. Therefore, the contention that the respondent preferred the false complaint cannot be accepted.

16. Relying upon Ex.A4, which is the certified copy of R.C.S.(referred charge sheet) No.449 of 2001, wherein the complaint given by Vincent, i.e., the father of the respondent against Shanmugasamy (father of the appellant) and others has been closed as false by Vadavalli police in Crime No.370 of 2000. The learned counsel for the appellant has contended that inasmuch as there is a positive finding that the complaint by the father of the respondent as false, then the Court must give a finding that the respondent is guilty of cruelty. Perusal of Ex.A5, reveals that the said complaint has been given on 20.12.2000. The sum and substance of the complaint is that the accused persons, i.e., the father of the appellant along with some others came to the school where the father of the respondent had been working and threatened and attacked him. While attacking the accused persons are said to have told that only if he (respondent's father) is alive, he will be able to go to police station to give a complaint and therefore, he must be done away with. Pursuant to this complaint, the complainant has been sent to Coimbatore Government Hospital with a memo. In the complaint itself, it is stated that the accused persons so behaved with the

respondent's father only because of the earlier complaint, dated 16.11.2000, preferred by the respondent which was under investigation.

16.A. The available materials thus indicate that there is enmity between the family of the appellant and the respondent because of the (a) earlier separation (b) earlier complaint. Under such circumstances, the Court has to be very careful in scrutinizing the evidence. It is not known whether copy of the referred charge sheet has been served on the complainant as per the procedure contemplated in the Criminal Procedure Code. That procedure permits the complainant to challenge the conclusion arrived at by the police. It is not known whether the procedure is adopted. As the decision taken by the police, is not final one cannot come to a definite conclusion, that the decision taken by the police authorities referring the case as false would be the correct decision and it is also the final decision. More over, it is not a complaint preferred by the respondent. She has stated in her evidence that she did not know anything about the complaint preferred by her father. The concerned police officer, who investigated the case ought to have been examined to show, the materials based on which the police authorities referred the case as false. Unless there are clenching evidence to show that the case is false, then, this Court cannot conclude that just because a criminal case has been referred by the police as false, then, automatically it becomes a false case.

17. The other allegations against the respondent are that she wanted to postpone the pregnancy and that even after she became pregnant, she did not inform the appellant. The main allegation is that only in order to financially support the parents family, the respondent did not exhibit any interest in having sexual relationship with the appellant. It is not the case of the husband that despite solvent condition of the wife's family still the wife wanted to give her salary to her family. It is an admitted fact that the father of the respondent is a teacher earning sufficiently. When the appellant was controverted as to the status of the sister of the respondent, (who remained unmarried and also working abroad) the respondent feigned knowledge. The only probable conclusion is that, the respondent with a view to probabilise his contention has feigned knowledge with regard to the status of the sister of the respondent.

18. The contention of the wife is that it is only when the husband took her to Doctor Seeniammal and the doctor after confirming the pregnancy informed both the husband and wife with regard to the pregnancy of the respondent. But, the contention of the husband is that the wife did not even take care to inform him about the pregnancy and that he came to know about the pregnancy only when the parents visited her. The contention of the appellant is unbelievable because the respondent, would have been interested to share this news first only with the appellant as a person who is responsible for the pregnancy. That would be the natural conduct of any wife. There are also circumstances to indicate that the respondent and his father had been requesting the husband to ake the wife back. Under such circumstances, the wife would have been anticipating and awaiting to share this news so that the opportunity of joining with the husband gets the required strength.

19. With regard to the allegations regarding postponement of the pregnancy that contention also appears to be improbable, because the following circumstances are strongly against the contention of the husband. Admittedly, the respondent had delivered the child in June, 2001. The appellant and the respondent got married on 12.6.2000. Therefore, it is evident that within one year of the marriage, the wife has delivered the child. The respondent became pregnant within two months of her marriage. Therefore, the contention that the respondent-wife went to the extent of postponing the conjugal relationship for the purpose of extending financial support to her family, especially when her family has been proved to be financially sound does not merit acceptance. Therefore, the allegation of cruelly as levelled by the husband against the wife is not proved. The finding of the trial court that appellant has not proved the cruelty also does not warrant any interference.

20. In the result, the Civil Miscellaneous Appeal is dismissed. No costs.

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# C. RAJAMANI VERSUS RATHNA BAI

**Madras High Court**

**O.M.S.No.50 of 1998 and A.No.5047 of 2008**

**Bench : Hon'ble Ms. Justice R. Mala**

*C.Rajamani ... Petitioner*
*Versus*
*Rathna Bai ... Respondent*

**Decided on 21 October, 2009**

- **This Petition has been filed for a declaration of the marriage solemnized on 22.01.1981 at Roman Catholic Church Thalayavattai Kanniyakumar District as null and void on the ground the same is vitiated by fraud or in the alternative for judicial separation on the grounds of desertion coupled with cruelty.**
- **Petition for decree of nullity- Such decree may be made on any of the following grounds:-**
  - **(1) that the respondent was impotent at the time of the marriage and at the time of the institution of the suit;**
  - **(2) that the parties was are within the prohibited degrees of consanguinity (whether natural or legal) or affinity;**
  - **(3) that either party was a lunatic or idiot at the time of marriage;**
  - **(4) that the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was then in force.**
- **It cannot be disputed that courts of law h ave the power to grant decrees which would be warranted by the facts of the case when such facts have been established by indisputable records even if they were not exactly pleaded by the parties.**
- **The Court has empowered to grant lessor relief on the basis of pleading and evidence before the court to meet out the ends of justice to the parties to the litigation.**
- **As per Section 73 of the Indian Evidence Act, the Court has every power to compare the writing of signature. There is no quarrel over the proposition laid down and especially, this document Ex.P.1 will not help to the case of the petitioner.**
- **Even though the petitioner/plaintiff has filed an application for dissolution of marriage on the ground of desertion and cruelty, after amendment he has not prayed for dissolution of marriage on the ground of desertion and cruelty. In the above said circumstances, he is not entitled for the relief of divorce on the ground of desertion and cruelty.**
- **Wife is entitled for maintenance of Rs.5,000/- per month from the petitioner from the date of the petition. She is also entitled for the right of residence in the petitioner's property till her life time.**

## JUDGMENT

This Petition has been filed for a declaration of the marriage solemnized on 22.01.1981 at Roman Catholic Church Thalayavattai Kanniyakumar District as null and void on the ground the same is vitiated by fraud or in the alternative for judicial separation on the grounds of desertion coupled with cruelty.

2. The averments in the petition is as follows:-

(i) The marriage between the petitioner and the respondent took place on 22.01.1981. The marriage was solemnized at Roman Catholic Church Thalayavattai at Kanniyakumar District. At the time of marriage 12 sovereigns of jewels were given along with a bank pass book with a deposit of Rs.10,000/- and the respondent is in custody of the jewels till he deserted the petitioner in the year 1995. The respondent did not mind for the welfare of the family and did not evince any interest in taking care of the petitioner. She behaved in such un-tolerable manner. She quarrelled with the petitioner for no fault on his part. She did not cook for a week or two. On another occasion, she blamed her fate for marrying the petitioner and scolded her parents for selecting the petitioner as her husband. She was atrocious and arrogant that quite often she used to go to her parents without any reason whatsoever and without the knowledge and consent of the petitioner and stay there for weeks. Sometime for months together. She also attempted to suicide by pouring kerosene on her and setting fire. The respondent made the matrimonial home a hell and the petitioner was put to great and serious mental agony by the indecent and improper behaviour of the respondent. Since the said occurrence took place, not ones in the blue moon, but as a matter of regular recurrences.

The petitioner never changed his treatment and approach to the respondent and treated her as he was treating her earlier, with the sole expectation that she would correct herself and become a family woman of normal wisdom. The respondent was unable to give birth to a child due to her physical infirmity. The impossibility of the respondent to conceive a child did not play any part to diminish the love and affection of the petitioner towards the respondent. The petitioner used to console himself and pacify his near and dear who used to worry for the absence of a child. He took all efforts to get rid of the infirmity of the respondent and arrange for medical treatment. She was treated by the famous Gynecologists, Dr.Joseph and Dr.Kamala Selvaraj. All the best treatment resulted in vain and it was found that it was impossible for the respondent to give birth to a child. The petitioner has spent Rs.80,000/- as medical expenses. Yet the petitioner did not hate her not was there any fail in the love and affection he had to her. (ii) But the behaviour of the respondent intolerable causing mental agony and though she was not able to give him a child, he did not mind under the bonafide hope in course of time, she would mend herself and proceed in the normal path as other house wives. The petitioner had been to the native place in the first week of September 1995 in connection with the marriage of the daughter of his brother which was celebrated on 11.9.1995.

The respondent refused to come to the village and did not attend the marriage of her in laws daughter. During the absence of the petitioner, the respondent deliberately and with ulterior motive got admitted herself in the hospital for no complaint whatsoever. She did not choose to send any message to the petitioner nor did she choose to get the consent of the petitioner. She got admitted in the G.G. Hospital, Chennai from 09.09.1995 onwards. The same came to be known to the petitioner from the hospital people that she was not having no specific complaints. On 27.09.1995, the respondent came to the house with a female child stating that the child was her child. The same was a terrible shock to the petitioner, who had been tolerating from the inception all the improper acts of the respondent and suffering. He repeatedly asserted that it was her child and she gave birth to the child . She also manipulated, forged and created certain documents in the Hospital and also outside the hospital to make it appear that she gave birth to a child. She also not able to answer the query and question in that regard. She admitted that she hired the child

on paying money. As the truth come out to light she felt ashamed for attempting to defraud and cheat the petitioner. She refused to live with the petitioner since her foul play was found out on 29.9.1995 with her jewels , bags and packages and thereafter she never attempted to return nor did she care to return to the petitioner's house and render conjugal obligation. He had also taken steps for dropping the proceedings against the respondent. That apart continuous mental agony, suffering , harassment of the respondent affected his health very badly and he became a diabetic. So it is impossible for the petitioner to live with her as there is no scope for correcting and mending herself. That apart she deserted the petitioner without any reasonable cause or excuse and has been living in her parent's house with her parents for the past more than 2 3/4 years. Hence, he is constrained to file this petition and approached the Court for grant of divorce or in the alternative for judicial separation on the ground of desertion coupled with cruelty.

3. The gist and essence in the counter affidavit filed by the respondent is as follows:

(i) This Court has no territorial jurisdiction . Hence, prayed for dismissal of this petition.

(ii) At the time of marriage 35 sovereigns of jewels, Rs.40,000/- cash and Rs.10,000/- Bank deposit were given as dowry. As per the custom prevailing in Kanyakumari District the marriage expenses at the residence of the petitioner and respondent would be met by respective parties. Apart from that enough household articles, utensils and other items were presented at the time of marriage. The respondent had behaved like a dutiful wife and also co-operated with the petitioner with kindness and affection. The averment in paragraph 4 and 5 of the petition is false, baseless and imaginary.

Unfortunately, the respondent is not able to bear the child to the petitioner. This is not the fault of the respondent. So far no Doctor has given any opinion that this respondent cannot bear a child. Unfortunately, the petitioner had no patience which had created so much for the respondent. The petitioner had always hated this respondent for the reason that she had not bear a child. It is false to contend that the petitioner has spent Rs.80,000/- towards medical expenses. Per contra, the parents of the respondent alone has given the medical expenses of the petitioner and the respondent. The petitioner had admitted the respondent in G.G. Hospital on 09.09.1994 for IVF test. The petitioner has left Madras without informing the respondent. He wantonly admitted her in the hospital and left to attend the marriage of his brother's daughter. The averment that on 27.9.95, this respondent came to the house with a female child is absolutely false. It is also false to contend that the respondent has manipulated certain documents in the hospital. It is also false to say that at the time of marriage the petitioner was informed that the respondent had passed the degree. It was informed that the respondent has not passed a degree course. The story of the child is to all imaginary. The respondent has not taken her jewels or any other belongings from the house of the petitioner so far. The jewels, dress and other household articles of the respondent are still with the petitioner. The petitioner has resigned the job in Hindustan Motors at Thiruvallur with oblique motive. The petitioner was sent away the respondent with a sole object of having a second marriage.

Ultimately, the petitioner had married one Mrs. Selin, daughter of Ponnumani who got a female baby also. The petitioner had taken this respondent to the native place in July 1996 and thereafter he did not turn up because of the second marriage. The petitioner had deserted the respondent.

(iii) So, the respondent alone with her mother came to Madras on 13.10.1996 and thereafter only they came to know that the petitioner had shifted his residence to No.20, Periyar Ist Cross Street, Padi. Probably, after the second marriage he did not want to stay in the said house. The respondent has given a complaint to the Koratur Police Station. The police has not taken any action. The respondent submits that Plot No.20, Periyar Ist Cross Street was purchased out of the cash given by the parents of this respondent. The Bank deposit of this respondent of Rs.10,000/- was also utilised

for the purpose of purchase of the plot. She is unemployed. He had let out the residence at No.20, Periyar, Ist Cross Street, Padi for huge rents and enjoying the benefits along with his second wife.

Hence, prayed for the dismissal of this application.

4. After hearing the arguments on both sides, counsel and perused the materials available on records. The following issues were framed for trial:

1. Whether the plaintiff is entitled to dissolution of marriage on the ground of desertion and cruelty?
2. Whether the plaintiff is entitled to the alternative relief of judicial separation on the ground of desertion coupled with cruelty?
3. To what other reliefs the plaintiff is entitled?"

5. The additional issues was framed as to whether the plaintiff is entitled to declare that the marriage solemnised on 22.1.1981 between the petitioner and the respondent is null and void on the ground that the same is vitiated by fraud.

6. Additional Issue : On the side of the petitioner P.W.1 was examined and Exs.P1 to P11 were marked. On the respondent side, R.W.1 was examined and Exs.R.1 to R16 were marked.

7. During the pendency of the trial, the respondent/wife has preferred this application 1542 of 2008 for claiming monthly maintenance of Rs.10,000/- from the date of filing of O.M.S.No.50 of 1990 and claiming Rs.20,000/- being the litigation expenses. At present, the respondent is owning house and commercial property worth of Rs.1.5 Crore at Srinivasa Nagar, Padi, Chennai-50 (4 Commercial & Industrial shops, 6 houses) and about Rs.25 lakhs worth of house building and lands at Nadikavoo near Nagerkoil and also doing real estate and money lending business and is getting monthly income not less than Rs.40,000/-

8. It is an admitted fact that arranged marriage has been solemnized between the petitioner and the respondent at Roman Catholic Church, Thalayavattai Kanniyakumar District on 22.1.1981. Even though the plaintiff has filed this suit under Section 21 of the Indian Divorce Act, 1869 for declaration of marriage between the petitioner and respondent as null and void on the ground the same is vitiated by fraud or in the alternative for judicial separation on the grounds of desertion coupled with cruelty.

9. Section 18 and 19 of the Indian Divorce Act is as follows:

18. Petition for decree of nullity- Any husband or wife may present a petition to the District praying that his or her marriage may be declared null and void.

Objects and Reasons- Clause 14- This clause seeks to amend section 18 of the Act relating to petition for decree of nullity. The omission of the words" or to the High Court" as proposed in this clause is consequential to the amendment proposed in section 10.

19. Ground of decree.- Such decree may be made on any of the following grounds:-

(1) that the respondent was impotent at the time of the marriage and at the time of the institution of the suit;

(2) that the parties was are within the prohibited degrees of consanguinity (whether natural or legal) or affinity;

(3) that either party was a lunatic or idiot at the time of marriage;

(4) that the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was then in force.

Nothing in this section shall affect the jurisdiction of the District Court to make decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud."

10. But It is contented by the learned counsel for the petitioner that during the trial only he came to know that the respondent/wife has played fraud and obtained consent for marriage since she has not attained puberty. She is not capable of performing conjugality. Hence, she has wantonly suppressed the same and marriage has been performed and fraud has been played by this respondent. Hence the marriage is vitiated by fraud. It is pertinent to note that it is the duty of the petitioner to plead the fraud and prove the same. It is appropriate to incorporate Order VI Rule 4 of CPC. It is as follows:

"Particulars to be given where necessary- In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars with dates and items (if necessary) shall be stated in the pleading"

11. It is pertinent to note that the petitioner has not averred anything about the fraud alleged to be committed by this respondent/wife for obtaining consent from this petitioner. He has merely amended the prayer column. It is pertinent to note that the petition to amend the plaint has been filed which has been dismissed. Against that he has preferred an appeal in that only amendment has been allowed. On that basis the amendment has been carried out. Even for that he has not pleaded. As per Order 6 Rule 4 of CPC fraud is to be pleaded by the person and proved by the person who pleaded. But the petitioner has not pleaded.

12. In the above said circumstances, the arguments advanced by the learned counsel for the petitioner that the marriage between the petitioner and respondent as null and void on the ground the same is vitiated by fraud is unacceptable one.

13. Learned counsel for the respondent has raised a plea that this Court has no jurisdiction to entertain this suit. At this juncture, the learned counsel for the petitioner would rely upon the decisions reported in AIR 1978 KARNATAKA 69 (A.JAYARAJ V. M. FLORENCE) wherein it is held as follows:

"So far as the decree of nullity of marriage on the ground of force or fraud is concerned, the same can be obtained only by presenting a petition to the High Court which has a residuary jurisdiction to deal with a petition for dissolution of marriage on the ground that consent of either party was obtained by force or fraud. Thus, the District Court has no jurisdiction to entertain a petition for declaration of nullity of marriage on the ground that the consent of either party to the marriage was obtained by force or fraud.

(i) The counsel has also relied on the decision of AIR 1982 ORISSA 37 (RANJUK RANJAN DAS V. PRANATI KUMARI) wherein it is held as follows:

"In so far as the dissolution of marriage and nullity of marriage on the specific grounds stated in S.19 are concerned both the District Court and the High Court have concurrent jurisdiction and when the case is one for declaration of nullity of marriage on the ground of force or fraud the exclusive jurisdiction of the High Court is saved"

(ii) Further he relied on the decision reported in AIR 1993 BOMBAY 61 wherein it is held that "Both District Court and High Court have concurrent jurisdiction"

While considering the above citation the District Court and High Court have a concurrent jurisdiction to entertain this suit for dissolution of marriage and annulment of marriage. Hence, the argument advanced by the learned respondent counsel that this Court has no jurisdiction does not merit acceptance.

14. Learned counsel for the respondent would contend that the application has been filed belatedly stating that the respondent/wife is concealing something and prayed fraud and obtained consent for the marriage. So the marriage itself is void. The marriage has taken place on 22.1.1981. He filed application in 1998. Therefore there is a delay. The learned counsel appearing for the petitioner has relied upon the decision reported in 1(2001) DMC 640 (SC) (D.BALAKRISHNAN V.PAVALAMANI) and urged that in the matrimonial matter there is no limitation and "annulment of marriage:

Non-consummation of marriage due to impotency: petition filed 10 years after marriage:petition cannot be held barred by limitation".

15. It is true in matrimonial matter, there is no limitation. But however, this citation is not applicable to the facts of the case because the marriage has been consummated that admittedly the petitioner/P.W.1 himself has taken the respondent/wife to hospital and took treatment to begot child. As per the documents filed by him and oral testimony of both the parties P.W.1 and R.W.1 corroborated the same. In the above said circumstances the above citation is not applicable.

16. Learned counsel for the petitioner relied upon the following decision in support of his contention that the marriage between the petitioner and respondent as null and void:

"1 (1991) DMC 576 (Valsa Vs. Moore) "12.The contentions raised by the respondent regarding the rheumatic arthritis of the heart of the petitioner is not supported by any evidence. Exts. R3 to R5 do not support the same. Ext.R5 shows that Ayurvedic Physician prescribed 'Sukumara Ghrutham' to the petitioner. The medicine even according to CPW-I is one to have easy conception. The respondent took the petitioner to Ayurvedic Physician and got 'Sukumara Ghrutham' prescribed. According to him 'Sukumara Ghrutham' is prescribed for easy conception because she did not conceive. From this it is evident that even at the time when the petitioner was taken to the Ayurvedic Physician, she was not told about the vasectomy operation underwent by the respondent. By that operation he become sterile. Thereafter, I fail to understand why he got 'Sukumara Ghrutham' administered to her for easy conception. This action of the respondent goes a long way to establish the case of the petitioner that fraud was played by him in getting the consent of the petitioner. That fraud was continued to be played even after the marriage. So, I have no hesitation in holding that the marriage between the parties has to be declared as nullity on the ground that the consent of the petitioner was obtained by respondent by playing fraud."

II (1998) DMC 357 (DB) (Bindu Sharma Vs. Ram Prakash Sharma "10. From the evidence of the parties and in the facts and circumstances of the case, it is established that respondent No.1 had made false statements to the petitioner that he was employed on monthly salary of Rs.1,700/- in the Sugar Factory and he induced the petitioner to give assent for marriage on the basis that mis-representation and, therefore, the petition for annulment of marriage has to be decreed."

AIR 1992 KERALA 176 (P.J. Moore Vs. Valsa "One of the sublime objects of married life is to have offsprings. This is not merely a traditional view, but an established truth which transcends ages and has universal acceptance. Motherhood is one of the cravings of a normal woman. No authority need be cited to support this philosophy. Parties enter into marriage alliance on the assumption that they would become father and mother in due course of time. If a person became incapable of procreation through act of man such as a surgery, he is under a basic duty to disclose that fact to the other party who wishes to join him in the wed-lock. Non-disclosure of this vital information which goes to the root of the married life amounts to fraud in matrimonial relationship. Consent, given by one spouse without knowledge of this basic defect in the other spouse, stands vitiated and tainted. It is open to the affected spouse to petition that his or her consent was wangled by fraud."

2001 (1) Civ.C.R. 826 (Mad) D.Balakrishnan Vs. Pavalamani "10. In the light of the medical evidence as seen from C.Ws.1 and 2 and Exs. C.1 and C.2 it is proved beyond doubt that the appellant/husband is impotent. We have already stated that in the petition the wife has claimed for nullity of marriage or in the alternative for divorce on the ground of non-consummation of marriage. The learned Family Court Judge in para 15 after holding that, inasmuch as the marriage was celebrated on 10.06.1982 and the wife has filed the present petition for divorce only on 11.07.1992, i.e., 10 years after the marriage, came to a conclusion that nullity of marriage cannot be awarded as it is barred by the provisions of the Act. After saying so, inasmuch as she had proved her case that the marriage is not consummated and as per expert evidence she continued to be virgin and her husband is impotent, granted a decree for divorce."

AIR 1982 ORISSA 37 Ranjuk Ranjan Das VS. Smt.Pranati Kumari Behera "In so far as dissolution of marriage and nullity of marriage on the specific grounds stated in S.19 are concerned both the District Court and the High Court have concurrent jurisdiction and when the case is one for declaration of nullity of marriage on the ground of force or fraud the exclusive jurisdiction of the High Court is saved."

Per contra the learned counsel for the respondent would rely upon the following decisions:

A.I.R.1937 Privy Council 146 Bharat Dharma Syndicate, Ltd., vs. Harish Chandra Where a litigant prefers the charges of fraud or other improper conduct against the other party, the tribunal, which is called upon to decide such issues should compel that litigant to place on record precise and specific details of these charges. Cases of such type will be much simplified if this Practice is strictly observed and insisted upon by the Court, even if no objection is taken on behalf of the parties who are interested in disproving the accusations.

..... Before parting with this case their Lordships desire to call attention to the great difficulty which is occasioned both to persons charged with fraud or other improper conduct, and to the Tribunals which are called upon to decide such issues, if the litigant who prefers the charges is not compelled to place on record precise and specific details of those charges. In the present case the petitioner ought not to have been allowed to proceed with his petition and seek to prove fraud, unless and until he had, upon such terms as the Court thought fit to impose, amended his petition by including therein full particulars of the allegations which he intended to prove. Such cases as the present will be much simplified if this practice is strictly observed and insisted upon by the Court, even if, as in the present case, no objection is taken on behalf of the parties who are interested in disproving the accusations.

I(2007) DMC 878 (DB) E.G.Ravi v. Jayashree

10. With respect to the alleged ground of impotency, C.W.1 Dr.Kuppulaxmi, who examined the respondent wife, has deposed that the respondent was physically fit for marital obligations. C.W.1 issued Ex. C-1 stating that the respondent was subjected to sexual relationship. C.W.2, a psychiatrist, examined the respondent and found that the respondent was a normal woman and fit for the marital life. The medical testimony being the evidence of experts would not leave the Court from the obligation of satisfying itself on the point in issue beyond reasonable doubt and the relevance of a medical evidence, therefore, cannot be disputed. [vide:sharda v. Dharmpal, III (2003) SLT 1= I(2003) DMC 627(SC)=(2003) 4 SCC 493. In this view of the matter, we are of the view that the petition has to file on the ground of impotency also. Probably, as observed by the Family Court, the respondent wife might not have matured enough at the time of marriage to perform her part of marital obligations, but that by itself would not be a ground for the petitioner husband to seek nullity of marriage."

9. Regarding non-consummation of marriage, what happened within the four walls with closed doors is known only to the petitioner husband and the respondent wife. Though it is contended on behalf of the petitioner husband that the respondent had not submitted herself to the marital relationship and on the ground of non-consummation of marriage, the petition is to be allowed, as already noticed, the petitioner husband in his cross-examination has admitted that he did not inform any body of the sexual aversion of the respondent wife whereas the respondent wife has categorically stated that the marriage got consummated on the date of marriage itself. That apart, Ex.C-1 certificate shows that the respondent was subjected to sexual relationship. Therefore, it cannot be stated that the petitioner husband has proved that the marriage was not consummated."

17. Considering the above citations along with the evidence on record, it is true that the respondent/wife has not played fraud upon the petitioner for obtaining consent for marriage. To the contrary, the marriage is an arranged one. Before the marriage, in December 1980, P.W.1 had gone to Madurai where R.W.1 was working and after seeing this bride both liked each other and betrothal has been conducted. Then

only the marriage has been performed. The only ground of fraud mentioned by this P.W.1 is that the respondent is not able to begot child and urged that she has not attained puberty and she had wantonly suppressed the fact. Therefore the marriage is void.

18. While considering the arguments of both the counsel except for the evidences of P.W.1 and R.W.1, no other evidence is available.

19. While considering the doctor's medical prescription and other report it is shown, the respondent has attained puberty and menstruation cycle is regular. Sometimes it was irregular and sometimes induced by way of medicines. If really she has not attained puberty she will not be fit for marital life. If she is really not attained puberty she will not be treated by the doctors for begotting child. P.W.1 himself admitted that he has taken his wife to doctor since she has not begotten child. She was treated by Dr. Joseph and that report has been marked as Ex.P2. In that it is stated that Laproscopy was done on 22.10.83. More over since she was admitted in GG Hospital, treatment has been given in that report viz., Ex.R.15, it was stated menarche moderate and menses irregular. So it is clearly proved that since she has attained puberty and then only the doctors have given treatment in the fertility research centre for IVF test. So considering the same since she has attained puberty poly cystic ovary is not amount to impotency.

20. In the above said circumstances, I am of the view that the arguments advanced by the learned counsel for the petitioner that she is impotent and that she has not attained puberty but she has obtained consent concealing the fact does not hold good. Therefore, I am of the opinion that the so far declaration that marriage is null and void is not acceptable. In the above said circumstances, the plaintiff has miserably failed to prove that the respondent wife is not attained puberty before his marriage and obtained consent from this petitioner for marriage concealing the fact that she has not attained puberty. So, there is no fraud on the side of the respondent for obtaining consent for marriage. So the marriage is not vitiated as per the provisions of Sections 18 and 19 of Divorce Act.

So, the Additional Issue No.1 is answered against this petitioner and in favour of this respondent.

21. Issue Nos.1 and 2 : The learned counsel for the petitioner would contend that even if the court comes to a conclusion that marriage is null and void, at this juncture, the petitioner is entitled for a decree of divorce on the ground of desertion and cruelty. He relied upon a decision reported in Ramish Francis Toppo v. Violet Francis Toppo, AIR 1989 Calcutta 128, in which it is held as follows:

"...But under S.45 of the Act the proceedings thereunder are regulated by the Civil P.C. Whereunder the Court is always entitled to grant a lesser or other relief if the materials on record justify such grant...."

The learned counsel also relied upon a decision reported in S.M.Ispahani and another v. Harrington House School by its Hon. Secretary, No.21, Dr.Thirumurthy Nagar Main Road, Nungambakkam, Madras-34, 2000(I) CTC 634 and submits that in the absence of proper pleading, the Court has a power to decree which would be warranted by facts established by records even if there is no pleading to that effect. In that decision, it is held as follows:

"12. In Madavan v. Kannammalam, 1989 (1) MLJ 136 : 1992 (2) LW 274 Srinivasan, J. as the Learned Judge then was has stated the principle as follows:

"The principle that it is not open to a plaintiff to abandon his own case and claim relief on the basis of the defendant's case can be invoked only in cases where the plaintiff having failed to prove the case with which he approached the court seeks to rely on the pleading of the defendant to secure a relief and not to cases where the plaintiff prays for relief on the basis of facts established by the record in the case though they are at variance with his pleading. .... It cannot be disputed that courts of law h ave the power to grant decrees which would be warranted by the facts of the case when such facts have been established by indisputable records even if they were not exactly pleaded by the parties."

22. It is well settled principle of law that the Court has empowered to grant lessor relief on the basis of pleading and evidence before the court to meet out the ends of justice to the parties to the litigation. But keeping it that in mind, while considering the evidence and pleading, the petitioner/plaintiff has filed a suit for dissolution of marriage on the ground of desertion and cruelty and alternatively for judicial separation. After P.W.1 was examined, he has amended the prayer for decree of nullity of marriage stating that the respondent is impotent, not attained puberty and she is not capable of begot child. Hence the marriage is void.

23. The learned counsel for the petitioner would focus mainly upon the argument that RW.1 wife is so far not conceived as she is having poly cystic ovary and she also underwent a surgery. At this juncture, the learned counsel appearing for the respondent would contend that the Medical Report filed by the petitioner has not been an admissible evidence, since the author of the document was not before the Court. He also relied upon the decision reported in Municipal Corporation of City of Ahmedabad, v. Gandhi Shantilal Girdharlal and another, AIR 1961 Gujarat 196 and Bommidala Poornaish v. The Union of India, AIR 1967 Andhra Pradesh 338.

24. It is true that if the Court wants to rely upon the opinion of the expert, the expert/author of the document to be examined. Because he would be subjected to cross-examination by the other side. Here he has not examined anyone of the doctors to prove the opinion. At this juncture, the learned counsel for the petitioner would contend that most of the documents are only a prescription and discharge report. To prove that, he has given proper treatment for his wife and given a treatment from 1981 to till she left the matrimonial home in 1995 due to his affection towards his wife. But she is not able to begot child as she is having follicies and the same was mentioned in the Medical Report as follows:

"In PCOS, these follicles remain immature, never growing to full development or ovulating to produce an egg capable of being fertilised. For the woman, this means that she rarely ovulates (releases an egg) and so is less fertile. In addition, she does not have regular periods and may go for many weeks without a period. Other features of the condition are excess weight and excess body hair."

It is true that she has not give birth to a child. So, the decision relied upon by the learned counsel for the petitioner in Jagannath Mudali v. Nirupama Behera, 2009(1) Civ.C.R.37 (Ori.) that a wife who is not fit to have sex or beget child would be a very just and reasonable ground on the part of a husband to refuse to live with wife on such ground, the marriage of the parties declared null and void. In that decision, it is held as follows:

"Marriage under the Hindu Law is not a pure religious ceremony. A wife who is not fit to have sex or beget child would be a very just and reasonable ground on the part of a husband to refuse to live with wife on such ground either under the Hindu Law, Mohammedan Law or as a matter of fact any other law. Here is the case where the appellant-husband is forced or compelled to live a life of celibacy while staying with the respondent-wife who is unable to have sexual relationship with him..."

But here after marriage she has taken treatment from Dr.Joseph and Dr.Kamala Selvaraj for having begot child. In such circumstances, the marriage has been consummated. Therefore, the decision relied upon by the learned counsel for the petitioner that she is not fit to have sex or begot child would be an unacceptable one. He also relied upon the decision reported in Geeta Devi Vs. Harish Kumar @ Purshottam and others, II (1996) DMC 551 in which it is held as follows:

"She also admitted that she did not mensurate till marriage. No treatment was done. She did not disclose this fact to her parents. She never tried to know as to why there was no mensuration. She admitted that she knew what was vagina, uterus. She, however, did not know what is cervix. The statements of other witnesses examined by either party cannot help in determining the fact as to whether the lady had female organs or not. Only the husband and lady can depose about it. The question as to who is to be believed can be determined with reference to the medical evidence on record. Before dealing with the medical

evidence, I may mention that if it was a fact that the lady was subjected to sexual intercourse, as stated by her, she could have obtained a medical report in this regard and the Doctor would have given an opinion that she was used to sexual intercourse but no effort whatsoever was made on her behalf. There is nothing on record to show that she ever tried to obtain such an evidence. An adverse presumption can, therefore, be made against her."

In this case both the petitioner and the respondent are living together as husband and wife and she has taken treatment for begot child. Therefore, the above stand is not applicable.

25. Now the learned counsel mainly focussing upon his argument to the effect that the respondent was subjected to cruelty since she has not begot child and she has stolen a child from the G.G. Hospital stating that as if she given birth to a child and she created a document which is marked as Ex.P.1 as if Dr.Kamala Selvaraj has sent a letter to her in respect of her pregnancy. All these documents have concocted one. At this juncture, he relied upon two decisions reported in Kalaimani and another v. Chinnapaiyan @ Perumal Gounder, (2005) 1 MLJ 54 and T.P.Mani and another vs. Krishnan, 2007-3-L.W.196. In Kalaimani and another v. Chinnapaiyan @ Perumal Gounder, (2005) 1 MLJ 54, it is held as follows:

"In addition to the modes of proving the handwriting as provided by Sections 45 and 47 of the Indian Evidence Act, Sec.73 of the Act provides another mode by direct comparison of the disputed signatures or written or finger impression with one, which is admittedly genuine or proved to be so. Section 73 of the Indian Evidence Act enables the Court using its own eyes to compare the disputed signatures with the admitted signatures."

and in T.P.Mani and another vs. Krishnan, 2007-3-L.W.196, it is held as follows:

"The learned Trial Judge has correctly come to the conclusion that it is always open to the court by invoking the powers under Section 73 of the Indian Evidence Act, to compare the signature of the defendants in the disputed document dated 16.12.1997 and the admitted signature available in the court.

In such circumstances, it is premature for the petitioners who have filed the application for sending the documents for experts opinion. It is for the Trial Court at the time of trial, to compare the signature in the disputed document Ex.A.1 along with the admitted signatures of the defendants and come to a conclusion, as per Section 73."

As per Section 73 of the Indian Evidence Act, the Court has every power to compare the writing of signature. There is no quarrel over the proposition laid down and especially, this document Ex.P.1 will not help to the case of the petitioner.

26. The learned counsel would contend that the petitioner has stolen a female baby from the G.G. Hospital stating that as if she has given birth to a child and this fact has been denied by R.W.1. Per contra, R.W.1 in her evidence stated that since her husband wants to adopt a child and a lady staff working at G.G. Hospital is having a female child, wants to hand over the same to her and she brought the child to her home and after seeing the child, the petitioner refused to take the child in adoption since the child was dark and female. It is stated in her cross-examination as follows:

"... The petitioner used to tell we have to adopt a child. A lady who was working in the G.G.Hospital who had a female child asked me to take the child. After seeing the female child, the petitioner told the female child was black and he refused to take child and he told it is better if it was a male child...."

Therefore, she denied the averement made by the petitioner. So the story narrated by the petitioner that the respondent has stolen a female baby from the G.G. Hospital is unacceptable one.

27. The learned counsel for the respondent would contend that she has given a complaint against her husband/the petitioner herein and others. She has also made character assassination against him which defame his reputation before the society. Consequently, he lost reputation in the society and it amounts

to cruelty. He also relied upon the decision reported in G.V.N.Kameswara Rao Vs. G.J.Billi, (2002) 2 Supreme Court Cases 296, it which it is held as follows:

""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 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."

28. At this juncture, while perusing the evidence of P.W.1, it is seen that the petitioner has denied the suggestion that he attempted to evict the respondent and driven her away from the portion by engaging goondas on 7.7.2004. It is not correct to say that the respondent has given complaint to the police, but no action was taken in this regard. It is stated as follows in the evidence of P.W.1 :

"I deny the suggestion that I attempted to evict the respondent and drive her away from her portion by engaging goondas on 07.07.2004. It is not correct to state that the respondent had given complaint to police but no action was taken in this regard. I deny the suggestion that my maid had removed 12 sovereign chain and 10 silk saris from the portion of the respondent. I do not know whether the respondent had filed criminal O.P.No.25090 of 2004 and the direction was given by this Hon'ble Court to the concern police. I do not know whether police took action only after the respondent filed contempt petition."

At this juncture, it is pertinent to note that he is gone to the extent of saying that he is having three children through one Selin. He has deposed as follows:

"I have two daughters Sowmya, Ramya and one son by name Stalin Raja. All the three children are studying in Vellammal School. The above children were born through one maid by name Celen who was looking after all the house hold duties after respondent left the matrimonial house."

It shows that the petitioner is having illicit intimacy with one Selin. Hence he has driven out his wife from the matrimonial house.

29. At this juncture, it is appropriate on the part of the court to consider the evidence of R.W.1. R.W.1 in his evidence has made allegation of character assassination against this petitioner. In his cross-examination, she has stated that she has given a complaint against the petitioner stating that he had some illicit intimacy with one Mini, daughter of a teacher. In that complaint, she has also stated that the petitioner had illicit intimacy with one Dasammal and also having illicit intimacy with one Selin and he had such intimacy after sending her to her native place and he subsequently married her. That complaint has been marked as Ex.R.7. It is true that she has also filed a Criminal Original Petition Ex.R.8 seeking direction against the respondent to provide necessary protection for her peaceful living in the house. It is true that the cruelty includes mental as well as physical cruelty. It depends upon each and every person who met out in a matrimonial matter. The cruelty will be weighed on the facts and circumstances of each case.

30. Considering the situation that since the respondent was driven out from the matrimonial home and the petitioner is having illicit intimacy with one Selin and given birth of three children and when she returned back, she was driven out from the house where she was put up, she filed Criminal Original Petition seeking direction not to harass by the respondent. Considering the fact that merely giving a police complaint would not amount to mental cruelty, the respondent has driven out from the matrimonial home and since the petitioner had an illegal intimacy with a maid and given birth of three children and

now he wants to recognize the status of that maid Selin, he has come forward with this divorce petition. In the above said circumstances, I am of the opinion that the arguments advanced by the learned counsel for the petitioner that the petitioner was subjected to mental cruelty is an unacceptable one and it is not a ground for divorce.

31. The learned counsel for the petitioner also relied upon a decision reported in Dr.Gopal Ramanathan vs. Jayashree, 2008-3-L.W.864 since the above said decision deals with difference of opinion between both the parties. But here as per the decision reported in Supreme Court merely because the marriage is irrefutable protection, had been the petitioner is not entitled for divorce. Because, the plaintiff/respondent has not begot child and as he had an illegal intimacy with one Selin and given birth to three children, he wanted to lead a happy successful life, he driven out his wife and now he is living with Selin and three children and sought for divorce. So, I am of the opinion that mere irrefutable protection arising out of marriage is not a reason for divorce as per the rulings of the Apex Court.

32. Another ground raised by the petitioner is that he is entitled for divorce on the ground of desertion. While considering the evidence of R.W.1, it is stated that she was driven out by the petitioner to her native place and then he is living with Selin and three children. When she returned back, he was not permitted by the petitioner to enter into the matrimonial home and she is living in a separate house owned by the petitioner herein and he is taking steps to drive her out. While dissolution is defined in Section 10, but there must be an animus on the part of the person deserting house to dissolve the marriage. Section 10 is extracted here under :

"10. Grounds for dissolution of marriage : (1) Any marriage solemnized whether before or after the commencement of the Indian Divorce (Amendment) Act, 2001, may on a petition presented to the District Court either by the husband or the wife, be dissolved on the ground that since the solemnization of the marriage, the respondent :

i. has committed adultery; or

ii. has ceased to be Christian by conversion to another religion; or

iii. has been incurably of unsound mind for a continuous period of not less than two years immediately preceding the presentation of the petition; or

iv. has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy; or

v. has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form; or

vi. 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 the respondent if the respondent had been alive; or

vii. has wilfully refused to consummate the marriage and the marriage has not therefore been consummated; or

viii. has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after passing of the decree against the respondent, or

ix. has deserted the petitioner for at least two years immediately preceding the presentation of the petition; or

x. has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent.

2. A wife may also present a petition for the dissolution of her marriage on the ground that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality."

Here there is no evidence before this Court to show that the respondent has deserted the petitioner with an animus to dissolve the marriage, severe the marital tie, she left the matrimonial home and residing out of the matrimonial home. Per contra, the petitioner has himself driven out his wife from the matrimonial home and not permitted after she returned from her native place. She has not permitted to enter the matrimonial home and he sought for divorce on the ground of desertion. The wrong doer cannot seek remedy for his own wrong.

33. In the original petition, he sought for the following reliefs:

a. For dissolution of the marriage between the petitioner and the respondent on the grounds of desertion and cruelty or in the alternative for judicial separation on the ground of desertion coupled with cruelty :

b. For cost of suit and c. For such or other orders as this Hon'ble Court may deem fit and proper under the circumstances of the case.

After amendment, the 1st relief was amended as follows:

*a. Declare the marriage solemnized on 22.1.1981 at Roman Catholic Church Thalayavattai, Kanniyakumari District as null and void on the ground the same is vitiated by fraud* or in the alternative for judicial separation on the grounds of desertion coupled with cruelty;

The relief sought for by the petitioner originally as to whether he is entitled for dissolution of marriage on the ground of desertion and cruelty has been amended by the petitioner to declare the marriage as null and void and alternative relief of judicial separation. So I am of the opinion that the petitioner is not entitled for judicial separation on the ground of desertion also.

34. Even though the petitioner/plaintiff has filed an application for dissolution of marriage on the ground of desertion and cruelty, after amendment he has not prayed for dissolution of marriage on the ground of desertion and cruelty. In the above said circumstances, he is not entitled for the relief of divorce on the ground of desertion and cruelty. The Additional Issue Nos.1 and 2 are answered accordingly.

35. It is pertinent to note that both the petitioner and the respondent have brought to my knowledge that an application in A.No.5047 of 2008 is pending for awarding maintenance during the pendency of the suit. It is true that the respondent wife is residing at the house belonging to the petitioner/husband. He is doing real estate business and as per his evidence, he is owning four residential portions and three shops in his house at Srinivasa Nagar at Padi and there is a small house plot in the same Srinivasa Nagar. He also owned 38 cents of land in Thiruninravoor and Door No.18, Srinivasa Nagar is also belonging to him. In such circumstances, it is the case of the respondent that he is doing Real Estate Business after he has got voluntary retirement from the Madras Motor Company near Tiruvallur. So, considering the financial status of the respondent, since the respondent wife is residing in the petitioner's house, she is entitled for maintenance only for food, cloth and medical expenses. As per law, she is entitled to reside in her husband' property/petitioner's property and even to-day, she is residing in the house of the petitioner. So, she is entitled for residence till her life time in the property of the petitioner. Apart from that, considering the financial status of the petitioner, the respondent is entitled for Rs.5,000/- per month towards maintenance from the petitioner from the date of the petition.

36. In fine, the suit is dismissed and the respondent-wife is entitled for maintenance of Rs.5,000/- per month from the petitioner from the date of the petition. She is also entitled for the right of residence in the petitioner's property till her life time.

No cost.

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# K.S.RAVICHANDRAN VERSUS SIVANANDA VIJAYA LAKSHMI

**Madras High Court**

**Bench : Hon'ble Mrs. Justice R. Banumathi and Hon'ble Mrs. Justice S. Vimala**

*K.S.Ravichandran*
*Versus*
*Sivananda Vijaya Lakshmi*

**C.M.A.No.3163 of 2011**

**and**
**M.P.Nos.1 of 2009, 1 and 2 of 2012**

**Decided on 7 March, 2012**

- **The Family Court granted the decree for divorce in favour of the husband. The petition filed by the wife for permanent alimony was allowed in part and the husband was directed to pay a sum of Rs.3,50,000/- to the wife as permanent alimony.**
- **The husband has challenged the order of the Family Court, only with regard to the order passed in I.A.No.2623 of 2005 directing the husband to pay a sum of Rs.3,50,000/- as permanent alimony ,i.a., on ground that the marriage was not consummated,therefore, the so-called wife cannot claim the status as the wife and, therefore, the petition is not maintainable.**
- **There is no Law which rules that when the marriage is not consummated the parties to the marriage would not acquire/retain the status as husband/wife.**
- **Even assuming that the decree granting divorce is valid, even then, the wife is entitled to make a claim under Section 25 of the Hindu Marriage Act. This legal position is amply supported by the decision reported in (2005) 2 SCC 33, Rameshchandra Rampratapji Daga v. Rameshwari Rameshchandra Daga.**
- **The wife seeking permission to withdraw the amount of Rs.1,50,000/- is allowed. The Appellant is directed to deposit the balance of Rs.1,50,000/- within three months from today, failing which the respondent/wife is entitled to file/continue the Execution Proceedings.**

**JUDGMENT**

**Hon'ble Mrs. Justice S. Vimala**

The Civil Miscellaneous Appeal is filed challenging the order passed by the I Additional Family Court at Chennai, in I.A.2623 of 2005 in O.P.No.2370 of 2004, dated 16.6.2009.

2. The husband filed the petition for divorce against his wife on the ground of cruelty.

3. The wife filed a petition seeking permanent alimony of Rs.5,00,000/- in I.A.2623 of 2005.

4. The Family Court granted the decree for divorce in favour of the husband. The petition filed by the wife for permanent alimony was allowed in part and the husband was directed to pay a sum of Rs.3,50,000/- to the wife as permanent alimony.

5. As against the order of granting a decree for divorce, the wife has not chosen to file any appeal. It was represented by the learned counsel for the appellant that the wife did not want to join the husband

and therefore, she has not chosen to file any appeal, even though, the wife has got a bright chance of succeeding in the appeal. Therefore, the decree of divorce passed by the Family Court has become final.

6. The husband has challenged the order of the Family Court, only with regard to the order passed in I.A.No.2623 of 2005 directing the husband to pay a sum of Rs.3,50,000/- as permanent alimony under the following grounds:

   a) When it is consistently alleged that the marriage was not consummated, the so-called wife cannot claim the status as the wife and, therefore, the petition is not maintainable.

   b) The Trial Court has given a finding that the wife is guilty of cruelty, then the wife is not eligible for the grant of permanent alimony.

   c) No materials have been produced with regard to the income of the husband and, therefore, there is no basic material for the award of permanent alimony.

   d) The Trial Court has not given the basis to arrive at the quantum of Rs.3,50,000/- as permanent alimony.

7. In view of the grounds raised, now the short point to be considered in this appeal is whether the order for permanent alimony passed by the Family Court is just and reasonable.

   7.1. The first contention of the learned counsel for the appellant is that when the wife herself has admitted that the marriage has not been consummated then, she has no status as wife and, therefore, the petition is not maintainable.

   7.2. The second contention is that even assuming that the wife has the status as wife and as the marriage has been dissolved on the ground of cruelty against the wife then, the wife is not entitled to make a claim for maintenance. These two contentions are untenable, because of the following reasons:-

   7.3. There is no Law which rules that when the marriage is not consummated the parties to the marriage would not acquire/retain the status as husband/wife.

   7.4. The husband himself has filed a petition for divorce, which indicates that only accepting the status of the respondent as wife such a petition could have been filed. When the husband himself has admitted the status of the respondent as wife, then it is unfair to contend that the respondent has no status as wife and therefore, the petition is not maintainable.

   7.5. Even though the wife has not chosen to prefer any appeal against the order granting divorce a mere perusal of the order of divorce go to show that the findings are perverse and there is no justification for the grant of divorce on the ground of cruelty.

   7.6. The perusal of the Judgment of the Family Court reveals that the marriage between the petitioner and the respondent is an admitted fact. There is an observation in the judgment that the sexual relationship between the petitioner and the respondent was not happy. There is an observation that the deficiency was only on the part of the petitioner-husband. Relying upon Ex.R1, which is a letter written by the brother of the wife, the trial court has given a finding that the wife was sent out of the home by the husband. But the trial court has strangely given a finding that the non-living of the wife with her husband amounts to cruelty, even after giving a finding that the wife was compelled to leave the house. The observation of the lower Court is described as below:

   "Whether reasonable cause or unreasonable cause, the petitioner lived without his wife made cruelty cannot be denied."

   The later part of the judgment, there is an observation the respondent was forced to leave the house, but, leaving of the husband singly is cruelty. These observations go to show that the findings

are perverse. However, since there is no appeal against the grant of divorce, we do not propose to elaborate further.

7.7. Even assuming that the decree granting divorce is valid, even then, the wife is entitled to make a claim under Section 25 of the Hindu Marriage Act. This legal position is amply supported by the decision reported in (2005) 2 SCC 33, Rameshchandra Rampratapji Daga v. Rameshwari Rameshchandra Daga, and the Hon'ble Supreme Court has held as follows:-

> 8. In the present case, on the husband's petition, a decree declaring the second marriage as null and void has been granted. The learned counsel has argued that where the marriage is found to be null and void meaning non-existent in the eye of the law or non est, the present respondent cannot lay a claim as wife for grant of permanent alimony or maintenance. We have critically examined the provisions of Section 25 in the light of conflicting decisions of the High Court cited before us. In our considered opinion, as has been held by this Court in Chand Dhawan case, the expression used in the opening part of Section 25 enabling the court exercising jurisdiction under the Act at the time of passing any decree or at any time subsequent thereto to grant alimony or maintenance cannot be restricted only to, as contended, decree of judicial separation under Section 10 or divorce under Section 13. When the legislature has used such wide expression as at the time of passing of any decree, it encompasses within the expression all kinds of decrees such as restitution of conjugal rights under Section 9, judicial separation under Section 10, declaring marriage as null and void under Section 11, annulment of marriage as voidable under Section 12 and divorce under Section 13. (emphasis supplied) Therefore, this Court hold that the petition filed by the wife seeking permanent alimony is maintainable.

8. Before discussing the merits of the case, it is relevant to point out originally the husband has filed C.R.P.No.1884 of 2009, seeking to set aside the order passed by the 1st Additional Family Court in I.A.No.2623 of 2005. As the order passed in I.A.No.2623 of 2005 has been clubbed with the main petition, the Civil Miscellaneous Appeal alone will lie against the order passed in the application. Having regard to this legal position advanced and giving a finding that the order passed in I.A.No.2623 of 2005 is not an interim order, but a final order, by the order dated 20.9.2010, direction has been given to the Registry to treat the Civil Revision Petition as Civil Miscellaneous Appeal and accordingly numbered as C.M.A.

9. According to the wife, the monthly income of the husband is Rs.20,000/- per month. The Trial Court has taken note of Ex.P1-Marriage Invitation and Ex. P4-Photograph and Ex.P5-copy of acknowledgement for return of articles and has come to the conclusion that the husband belongs to a wealthy family and has awarded permanent alimony to the extent of Rs.3,50,000/-. In the list of articles the 14 items of gold jewellery has been listed, apart from silver articles, dress materials and furnitures.

9.1. Prima facie, the contention of the learned counsel for the husband that there are no materials to arrive at the quantum may appear to be correct. But, it is not so, as the income of the husband is within his special knowledge. It is for the husband to prove his income especially, when it is alleged by the wife that the husband is earning a sum of Rs.20,000/- per month. In the absence of husband filing any document to show his income, there is no other alternative except to take the income (in the main petition) as alleged by the wife must be taken as correct, having regard to averments made in the affidavit by the wife which remains uncontroverted. The wife is aged about 34 during 2005. Now she must be aged 41. The average life Indian citizen said to be around 70. The wife is asking for Rs.5,00,000/- as life time maintenance. The husband is said to be a business man. It is also stated that he owns a house at No.15, Vellalar Street, Vadapalani, Chennai-20. Even though it is alleged that house property has been sold, no documents has been produced either to show that it was sold or if sold how the sale consideration was utilised. Therefore, the amount of maintainable fixed at Rs.3,50,000/- cannot be said to be unreasonable.

10. It is represented that the husband has already deposited a sum of Rs.2,00,000/- before the Family Court and the wife has withdrawn Rs.50,000/- Therefore, the wife is permitted to withdraw the remaining amount.

11. The Civil Miscellaneous Appeal is dismissed. Order passed by the I Additional Family Court in I.A.No.2623 of 2005 is confirmed. In view of the order passed in I.A.N0.2623 of 2005, M.P. No.1 of 2011 stands dismissed. Consequently, M.P.No.1 of 2012 praying to vacate the stay stands closed. M.P.No.2 of 2012 filed by the wife seeking permission to withdraw the amount of Rs.1,50,000/- is allowed. No costs.

The Appellant is directed to deposit the balance of Rs.1,50,000/- within three months from today, failing which the respondent/wife is entitled to file/continue the Execution Proceedings.

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# C.ARUL MANIKANDAN VERSUS T.ARCHANA

**Madras High Court**

**Bench : Hon'ble Mr. Justice R. Subbiah and Hon'ble Mr. Justice A.D. Jagadish Chandira**

*C.Arul Manikandan ...Appellant*
*Versus*
*T.Archana ...Respondent*

**Civil Miscellaneous Appeal No.1172 of 2017**

**and**
**C.M.P.No.896 of 2017**

**Decided on 3 August, 2017**

- **Appeal has been filed by the husband against the order of the Family Judge, Dharmapuri, dismissing the petition filed under Section 13(1) (i-a) of the Hindu Marriage Act, 1955 for dissolution of marriage.**
- **It is to be seen that a petition for divorce is not like any other commercial suit. Section 23 of the Hindu Marriage Act mandates that the court before granting decree for divorce, whether defended or not has to satisfy itself in respect of several factors mentioned in sub-section (1). It is to be seen that even in cases of petition for divorce filed under Sec 13-B of the Hindu Marriage Act 1955, the grant of Divorce is not automatic though both parties jointly present the petition for divorce on mutual consent.**
- **The mere filing of the petition with mutual consent does not authorise the court to pass a decree for divorce. The parties are required to take a further step. Under sub-section (2) of Section 13-B the parties are required to make a joint motion not later than six months after the date of presentation of the petition and not later than 18 months after the said date.**
- **The practice of seeking divorce and grant of divorce based on Panchayat Muchalicka if accepted by courts will lead to development of extra constitutional bodies attempting to usurp the powers of courts in matrimonial matters which will be against public policy and the spirit of the Family Laws in India where several safeguards have been made to protect the institution of marriage.**
- **We are of the considered opinion that the Family Court below had rightly concluded that though the wife had not appeared before the Court, no other person had been examined by the appellant/ petitioner to prove his case and that too in respect of the allegations of extra marital affairs against the wife and has held that the appellant/petitioner had failed to satisfy the court on the grounds raised and had dismissed the petition for divorce.**

## JUDGMENT

(Judgment of the Court was delivered by **A.D.JAGADISH CHANDIRA, J**) This Civil Miscellaneous Appeal has been filed by the husband against the order of the Family Judge, Dharmapuri, dismissing the petition filed under Section 13(1) (i-a) of the Hindu Marriage Act, 1955 for dissolution of marriage.

2. Brief facts leading to filing of this Civil Miscellaneous Appeal are as follows:- The marriage between the Appellant and the Respondent was solemnized on 22.05.2015. According to the appellant the Respondent from the day one of the marriage refused to consummate the marriage. The Respondent used to chat with her paramour in a cell phone and she openly confessed her intimacy and made her intention clear that she would not live with the petitioner. A panchayat was held on 16.06.2015 in which the Respondent entered into Muchalicka with the petitioner for getting the decree of divorce. But the Respondent did not come forward to file the petition for divorce on mutual consent. The petitioner had been subject to great mental agony and torture because of her indifferent attitude. There is no scope for reunion. Hence the petition is filed for the decree of divorce on the ground of cruelty. The Respondent remained ex parte.

3. The learned Family Court, Dharmapuri, after examining the appellant as P.W.1, marked 3 documents as Ex.P1 to P3 viz; the marriage invitation,copy of the voter's ID and the Divorce Muchlicka Document and after considering the material available on record, has dismissed the petition on the ground that the averments made out by the appellant/husband do not constitute cruelty and that though the wife had not appeared before the Court, no other person had been examined by the appellant/petitioner to prove his case and that too in respect of the allegations of extra marital affairs against the wife. Further the Family Court had held that merely that there was a Panchayat Muchalicka, the decree of divorce would not be automatically granted and had concluded saying that as per Sec 23(1) of the Hindu Marriage Act, even in uncontested matters the court has to satisfy itself with regard to the averments made and pass orders only if the ingredients of the grounds for divorce are strictly made out and had dismissed the petition for divorce.

4. Challenging the above order, the present appeal has been filed by the husband.

5. Heard Mr.Syed Izzath, learned counsel for the appellant. There is no representation for the Respondent.

6. The learned counsel for the appellant vehemently contended that when the wife had willfully remained absent, the Family Court ought to have allowed the petition for divorce relying on the Divorce Muchalicka document which was marked as Ex.P3 on the side of the appellant/petitioner, which is a deed of agreement for divorce wherein the parties have agreed to live separately and had also agreed to get divorce by applying through the proper legal forum and that the Court below ought to have believed that and allowed the petition for divorce. Further, it was also contended by the learned counsel that the Court below ought to have believed the contention of the husband that the wife had refused to willfully consummate the marriage and thereby caused cruelty to him.

7. We have gone through the oral and documentary evidence filed by the appellant. The Respondent/ wife had remained ex parte. The Family Court after taking note of the oral evidence and the divorce Muchalicka document which has been marked as Ex.P3, refused to grant divorce on the ground stating that, to the grant of a decree of divorce under Section 23(1) of the Hindu Marriage Act what is required is that the Court must satisfy itself and has to come to the conclusion that the party seeking divorce satisfies the Court with regard to the allegations and the grounds in which the divorce is sought for. The Court having considered the above had arrived at a conclusion that the averments made out by the appellant/husband do not constitute cruelty and has dismissed the petition for divorce. The Court below had rightly given a finding that if the wife had subscribed her signature in EX P3 she would have come to the court along with the petitioner for seeking divorce under mutual consent and had also refused to take note of the Muchalicka stating that none of the attestors to the Muchalicka had been examined and thereby refused to accept it.

8. It is to be seen that a petition for divorce is not like any other commercial suit. Section 23 of the Hindu Marriage Act mandates that the court before granting decree for divorce, whether defended or not has to satisfy itself in respect of several factors mentioned in sub-section (1). It is to be seen that even in cases of petition for divorce filed under Sec 13-B of the Hindu Marriage Act 1955, the grant of Divorce is not automatic though both parties jointly present the petition for divorce on mutual consent. In the

decision reported in (1991) 2 SCC 25 Smt.Sureshtadevi v. Om Prakash, in the matter of Divorce by mutual consent, the Honble Apex Court has held:

The mere filing of the petition with mutual consent does not authorise the court to pass a decree for divorce. The parties are required to take a further step. Under sub-section (2) of Section 13-B the parties are required to make a joint motion not later than six months after the date of presentation of the petition and not later than 18 months after the said date. This motion enables the court to proceed with the case in order to satisfy itself about the genuineness of the averments in the petition and also to find out whether the consent was not obtained by force, fraud or undue influence. The court may make such inquiry as it thinks fit including the hearing or examination of the parties for the purpose of satisfying itself whether the averments in the petition are true. If the court is satisfied that the consent of parties was not obtained by force, fraud or undue influence and they have mutually agreed that the marriage should be dissolved, it must then pass a decree of divorce.D (Paras 13 and 10)

9. When such is the case, the practice of seeking divorce and grant of divorce based on Panchayat Muchalicka if accepted by courts will lead to development of extra constitutional bodies attempting to usurp the powers of courts in matrimonial matters which will be against public policy and the spirit of the Family Laws in India where several safeguards have been made to protect the institution of marriage.

10. Taking note of the above, we are of the considered opinion that the Family Court below had rightly concluded that though the wife had not appeared before the Court, no other person had been examined by the appellant/petitioner to prove his case and that too in respect of the allegations of extra marital affairs against the wife and has held that the appellant/petitioner had failed to satisfy the court on the grounds raised and had dismissed the petition for divorce.

11. We find no infirmity in the order passed by the Family Court Court. We confirm the order passed by the Family Court and dismiss the appeal. No costs. Consequently, C.M.P.No.896 of 2017 is closed.

**R.SUBBIAH,J**

**A.D.JAGADISH CHANDIRA,J**

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# R.THANGAMANI @ MAINAVATHY VERSUS S.SATHISHKUMAR

**Madras High Court**

**Bench : Hon'ble Mr. Justice R. Subbiah and Hon'ble Mr. Justice A.D. Jagadish Chandira**

*R.Thangamani @ Mainavathy .. Appellant/Respondent*
*Versus*
*S.Sathishkumar .. Respondent/Petitioner*

**Civil Miscellaneous Appeal No. 44 of 2017**

**Decided on 22-09-2017**

- **The appellant is the wife who has filed this appeal, challenging the Order and Decreetal Order passed by the Family Court, Erode, granting divorce under Section 13(1) (i-a) and (i-b) of the Hindu Marriage Act, 1955.**
- **The Family Court taking into consideration of the oral and documentary evidence had arrived at the conclusion and granted the relief sought for by the respondent/husband under Section 13(1)(i-a) on the ground that the wife had committed cruelty on him and also under Section 13(1)(i-b) that they have been living separately for more than 5 years and passed an order of divorce on the ground of cruelty and desertion.**
- **Public interest demands not only that the married status should, as far as possible, as long as possible, and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact.**
- **We are also satisfied that this marriage has irretrievably broken down. Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. But, where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, the courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the courts verdict, if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried-up there is hardly any chance of their springing back to life on account of artificial reunion created by the courts decree.**

Judgment Reserved on: 07.08.2017

Judgment Pronounced on: 22.09.2017

## JUDGMENT

(Judgment of the Court was delivered by **A.D.JAGADISH CHANDIRA, J**) The appellant is the wife who has filed this appeal, challenging the Order and Decreetal Order passed by the Family Court, Erode, granting divorce under Section 13(1) (i-a) and (i-b) of the Hindu Marriage Act, 1955.

2. Brief facts leading to the filing of the Hindu Marriage Original Petition by the respondent/husband seeking divorce in H.M.O.P. No. 244 of 2014 on the file of the Family Court, Erode, was that the marriage between the appellant and the respondent was solemnized on 30.04.2007 at Sri Amman Kalaiyarangam, Kompanaipudhur, Kolathupalayam Village, Kodumudi Taluk, Erode District, according to Hindu rites and custom; that the appellant lived with the respondent only for 3 months and in the meanwhile the

appellant conceived and out of the wed lock, a female child was born on 10.04.2008; that the respondent went to the appellantDs parentDs home for visiting his wife and child and at that time the appellantDs brother picked up quarrel with the respondent, humiliated him and abused him with unparliamentary words; that the respondent asked the appellant to come to the matrimonial home for reunion, but the appellant refused to come forward to reunite with the respondent; that even though the respondent as well as the respondentDs parents and relatives had made several attempts for the reunion of the appellant with the respondent, the appellant adamantly refused to come forward to matrimonial home; that the respondent filed H.M.O.P.No.72 of 2010 on the file of the II Additional Sub-Judge, Erode under section 9 of the Hindu Marriage Act, for Restitution of Conjugal Rights and the same was ordered on 13.12.2010 directing the appellant/wife to come forward for reunion within two months; that the appellant did not obey the order of the learned Sub-Judge, for Restitution of Conjugal Rights; that though the respondent had taken steps for reunion in the year 2011-2012, the brother of the appellant did not want to allow his sister to live with her husband, only with an intention to receive his sisterDs earning; that the respondent had given a police complaint on 10.05.2012 to advice the appellant to obey the order of Restitution of Conjugal Rights; that since the appellant was not even heeding the advice of the police officer, the respondent issued a legal notice dated 30.05.2012, calling upon the appellant for reunion with the respondent; that the appellant neither come forward to reunion nor send reply to the respondent. Hence, the respondent was constrained to file the petition for divorce.

3. The appellant/wife had filed a counter alleging that the respondent after the birth of the child did not take any steps to see the child; that the respondent had not shown any care towards the appellant and the child; that the maintenance proceedings initiated by the appellant in M.C.No.3 of 2014 on the file of the Family Court, Erode was disposed of only after 8 years and that the respondent/husband did not pay any maintenance amount towards the appellant and the minor child; that only after institution of the maintenance proceedings the respondent/husband had filed H.M.O.P.No.72 of 2010 and sought for restitution of conjugal rights and that the said application was allowed on 31.12.2010; that the respondent/husband had sought for divorce on the ground of cruelty and desertion in H.M.O.P.No.244 of 2014 before the Family Court Erode wherein the appellant/wife had filed her detailed objections; that there is no evidence to show what is the cruelty committed by the appellant/wife; that absolutely there is no pleadings and materials to show that the appellant/wife had committed cruelty on the respondent/ husband; that the respondent/husband has filed the petition for restitution of conjugal rights only to defeat the maintenance proceedings and that he did not come forward to maintain the appellant/wife and child which he is legally bound to do; that the burden of proof always lies on the respondent/husband to establish beyond reasonable doubt to the satisfaction of the court, the allegation of desertion throughout the entire period of two years before filing the petition. Hence, she prays for dismissal of the petition.

4. Before the trial Court, on the side of the respondent/ husband he examined himself as PW1 and on the side of the appellant/wife, she had been examined as R.W.1. The respondent/husband on his side had marked the following documents:-Ex.P1 is the wedding invitation; Ex.P2 is the wedding photo; Ex.P3 is the Family Card; Ex.P4 is the order passed in H.M.O.P.No.72/2010 (Restitution of Conjugal Rights); Ex.P5 is the complaint given by the respondent/husband before the police station; Ex.P6 is the legal notice issued by the respondent/husband.

5. During the chief examination before the Family Court, the respondent/petitioner had stated that the marriage between him and his wife the appellant took place on 30.4.2007 at Pudur Sri Amman Kalai Arangam as per Hindu Rites and Customs and that the marriage expenses were borne by both side and thereafter they had lived as a joint family at the house of the respondent/husband and after 3 months the appellant/wife had insisted for a separate residence for which he had asked her to wait for sometime and whereas she had without minding it left to her parents house and that he had requested her to join him, for which she had stated that if only a separate residence was arranged she would join him and that thereafter on 10.4.2008 a girl child was born and when he had gone to see the child his wife and her

brother had prevented him from seeing the child, and after 3 months he had called his wife and child to come home and she had agreed and come home on 15.7.2008 and that on the very same day she had returned back to her parents house and even after several conciliations through panchayatars she had been adamant and refused to join him in matrimony and stayed in her parents house. Thereafter again when he had gone to her house to see his wife and child the brother of the appellant had spilt coffee on him and had along with his sister/the appellant herein had abused him and humiliated him. Thereafter a mediation was arranged through panchayatars and she had refused to join him. Thereafter the appellant had filed M.C.No.59/2009 before the Chief Judicial Magistrate, Erode seeking maintenance and that even during the pendency of the M.C. Proceedings he had through relatives called her to join him for which the appellant had asked him to leave his native place and asked him to seek for a separate residence somewhere else and that as per her demand he had taken up a separate residence on 4.7.2010 near Balamarathagan Temple and after living there for 2 months she had again compelled him to leave her at her parents house. When he had called her again she had refused to join him and thereby had denied to render him marital and conjugal obligations and had contended that thereby the wife had committed acts of mental and physical cruelty and had expressed that there was no chance to live with her and had filed the divorce petition. However, in the cross-examination, P.W.1 has stated that even if the wife was ready to join him he had expressed that he was not ready to take her back. He had admitted to have given a complaint to Kodumudi Police Station to advise his wife for reunion and that thereafter only he had given a legal notice to her for Restitution of Conjugal Rights. However, he had refused that the appellant/ wife had sent a notice for reunion and that when she had come back to join him he had denied to take her back and had also denied that she can come to the matrimonial home only after withdrawing the maintenance case. Further he had also denied that he had not gone to see the female child which was born on 10.4.2008 and submitted that the reason for not going was that he was not informed about the birth of the child. He had denied that the relatives and the parents of the appellant/wife suggested for a reunion and had also denied that several steps had been taken by the appellant/wife and that he is the one who has refused to join her. He had also denied that he was the reason for the separation for six years. He had also further denied that since because the appellant/wife had filed the petition for maintenance, he had filed the petition for restitution of conjugal rights and that he denied that he had not paid any maintenance to the wife or child and had stated that he had paid Rs.50,000/- to them.

6. During the chief examination before the Family Court, the appellant/wife had stated that within three months of marriage she had demanded to have a separate residence and that the respondent/husband was having illegal relationship with several women and that he used to come back home late in the night in a drunken mood and committed cruelty on her. She had stated that the respondent/husband did not come to visit her child after delivery and that he never changed his habits and thereafter a panchayat was held and they were living together in a separate residence for two months and had denied that she had gone back to her parents home for two months and she had also denied that she refused to join him after the order passed in the restitution of conjugal rights petition by the Sub-Court, Erode; In the Cross-Examination she had stated that she had studied upto 10th Std., and that her father's name is Ramasamy, and he passed away before 12 years and that she has an elder brother and after the death of her father she had been taken care by her mother and elder brother. The respondent/petitioner was not her relative and that he was living in a joint family and after marriage she was in the joint family and that she left the matrimonial home within three months, due to cruelty. She had admitted that she had agreed to live with the husband and when the question was put to her whether she was prepared to join her husband she had told that he was living with another woman for three months and that later the woman had left to her parent's house but however refused to join her husband. Further she had told that she is not aware of the name of the woman and that no steps were taken to know the name of the woman and no complaint was preferred to the police or no petition was filed before the court. She had denied that the story about the woman was an imagination. When she had been questioned why she did not join her husband after the order passed in the petition for restitution of conjugal rights she told that during the period her husband

had married another woman and that was the reason she did not go and when she was asked if she was ready to join her husband, she had refused to join him and further had stated that her husband had committed sex torture on her and that if at all there comes a situation at a later point of time and that if the child asks for she would join her husband. Further she had admitted that they were living separately for the past four or five years and had admitted that there was dispute between her elder brother and her husband right from the beginning and that they are not in talking terms. She had admitted that the elders had agreed and arranged for a separate living on 4.7.2010.

7. The Family Court taking into consideration of the oral and documentary evidence had arrived at the conclusion and granted the relief sought for by the respondent/husband under Section 13(1)(i-a) on the ground that the wife had committed cruelty on him and also under Section 13(1)(i-b) that they have been living separately for more than 5 years and passed an order of divorce on the ground of cruelty and desertion. While considering the ground of cruelty the Family Court in paragraphs 17 and 18 of the judgment had observed that it is normal that there will be trivial issues between the spouses in a married life and when there is a child the trivial issues have to be adjusted between themselves and that they should take steps to run the family in a proper way. The Family Court also held that the petitioner/husband had taken several steps by filing petition before the Court and also before the Police Station for uniting him with his wife and had also taken steps through the elders to unite him with his wife and had also agreed for separate living. Whereas the wife had alleged that the husband was a alcoholic and that he was having affair with many women. The Family Court also observed that if the allegations against the husband are true, that he was an alcoholic and that he was having affairs with many women, the wife would have taken steps when especially they were being separated from the year 2010. The wife had filed a petition claiming maintenance in the year 2009 before the Chief Judicial Magistrate Court, but in that petition, no allegations had been made against the husband about his character that he was an alcoholic and having illicit relationship with many women and thereby refused to maintain her and the child, whereas the allegations of immorality were raised in the counter. Thereby, based on the above observations the Family Court had held that the the false allegations against the husband has caused mental cruelty, if not physical cruelty to the husband. That apart, the Family Court had also given a finding that the wife had filed a separate petition for claiming maintenance and when the separate petition for maintenance was filed, the husband had taken several steps to join her with him which had ended in futility only due to the conduct of the wife. In fact, it has also been accepted by the wife in her cross-examination. The further findings of the Family Court is that when a wife had raised false allegations against the husband there is no chance of living together any further and also took note of the fact of the refusal of the wife to join the husband when a question was put to her. Thereby taking into consideration the documents and the evidence adduced by the wife and husband the Family Court had held that the wife had committed mental cruelty to her husband and granted divorce under Section 13(1)(i)(a) and 13(1)(i)(b) of the Hindu Marriage Act. The appeal has been filed against the finding and judgment of the Family Court.

8. The learned counsel for the appellant had assailed the order of the Family Court stating that it was the respondent/husband who had not taken any steps to see the child after the birth of the child and that he has not shown any care towards the appellant and her child and that only after the initiation of the maintenance proceedings by the wife, the husband had filed H.M.O.P.No.72 of 2010 under Section 9 of the Hindu Marriage Act seeking restitution of conjugal rights and submitted that the petition for restitution of conjugal rights had been filed only to circumvent the maintenance petition filed by the wife and the real intention was not to join with the wife. Further it was submitted by the learned counsel for the petitioner that there is no averment to show what was the cruelty committed by the wife and the Family Court without any legally acceptable evidence had erroneously granted divorce on the ground of cruelty when absolutely there are no pleadings and materials to show that the appellant/wife had committed cruelty on the respondent. Moreover, no legal evidence had been adduced by the respondent/husband to show that there was desertion throughout the entire period of two years before filing the

petition for divorce and in such event, contended that the order of grant of divorce by the Family Court is neither legally nor factually sustainable and prayed for setting aside the order of the Family court.

9. On the contrary, the learned counsel for the respondent/husband submitted that the marriage between the appellant and the respondent took place on 30.04.2007 and that the appellant lived with the respondent only for a period of three months after the marriage during which period she got conceived and thereafter, left to her parents home for delivery and a female child namely Vaishnavi was delivered on 10.04.2008. The learned counsel for the respondent further submitted that it is the categorical evidence of the husband that even the birth of the child was not intimated to him and that when he had gone there to see his child and wife, he was prevented to see the child and that he was ill treated and humiliated by the brother of the wife and that right from the day of marriage there was dispute between the brother of the wife and the respondent. It was further contended by the learned counsel for the respondent that though the respondent comes from a joint family in order to keep the appellant happy he had taken a separate house near Balamarathagan Temple, whereas from there also she went away without any reasonable cause and the further steps taken by the respondent/husband through his relatives and common friends for reunion also failed. The appellant had adamantly refused to join him in the matrimonial home and that the maintenance petition filed by her was still pending and that though he was willing for reunion right from the beginning she had refused to join him forcing him to file a petition for restitution of conjugal rights and the same was also ordered on 13.12.2010. Thereafter, the husband had also given a petition to the police to advice her to come and join him and also took various steps which had ended in futility. Further submitted that the intention of the appellant was only to harass him and submitted that though no the allegations of the appellant being an alcoholic or a person having illicit affair was raised in the M.C. Petition, false allegation was stated in the counter filed by the appellant in the divorce petition which has caused severe mental cruelty to the husband and thereby submitted that the Family Court had given a right finding that it was the conduct of the appellant which was the reason for separation and that when serious and false allegation had been raised against the husband that would not be conducive for the parties for reunion and that it would amount to cruelty. He also contended that admittedly it is the categoric evidence of the wife that they are living separately for more than about 5 years and that the bonding of marriage has been lost due to the long separation between the parties. It was further contended that the Family Court had rightly granted divorce relying on the Full Bench of the Apex Court in Samar Ghosh vs. Jaya Ghosh reported in 2007 4 SCC 511.

10. We have heard the learned counsels for both sides and perused the materials placed on record.

11. In the present case it is seen from the evidence that the appellant had left the matrimonial home within three months from the date of marriage and that the birth of the child was not intimated to the husband and that when he had gone to the wife's house to see the child, he was prevented by the appellant and her brother. Further, it is the admitted case of the appellant that there was no cordial relationship between her brother and her husband from the beginning and it is the case of the respondent/husband that he was ill-treated by the brother of the appellant by pouring coffee on him. Further, the Family Court has also held that allegations against the husband being an alcoholic and a person of immoral character though have not been raised in the maintenance petition were raised in the counter filed by the appellant in the divorce petition, the Family Court had categorically given a finding that the serious and false allegations would always cause mental cruelty to the husband. Further, it is seen from the evidence that steps have been taken by the respondent/husband to have a separate living and that she had refused to live with him there. Thereafter the husband had filed a petition for restitution of conjugal rights which was ordered in his favour and that he had taken steps through relatives and common friends and had also taken steps by giving a petition to the police to advise the appellant to join him in matrimonial home.

12. In the judgment referred to above in Samar Ghosh v. Jaya Ghosh reported in 2007 4 SCC 511, the Honble Apex Court has enumerated the following principles which reads as follows:- (paragraphs 97 to 102) D97.

This Court in Naveen Kohli v. Neelu Kohli reported in (2006) 4 SCC 558 dealt with the similar issues in detail. Those observations incorporated in paragraphs 74 to 79 are reiterated in the succeeding paragraphs.

"74. We have been principally impressed by the consideration that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties.

75. Public interest demands not only that the married status should, as far as possible, as long as possible, and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact.

76. Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied for ever to a marriage that in fact has ceased to exist."

77. Some jurists have also expressed their apprehension for introduction of irretrievable breakdown of marriage as a ground for grant of the decree of divorce. In their opinion, such an amendment in the Act would put human ingenuity at a premium and throw wide open the doors to litigation, and will create more problems then are sought to be solved.

78. The other majority view, which is shared by most jurists, according to the Law Commission Report, is that human life has a short span and situations causing misery cannot be allowed to continue indefinitely. A halt has to be called at some stage. Law cannot turn a blind eye to such situations, nor can it decline to give adequate response to the necessities arising therefrom.

79. When we carefully evaluate the judgment of the High Court and scrutinize its findings in the background of the facts and circumstances of this case, it becomes obvious that the approach adopted by the High Court in deciding this matter is far from satisfactory."

98. On proper analysis and scrutiny of the judgments of this Court and other Courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept of 'mental cruelty' within which all kinds of cases of mental cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.

99. Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

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 or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of

marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.

102. When we take into consideration aforementioned factors along with an important circumstance that the parties are admittedly living separately for more than sixteen and half years (since 27.8.1990) the irresistible conclusion would be that matrimonial bond has been ruptured beyond repair because of the mental cruelty caused by the respondent.D

13. Further in the case reported in 2012 (2) MLJ 833 (U.Sree vs. U.Srinivas), at paragraph 88, it has been held as follows:-

88. In short, it would be difficult for the parties to bury the past and to begin a new relationship of Husband and Wife. For the past 15 years both parties have remained separately. During these years, they developed their own life style, remained in isolation and grown in their own thoughts. Marriage tie between the parties has become emotionally dead and the same is beyond repair because of the emotionally dead relationship which is a positive act of oppressive mental cruelty, in our considered opinion. There is no chance for both parties to live together in future. In such a context, the decree of Divorce is the only remedy to be passed, so that the parties may choose their life of their own way, when there has been no scope for their reunion.

14. The ratio in the above judgments had been further fortified by the later judgment of the Hon'ble Apex Court reported in (2013) 5 SCC 226 (K.Srinivasa Rao vs. D.A.Deepa), wherein it had been held as follows:- (paragraphs 29 to 35) š 9. In our opinion, the High Court wrongly held that because the appellant-husband and the respondent-wife did not stay together there is no question of the parties causing cruelty to each other. Staying together under the same roof is not a pre-condition for mental cruelty. Spouse can cause mental cruelty by his or her conduct even while he or she is not staying under the same roof. In a given case, while staying away, a spouse can cause mental cruelty to the other spouse by sending vulgar and defamatory letters or notices or filing complaints containing indecent allegations or by initiating number of judicial proceedings making the other spouses life miserable. This is what has happened in this case.

30. It is also to be noted that the appellant-husband and the respondent- wife are staying apart from 27/4/1999. Thus, they are living separately for more than ten years. This separation has created an unbridgeable distance between the two. As held in Samar Ghosh, if we refuse to sever the tie, it may lead to mental cruelty.

31. We are also satisfied that this marriage has irretrievably broken down. Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. But, where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, the courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the courts verdict, if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried-up there is hardly any chance of their springing back to life on account of artificial reunion created by the courts decree.

32. In V. Bhagat this Court noted that divorce petition was pending for eight years and a good part of the lives of both the parties had been consumed in litigation, yet the end was not in sight. The facts were such that there was no question of reunion, the marriage having irretrievably broken down. While dissolving the marriage on the ground of mental cruelty this Court observed that irretrievable breakdown of marriage is not a ground by itself, but, while scrutinizing the evidence on record to determine whether the grounds alleged are made out and in determining the relief to be granted the said circumstance can certainly be borne in mind.

33. In Naveen Kohli, where husband and wife had been living separately for more than 10 years and a large number of criminal proceedings had been initiated by the wife against the husband,

this Court observed that the marriage had been wrecked beyond the hope of salvage and public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto. It is important to note that in this case this Court made a recommendation to the Union of India that the Hindu Marriage Act, 1955 be amended to incorporate irretrievable breakdown of marriage as a ground for the grant of divorce.

34. In the ultimate analysis, we hold that the respondent-wife has caused by her conduct mental cruelty to the appellant-husband and the marriage has irretrievably broken down. Dissolution of marriage will relieve both sides of pain and anguish. In this Court the respondent-wife expressed that she wants to go back to the appellant-husband, but, that is not possible now. The appellant-husband is not willing to take her back. Even if we refuse decree of divorce to the appellant-husband, there are hardly any chances of the respondent-wife leading a happy life with the appellant-husband because a lot of bitterness is created by the conduct of the respondent-wife.

35. In Vijay Kumar, it was submitted that if the decree of divorce is set aside, there may be fresh avenues and scope for reconciliation between parties. This court observed that judged in the background of all surrounding circumstances, the claim appeared to be too desolate, merely born out of despair rather than based upon any real, concrete or genuine purpose or aim. In the facts of this case we feel the same.DOn consideration of the facts and the above decision it is seen that the Family Court had rightly held that the acts of the appellant/wife had constituted cruelty and had granted divorce. The Family Court had also held that reckless and false accusation against her husband, not supported by proof amounts to cruelty.

15. Further it is to be seen that the parties have been living separately for more than 10 years. On a perusal of the records and deposition of the appellant as well as the respondent coupled with the fact that the marriage between the appellant and the respondent took place on 03.04.2007 dispute arose between them within three months of marriage, M.C.No.58/2009 was filed on the file of the Judicial Magistrate, Erode on 8.10.2009 and during the pendency of the M.C.No.58/2009 and thereafter, steps had been taken by the respondent/husband to join to her in matrimonial home failed and that the appellant had filed H.M.O.P.No.72 of 2010 on the file of the II Additional Sub-Judge, Erode under section 9 of the Hindu Marriage Act, for Restitution of Conjugal Rights on 9.3.2010 and the same was ordered on 13.12.2010 and H.M.O.P.No.224 of 2014 for divorce was filed on 25.07.2013, after six years of marriage and after completion of trial the Family Court has granted divorce on 14.11.2016 and the appeal has been filed on 02.01.2017 and till today the parties are living separately. The parties have been litigating for more than 10 years. In respect of cruelty the husband had let in evidence that he was illtreated and it is also admitted case of the wife that there was dispute between them within three months from the date of marriage. Hence, we find that there is no possibility for reunion between the appellant and the respondent due to the long period of separation and the matrimonial bond has broken beyond repair as evidenced and thus relying upon the judgment of Samar Ghosh, the Family Court had held that the husband had made out a case for divorce and had allowed the petition granting divorce dissolving the marriage between the appellant and the respondent dated 30.04.2007.

16. Further the Family Court has also held that in spite of several efforts taken by the respondent/husband for reunion and orders being passed by the Family Court allowing the petition for restitution of conjugal rights, the appellant/wife had refused to join with him. The respondent/ husband had also approached the police by giving a petition to the police to give effect to the said order wherein the police had advised the appellant/wife to join the respondent/husband and even then the appellant/wife had not joined the respondent/husband and thereby allowed the petition on the ground of desertion too.

17. We feel that there is no error in the finding of the Family Court, Erode granting the decree of divorce and we confirm the order and decreetal order passed by the Family Court, Erode, in H.M.O.P.No.244 of 2014 dated 14.11.2016. Accordingly, this appeal stands dismissed. No costs.

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# S.SAVITHA VERSUS MR.VELMURUGAN

**Madras High Court**

**Bench : Hon'ble Mr. Justice R. Subbiah and Hon'ble Mr. Justice A.D. Jagadish Chandira**

*S.Savitha .. Appellant/Respondent*
*Versus*
*Mr.Velmurugan .. Respondent/Petitioner*

**Civil Miscellaneous Appeal No. 876 of 2014**

- **The appellant is the wife, who has filed the appeal against the Order and Decreetal Order dated 28.09.2013 passed by the II Additional Family Court, Chennai in O.P. No. 1447 of 2007, granting decree of divorce under Section 13(1)(1-a) of the Hindu Marriage Act, 1955.**
- **Parties have been living separately for more than 10 years. On a perusal of the records and deposition of the appellant as well as the respondent coupled with the fact that the marriage between the appellant and the respondent took place on 03.09.2004 dispute arose between them within three months of marriage, the divorce petition was filed on 11.05.2007 after four years of marriage and after completion of trial the Family Court has granted divorce on 28.11.2013 and the appeal has been filed on 14.02.2014 and till today the parties are living separately. Moreover, the appeal had not been earnestly followed up and after the lapse of time for preferring the appeal it is understood that the respondent had also married again and he has got two children out of the marriage. The appellant has contested the case for about 10 years.**
- **Taking into consideration the above facts we are of the opinion that the judgment of the Family Court granting decree of divorce is to be confirmed on the ground of cruelty. However, we are also alive to the plight of the Appellant wife who appears to be dependant on her relatives. It has been stated by the appellant that the respondent is gainfully engaged in a profitable travel business and that recently he has also purchased a property worth several lakhs and that he is capable of maintaining her and that she is dependent on her relatives for survival. The Appellant and the respondent have been separated for more than 10 years and the appellant has fought the legal battle for more than 10 years, and she is dependant on her relatives, therefore her future has to be secured by directing the respondent/ husband to provide her permanent alimony under Section 24 of the Hindu Marriage Act. We have also taken note of the submissions made by the learned Senior Counsel for the respondent with regard to the willingness of the respondent to pay permanent alimony. Taking into consideration the submissions of the learned Senior Counsel and also the facts and circumstances of the case that the respondent/husband has already paid Rs.2,31,000/- towards interim alimony pursuant to order of this Court, we are of the opinion that the respondent/husband should be directed to pay a further sum of Rs.12,00,000/- (Rupees Twelve Lakhs only) as and by way of permanent alimony within a period of six weeks from the date of receipt of the copy of the order.**

Judgment Reserved on: 18.07.2017

Judgment Pronounced on:31.08.2017

## JUDGMENT

(Judgment of the Court was delivered by **A.D.JAGADISH CHANDIRA, J**) The appellant is the wife, who has filed the appeal against the Order and Decreetal Order dated 28.09.2013 passed by the II Additional Family Court, Chennai in O.P. No. 1447 of 2007, granting decree of divorce under Section 13(1)(1-a) of the Hindu Marriage Act, 1955.

2. Brief facts leading to the filing of the Original Petition for divorce by the respondent/husband seeking divorce was that he and the appellant got married on 03.09.2004 at Sri Varalakshmi Ramachandra Tirumana Mandapam, Sevoor, Arani Taluk, according to Hindu rites and custom and that the marriage was arranged one; that he had given dollar chain worth about 5 sovereigns and also 7 rings worth about 5 sovereigns to the appellant/wife at the time of marriage and that 50% of the marriage expenses was borne by him and that no demand of dowry was made at the time of marriage; that the respondent/husband does not know what are the jewels and other articles given to the appellant/wife at the time of marriage by way of Sridhana; that immediately after the marriage, both of them lived together happily in the respondent's sister's house, only for one week. Before the marriage the appellant's relative one Mr.R.Vinayagamoorthy who negotiated the marriage had informed him that the appellant is a graduate and belonged to a reputed family and only after marriage the respondent came to know that the appellant had studied only upto plus two and that the other details given before the marriage were false and that the appellant and her relatives had given a false and manipulated Jathagam to suit the respondent's Jathagam and only after the marriage and that the respondent came to know that the Jathagam given by the appellant and her relatives was a false one.

3. It was further alleged that the respondent was shocked to hear from the appellant's own relatives that she was having illegal contact with one Sembian even before marriage and that the respondent came to know that, even after marriage the said Sembian had come to the house when the respondent was in his office; that the appellant lived as a wife with the respondent only for a week and thereafter failed and neglected to do her matrimonial obligations; that one person by name Saravanan claiming himself to be the appellant's cousin brother came to Chennai and stayed in the house and that after a week from the date of the marriage, one afternoon when the respondent came from the office, he found the appellant and Saravanan in the bed room in compromising position and when he questioned about the same out of shock, the appellant coolly informed that she had contact with Saravanan even before the marriage and threatened the respondent that if he disclosed the same to anybody she would commit suicide and throw the blame on the respondent; that the appellant after solemnization of the marriage, voluntarily had sexual intercourse with Saravanan and that the appellant often picked up petty quarrels with the respondent and created a big scene and that even does not allow him to sleep and that she has also beaten the respondent on one or two occasions when she got angry; that the respondent could not tolerate the way she shouts at loud pitch using unparliamentary words and filthy language and that she pressurized him that he should not go to any of his relatives house.

4. It was further alleged that on 12.11.2006 when the respondent was having his dinner in his brother's house, the appellant barged into the house and started shouting at loud pitch for nothing and created a big scene as if the respondent's brother and sister-in-law beat her, however nothing untoward had happened on that day; that the respondent's relatives took the issue before the local councillor and the same was turned futile and that from 13.11.2006 the appellant deserted the respondent; that after that incident, he tried to negotiate with her to lead a smooth life, however he was informed that she was interested to live with him; that during the month of January 2007, three persons came to the respondent's office and threatened him with dire consequences; that even when the respondent speaks with his cousin sisters, the appellant makes a big hue and cry and doubts the respondent's chastity; that the appellant has caused a lot of cruelty both mentally and physically and all his efforts to unite with the appellant turned futile and that he has not condoned the adulterous act committed by the appellant and that the appellant is residing alone

since November 2006; that unable to bear the torture the respondent was forced to give a legal notice to the appellant on 03.05.2007 and that the appellant has refused to receive the notice and it has been returned with an endorsement 'refused'; that the marriage between the respondent and the appellant had irretrievably broken down owing to the wilful and deliberate mental torture and harassment rendered by the appellant towards the respondent. On the above grounds, he prayed for dissolution of the marriage.

5. The appellant has filed a counter alleging that her family alone had incurred the entire marriage expenses to the tune of Rs.4 lakhs; that after the marriage there was constant torture and harassment demanding dowry of Rs.1,00,000/- and a motor cycle; that the respondent's family had well before marriage demanded 20 sovereigns of jewel which was given to the respondent and 5 sovereigns to be gifted to the respondent; that after marriage the respondent's sister very often used to come home and directed the appellant to buy fridge, washing machine and a motor bike from her paternal uncle.

6. Further in the counter the appellant denied the allegations that she is in possession of 7 rings belongs to the respondent and that after the marriage both the appellant and the respondent lived in the sister's house and that a false horoscope was given to fix the marriage and that she represented that she was a graduate; that all the stories about horoscope manipulation is nothing but the figment of respondent's imagination. The appellant had denied the allegation that she was having illegal contact with Sembian and that the said Sembian is none other than the husband of her sister Sangeetha, who lives in Chengalpet and that her sister came twice to the respondent's matrimonial home and advised the respondent to lead a happy married life; that the allegation of the respondent that Sembian's visit to their residence in his absence is baseless; that the appellant denied the allegation that the appellant and the respondent lived together only for a week as husband and wife and that she neglected to do her matrimonial obligations and that it is the respondent on the other hand who failed to maintain the household and always stayed in his brother's house; that the respondent did not take food regularly from the matrimonial house; that only to avoid the legal impediment in numbering the petition on the ground of adultery after a lapse of nearly 2-1/2 years since the event of witnessing the adulterous living of the appellant were falsely averred by the respondent; that the address of the said Saravanan is stated by the respondent as unknown and that the respondent himself alleges that Saravanan is a brother of appellant; that the entire allegation is a cooked up story only for filing this O.P.

7. It was further alleged that the respondent did not come home at night hours and he used to come in the morning at 7 ˜ Clock only for a shave and bath and go to office; that the appellant patiently waited for the respondent to mend his ways and went to his brother's house only on the look out of the respondent, several panchayats were also held by the appellant's uncle so that the respondent would change his mind and lead a happy married life; that the appellant pleaded with him to come along with her to the matrimonial residence, but the appellant was beaten severely and when the issue was taken up before the local councillor by the respondent and they advised the respondent only; that it is the respondent who deserted the appellant; that the relatives of the appellant had gone to meet the respondent and his brother only to sort out the problems and mend the strained relationship and since he is the elder brother, his relatives had requested him to settle the problem and advice his younger brother; that the appellant suspected the respondent that he had illicit relationship with his brother's wife and that only to cover up his illicit relationship the respondent is making such wild allegations of adultery on the appellant; that the respondent had very close relationship with another women colleague about whom the appellant came to know after these problems; that inspite of all the cruelties, tortures meted out by the respondent, the appellant is willing to live with him as a dutiful wife and that it is not the appellant who wanted to live alone; that the respondent stopped coming to the matrimonial home and that only on the fond hope of reunion the appellant never persuaded the criminal complaint and in all the conciliation held in the mediation in the anticipatory bail petition filed by the respondent the appellant had expressed her eagerness for reunion; that it is only the respondent who refused for the reunion; that a legal notice was sent by the respondent and the same was refused by her only in the fond hope or reunion and that the

respondent was not aware of the contents of the notice; that there is no iota of truth in the pleadings of the respondent; that it is the respondent who treated the appellant cruelly for want of more dowry and deserted her and that the petition filed by the respondent is devoid of any truth and no merits. Hence she had prayed for dismissal of the petition.

8. Before the trial Court, on the side of the respondent/ husband he examined himself as PW1 and his father and brother were examined as PW2 and PW3 and Ex.P1 to Ex.P5 were marked. On the side of the appellant/wife, she examined herself as RW1 and her uncle Vinayagam, her Sister Sangeetha and her friend one G.Vengatakrishnan were examined as RW2 to RW4 and Ex.R1 to R4 were marked. The Family court though framed issues in respect of adultery and cruelty, disbelieved the husband in respect of allegations of adultery. However, allowed the petition for divorce on the ground of cruelty. The Family Court had taken into consideration that the appellant used to shout at him, suspecting him and further getting angry and hurling vessels at him and not allowing him to sleep which amounted cruelty. Further a contention was also raised that the appellant had preferred a false complaint under Section 498A of IPC and the said complaint was not proceeded by the police after enquiry and that the false complaint under Section 498A caused cruelty. The Family Court took into consideration the admission of the appellant in her evidence that she had preferred a complaint against the respondent under Protection of Women from Domestic Violence Act and for maintenance and had also taken into consideration the contention of the appellant in her counter that the husband alone treated her with cruelty for want of more dowry and deserted her. The Family Court also took into consideration the submission of the wife in her proof affidavit that she had strong reason to suspect that her husband had illicit relationship with his brother's wife and that she had also stated that her husband had close relationship with another woman colleague in the office and that she came to know after the problems. The Family Court also relied on the deposition of the appellant/wife which is extracted hereunder:-

9. In the proof affidavit filed by the appellant before the Family Court she has stated as follows:

I had strong reasons to suspect that the petitioner had illicit relationship with his brotherDs wife. Only to cover up his illicit relationship the petitioner is making such wild allegation of adultery on me. The petitioner had very close relationship with another woman colleague about whom I came to know after these problems. The mediator who arranged the marriage had openly told me that they got the petitioner married in the fond hope of bringing a change in him. In spite of all the cruelties, tortures, and immoral incidents and unfaithfulness the respondent is willing to condone all his mistakes and willing to live with him as a dutiful wife. It is not me who wanted to live alone. The petitioner only stopped coming to the matrimonial residence. Only on the fond hope of reunion I never persuaded the criminal complaint and in all the conciliation held in the mediation in the Anticipatory Bail Application filed by the petitioner I expressed eagerness for reunion. It is only the petitioner who refused for the reunion. DWhereas, in the cross-examination, the respondent/appellant has deposed as follows:-

10. The Family Court thus came to the conclusion from the evidence of R.W.1 that there were disputes between the appellant/wife and respondent/husband within a week of marriage and the Family Court had further concluded that it is the categorical evidence of the appellant/wife that the respondent/husband had stopped coming to the matrimonial home for sometime and he did not come home at night hours and used to come in the morning at 7 'O' clock only for a shave and bath and go to the office. Further the Family Court took note of the counter and deposition of the of the appellant/wife in which she had stated that she and her husband lived happily for three months and though she has deposed that there was a dispute within a week and the husband never used to take any food at home and the reason for the attitude of the husband has not been disclosed. The Family Court also came to the conclusion that it is not the case of the appellant/wife that the respondent/husband ill-treated her and caused cruelty but she had suspected that he was having illegal contact with his colleague in the office or that he might be having illicit intimacy with his brother's wife and ultimately came to the conclusion that it was the appellant/ wife who committed cruelty and granted divorce on the ground of cruelty and dismissed the said petition

regarding the ground of adultery. Aggrieved against the said order and decretal order, the respondent/ wife has preferred this present appeal.

11. The learned counsel for the appellant Mr.N.Manoharan vehemently contended that the Family Court had wrongly interpreted the evidence of the appellant/wife and in the absence of any proof for the cruelty, wrongly arrived at a conclusion that the appellant had subjected the respondent to mental cruelty. Further it was contended that the order has been passed by the Family Court Judge basing his findings on assumptions and presumptions and the Family Court ought not to have granted divorce on the ground that the shouting of the appellant at the respondent caused mental cruelty when especially there was no evidence for the same and he further contended that the husband has to prove his case by cogent evidence. Whereas the Family Court has allowed the case based on the answers elicited from the appellant/wife during the cross-examination.

12. Per contra, it was contended by the Mr.AR.L.Sundaresan, learned Senior Counsel for the respondent that the Family Court had rightly taken into consideration the evidence of the appellant/wife and the respondent/husband. In the present case the appellant has stated that herself and the respondent were happy for 3 months and admitted that there was a dispute within a week of the marriage. Whereas the case of the respondent is that the appellant used to shout and suspect the respondent and that the appellant ought to have denied the allegation specifically or she should have taken efforts to prove before the Family Court on what circumstances she behaved in that manner or the reason for the respondent to come home at night left in the morning and subsequently stop coming home completely. Further the vague denial of the appellant and her inconsistent pleas regarding the demand of dowry, her suspicion of illegal intimacy of respondent with his brother's wife and his office colleague prove the case of the respondent that he was subjected to mental cruelty by the appellant.

13. Further, it was also contended by Mr.AR.L.Sundaresan, learned Senior Counsel for the respondent that the parties have been living separately for the past 10 years and the marriage has virtually lost its meaning for them and that they have reached the point of no return and that she had also not filed any petition for restitution of conjugal rights so as to express her inclination to join the respondent at any point of time and as such there was no life in the marriage bond and that it should be dissolved for this reason. It was further submitted by the counsel for the respondent that due to the long date of separation and since the appeal was not earnestly followed in time, the respondent had meanwhile married for the second time and has got two children born out of the wedlock and submitted that he is prepared to pay substantial amount towards permanent alimony. He also brought to the notice of this Court that in view of the interim orders passed by this Court, he had already paid an amount of Rs.2,31,000/- to the appellant/wife. It was further submitted that both of them have lived together for a period of six months and thereafter they have been living separately throughout.

14. We have carefully gone through the submissions made by both the counsels and also gone through the records of the lower court. In view of the submissions made on either side the only question that has to be seen is as to whether the finding of the Family Court that the act of the appellant/wife would amount to cruelty so as to concur with the finding of the lower court.

15. In respect of cruelty the Full Bench of the Apex Court in Samar Ghosh v. Jaya Ghosh reported in 2007 4 SCC 511 has held as follows:- (paragraphs 97 to 102) D97.This Court in Naveen Kohli v. Neelu Kohli reported in (2006) 4 SCC 558 dealt with the similar issues in detail. Those observations incorporated in paragraphs 74 to 79 are reiterated in the succeeding paragraphs.

> "74. We have been principally impressed by the consideration that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie the

law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties.

75. Public interest demands not only that the married status should, as far as possible, as long as possible, and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact.

76. Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied for ever to a marriage that in fact has ceased to exist."

77. Some jurists have also expressed their apprehension for introduction of irretrievable breakdown of marriage as a ground for grant of the decree of divorce. In their opinion, such an amendment in the Act would put human ingenuity at a premium and throw wide open the doors to litigation, and will create more problems then are sought to be solved.

78. The other majority view, which is shared by most jurists, according to the Law Commission Report, is that human life has a short span and situations causing misery cannot be allowed to continue indefinitely. A halt has to be called at some stage. Law cannot turn a blind eye to such situations, nor can it decline to give adequate response to the necessities arising therefrom.

79. When we carefully evaluate the judgment of the High Court and scrutinize its findings in the background of the facts and circumstances of this case, it becomes obvious that the approach adopted by the High Court in deciding this matter is far from satisfactory."

98. On proper analysis and scrutiny of the judgments of this Court and other Courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept of 'mental cruelty' within which all kinds of cases of mental cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.

99. Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

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 or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.

102. When we take into consideration aforementioned factors along with an important circumstance that the parties are admittedly living separately for more than sixteen and half years (since 27.8.1990) the irresistible conclusion would be that matrimonial bond has been ruptured beyond repair because of the mental cruelty caused by the respondent.

16. In 2012 (2) MLJ 833 (U.Sree vs. U.Srinivas), at paragraph 88, it has been held as follows:-

> 88. In short, it would be difficult for the parties to bury the past and to begin a new relationship of Husband and Wife. For the past 15 years both parties have remained separately. During these years, they developed their own life style, remained in isolation and grown in their own thoughts. Marriage tie between the parties has become emotionally dead and the same is beyond repair because of the emotionally dead relationship which is a positive act of oppressive mental cruelty, in our considered opinion. There is no chance for both parties to live together in future. In such a context, the decree of Divorce is the only remedy to be passed, so that the parties may choose their life of their own way, when there has been no scope for their reunion.

17. The ratio in the above judgments had been further fortified by the later judgment of the Hon'ble Apex Court reported in (2013) 5 SCC 226 (K.Srinivasa Rao vs. D.A.Deepa), wherein it had been held as follows:- (paragraphs 29 to 36) š 9. In our opinion, the High Court wrongly held that because the appellant-husband and the respondent-wife did not stay together there is no question of the parties causing cruelty to each other. Staying together under the same roof is not a pre-condition for mental cruelty. Spouse can cause mental cruelty by his or her conduct even while he or she is not staying under the same roof. In a given case, while staying away, a spouse can cause mental cruelty to the other spouse by sending vulgar and defamatory letters or notices or filing complaints containing indecent allegations or by initiating number of judicial proceedings making the other spouses life miserable. This is what has happened in this case.

> 30. It is also to be noted that the appellant-husband and the respondent- wife are staying apart from 27/4/1999. Thus, they are living separately for more than ten years. This separation has created an unbridgeable distance between the two. As held in Samar Ghosh, if we refuse to sever the tie, it may lead to mental cruelty.
>
> 31. We are also satisfied that this marriage has irretrievably broken down. Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. But, where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, the courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the courts verdict, if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried-up there is hardly any chance of their springing back to life on account of artificial reunion created by the courts decree.
>
> 32. In V. Bhagat this Court noted that divorce petition was pending for eight years and a good part of the lives of both the parties had been consumed in litigation, yet the end was not in sight. The facts were such that there was no question of reunion, the marriage having irretrievably broken down. While dissolving the marriage on the ground of mental cruelty this Court observed that irretrievable breakdown of marriage is not a ground by itself, but, while scrutinizing the evidence on record to determine whether the grounds alleged are made out and in determining the relief to be granted the said circumstance can certainly be borne in mind.
>
> 33. In Naveen Kohli, where husband and wife had been living separately for more than 10 years and a large number of criminal proceedings had been initiated by the wife against the husband, this Court observed that the marriage had been wrecked beyond the hope of salvage and public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto. It is important to note that in this case this Court made a recommendation to the Union of India that the Hindu Marriage Act, 1955 be amended to incorporate irretrievable breakdown of marriage as a ground for the grant of divorce.

34. In the ultimate analysis, we hold that the respondent-wife has caused by her conduct mental cruelty to the appellant-husband and the marriage has irretrievably broken down. Dissolution of marriage will relieve both sides of pain and anguish. In this Court the respondent-wife expressed that she wants to go back to the appellant-husband, but, that is not possible now. The appellant-husband is not willing to take her back. Even if we refuse decree of divorce to the appellant-husband, there are hardly any chances of the respondent-wife leading a happy life with the appellant-husband because a lot of bitterness is created by the conduct of the respondent-wife.

35. In Vijay Kumar, it was submitted that if the decree of divorce is set aside, there may be fresh avenues and scope for reconciliation between parties. This court observed that judged in the background of all surrounding circumstances, the claim appeared to be too desolate, merely born out of despair rather than based upon any real, concrete or genuine purpose or aim. In the facts of this case we feel the same. 36. While we are of the opinion that decree of divorce must be granted, we are alive to the plight of the respondent-wife. The appellant-husband is working as an Assistant Registrar in the Andhra Pradesh High Court. He is getting a good salary. The respondent-wife fought the litigation for more than 10 years. She appears to be entirely dependent on her parents and on her brother, therefore, her future must be secured by directing the appellant-husband to give her permanent alimony. In the facts and circumstance of this case, we are of the opinion that the appellant-husband should be directed to pay a sum of Rs.15,00,000/- (Rupees Fifteen Lakhs only) to the respondent-wife as and by way of permanent alimony.

18. In the recent judgment relied on by the counsel for the Appellant reported in AIR 2017 SC 2138 (Raj Talreja vs. Kavita Talreja), the three Judges Bench of the Apex Court has held as follows:-

™0. Cruelty can never be defined with exactitude. What is cruelty will depend upon the facts and circumstances of each case. In the present case, from the facts narrated above, it is apparent that the wife made reckless, defamatory and false accusations against her husband, his family members and colleagues, which would definitely have the effect of lowering his reputation in the eyes of his peers. Mere filing of complaints is not cruelty, if there are justifiable reasons to file the complaints. Merely because no action is taken on the complaint or after trial the accused is acquitted may not be a ground to treat such accusations of the wife as cruelty within the meaning of the Hindu Marriage Act 1955 (for short Dthe ActD). However, if it is found that the allegations are patently false, then there can be no manner of doubt that the said conduct of a spouse levelling false accusations against the other spouse would be an act of cruelty. In the present case, all the allegations were found to be false. Later, she filed another complaint alleging that her husband along with some other persons had trespassed into her house and assaulted her. The police found, on investigation, that not only was the complaint false but also the injuries were self inflicted by the wife. Thereafter, proceedings were launched against the wife under Section 182 of IPC.

In the above judgment the Hon'ble Apex Court had held that wife made reckless, defamatory and false accusation against her husband, his family members and colleagues which would definitely have the effect of lowering his reputation in the eyes of his peers and when it is found that the allegations are patently false, then there can be no manner of doubt that the said conduct of a spouse levelling false accusation against the other spouse would be an act of cruelty.

19. In the above judgment referred to in the foregoing paragraph the Hon'ble Apex Court had held that though the acts of the wife for filing false case against her husband amount to cruelty, had also stated that they are not oblivious to the requirements of the wife to have a decent living and directed the husband to pay substantial amount towards permanent alimony. Taking into consideration the ratio laid down by the Apex Court in the above referred judgment and applying the above principle to the present case we see that in this case also the wife had not only preferred a complaint alleging demand of dowry which she had not pursued further but had also alleged illicit intimacy of her husband with his own brother's wife and with his office colleague.

20. Though the court below has held that there is no proof of adultery and had rejected the claim of the husband on that ground had at the same time not believed the allegations of the wife that her husband had illegal relationship with his brother's wife and also one another office colleague. However, the Family Court had rightly held that the wife's reckless and false allegations against her husband and his family members and colleague, lowering his reputation which allegations later found to be patently false held that the conduct of the wife levelling false accusation against the husband amounts to cruelty and had stated that the husband is entitled to decree of divorce.

21. Further it is to be seen that the parties have been living separately for more than 10 years. On a perusal of the records and deposition of the appellant as well as the respondent coupled with the fact that the marriage between the appellant and the respondent took place on 03.09.2004 dispute arose between them within three months of marriage, the divorce petition was filed on 11.05.2007 after four years of marriage and after completion of trial the Family Court has granted divorce on 28.11.2013 and the appeal has been filed on 14.02.2014 and till today the parties are living separately. Moreover, the appeal had not been earnestly followed up and after the lapse of time for preferring the appeal it is understood that the respondent had also married again and he has got two children out of the marriage. The appellant has contested the case for about 10 years.

22. Taking into consideration the above facts we are of the opinion that the judgment of the Family Court granting decree of divorce is to be confirmed on the ground of cruelty. However, we are also alive to the plight of the Appellant wife who appears to be dependant on her relatives. It has been stated by the appellant that the respondent is gainfully engaged in a profitable travel business and that recently he has also purchased a property worth several lakhs and that he is capable of maintaining her and that she is dependent on her relatives for survival. The Appellant and the respondent have been separated for more than 10 years and the appellant has fought the legal battle for more than 10 years, and she is dependant on her relatives, therefore her future has to be secured by directing the respondent/husband to provide her permanent alimony under Section 24 of the Hindu Marriage Act. We have also taken note of the submissions made by the learned Senior Counsel for the respondent with regard to the willingness of the respondent to pay permanent alimony. Taking into consideration the submissions of the learned Senior Counsel and also the facts and circumstances of the case that the respondent/husband has already paid Rs.2,31,000/- towards interim alimony pursuant to order of this Court, we are of the opinion that the respondent/husband should be directed to pay a further sum of Rs.12,00,000/- (Rupees Twelve Lakhs only) as and by way of permanent alimony within a period of six weeks from the date of receipt of the copy of the order.

23. With the above observations this appeal is dismissed of. No costs.

**R. SUBBIAH, J**

**A.D.JAGADISH CHANDIRA, J**

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# SALOME VERSUS DR.PRINCE D.IMMANUEL

**Madras High Court**

**Bench : Hon'ble Ms. Justice V.M. Velumani**

*Salome, W/o.Prince D.Immanuel .. Appellant*
*Versus*
*Dr.Prince D.Immanuel .. Respondent*

**C.M.A.(MD)Nos.238 of 2012 and 239 of 2012**

**C.M.A.(MD)No.238 of 2012**

**Decided on 6 April, 2017**

- **On a bare reading of Section 13 of the Act, reproduced above, it is crystal clear that no such ground of irretrievable breakdown of the marriage is provided by the legislature for granting a decree of divorce. This Court cannot add such a ground to Section 13 of the Act as that would be amending the Act, which is a function of the legislature.**
- **A person is not allowed to take advantage of his own wrong. The appellant has failed to prove his allegation of cruelty. Not just this, he had also demanded dowry and it is he who abandoned the respondent. Under the circumstances, there is no infirmity in the order of the learned trial judge inasmuch as the appellant is not entitled to a decree of divorce under Section 13(1)(ia) of the Hindu Marriage Act, 1955. Furthermore, Section 23(1)(a) of the Act makes it abundantly clear that a decree can be granted when the Court is satisfied that the petitioner is in no way taking advantage of his wrong. Such is not the case here, as it is the appellant who abandoned the company of his wife.**
- **Mental cruelty is not defined in the Act and it cannot be put on a strait-jacket formula. Facts and circumstances of each case must be considered on merits to decide whether the party alleging mental cruelty has proved the same. Normal wear and tear and minor misunderstanding and irritation in family life, cannot be termed as mental cruelty. The action alleged against other party must be such that which makes it impossible for the party to live with other party as husband and wife.**
- **There is nothing on record to show that after obtaining decree, he took steps to make the appellant to live with him as his wife. He has not filed any E.P. as per Order 21 Rule 32 Civil Procedure Code. Where a person, who suffered a decree of restitution of conjugal rights has wilfully failed to obey the decree, the person, who obtained decree can enforce the same by attachment of his or her property. In the circumstances, the fact that the appellant and the respondent are living separately for more than 10 years and the attitude of the respondent even after obtaining a decree of restitution of conjugal rights has not taken steps to enforce the same, but insisting on retaining matrimonial bond would amount to causing mental cruelty and to torment and traumatized the appellant.**
- **The ratio laid down in the said judgments are squarely applicable to the facts of the present case. The insistence of the respondent to continue the matrimonial tie even though he is fully aware that there is no possibility of re-union and living together as husband and wife, amounts to causing mental cruelty to the appellant.**

Reserved on : 14.03.2017

Delivered on : 06.04.2017

## COMMON JUDGMENT

These Civil Miscellaneous Appeals have been filed by the appellant to set aside the Judgment and Decree, dated 19.11.2011, passed in I.D.O.P.Nos.8 and 42 of 2007, by the learned Principal District Judge, Thoothukudi.

2. Since the issues involved in both the Civil Miscellaneous Appeals are interlinked, they are heard together and disposed of by this common judgment.

3. The appellant is the wife and the respondent is the husband. The marriage between the appellant and the respondent was solemnized on 19.06.2003 at St.John Baptist Church, Kadatchapuram, Thoothukudi District, according to Christian Customs and Rites. The appellant is a Doctor and the appellant's parents are also Doctors. The respondent is working as a Veterinary Doctor and subsequently, obtained Doctorate Degree in the Field of Meat Research. At the time of marriage, the respondent was working as a Scientist at National Research Centre, Hyderabad, Andhra Pradesh. At that time, the appellant was working as Doctor in Leprosy Mission Hospital (TLM) at Kothara, Maharashtra, on 5 years bond. According to appellant, the respondent treated her in suspicious manner regarding her fidelity. He was not behaving like an educated person, but, like a downtrodden uneducated man. At the time of marriage, the respondent promised the appellant that he would allow her to do her Post Graduate studies. Subsequently, he refused to do so.

4. The respondent used to ring up the appellant while assisting the Surgeon in the Operation Theatre and when she did not answer call in the mobile he would question her and harass her by asking cheap questions and mentally harassed the appellant. When they were staying at Hyderabad and when the appellant gave water to small boy, who used to deliver dry cleaned clothes, the respondent shouted at the appellant in the presence of his parents. On 22.05.2005, he sent an Email to the father of the appellant accusing the appellant having affair with the staff of the hospital. He also had cheap suspicion and questioned the appellant about the relationship with the Superintendent, who is an aged person. When her parents presented a Shirt to the respondent, worth Rs.1,400/-, he threw the Shirt and scolded the appellant that the Shirt is fit for only a beggar. The respondent never allowed her to talk to her sister or to his friends. He used to be very friendly with the parents of the appellant in their presence, but he used to talk ill of them in their absence to the appellant. During their Honeymoon Trip at Kodaikanal, he behaved indifferently with everyone and were telling lies to everyone. When he went to USA, he did not inform the appellant or her parents. When the appellant received a Christmas Greetings, wishing a Happy and Peaceful Christmas, he wrongly interpreted the wish 'Happy and Peaceful Christmas'. The respondent is suffering from inferiority complex and used to torture the appellant stating that she is not smart, good looking and her parents dumped her on him, since they could not find a suitable groom. The respondent used to tell the appellant that she is not smart as his sister and he will not take her out with him anywhere. Even though, the appellant as a dutiful wife took care of his mother, the appellant used to find fault with her. The respondent boasted the appellant that he has put 22 locks to his house. For the above mental torture, the appellant issued a notice to the respondent on 06.10.2006 and filed I.D.O.P.No.8 of 2007, for dissolving the marriage, that took place on 19.06.2003 between the appellant and the respondent.

5. The respondent filed counter statement and denied all the averments made by the appellant. According to respondent, the marriage is an arranged marriage. After the appellant and the respondent met only, the marriage was arranged and after betrothal, they were married. The respondent is very proud of having appellant as his wife and has lot of love and affection for her. He took her along with him wherever he went and when she was staying with him in Hyderabad, they visited number of places. He denied the various allegations made by the appellant in her petition. According to the respondent, he informed the appellant and her parents when he left to U.S.A. and gave his address. The notice issued by the appellant was served on him only in U.S.A. The respondent also stated that he has not put 22 locks in his home. The appellant only without any reason, left the matrimonial home and at the instigation of her father, she made these allegations. The respondent was not informed about betrothal and marriage of appellant's younger sister and was not invited for the marriage. When the appellant had a trouble with one of the co-employees at TLM, Kothara, the respondent only went

and brought her to Hyderabad and subsequently, left her at her native place. The respondent encouraged the appellant to pursue her Post Graduate Course in C.M.C. at Vellore.

6. On the very same averments made in the counter statement, the respondent filed I.D.O.P.No.42 of 2007, for restitution of conjugal rights. The appellant filed counter statement making the same averments made by her in the petition filed by her in I.D.O.P.

7. Both the I.D.O.Ps. were heard together and common evidence was let in I.D.O.P.No.8 of 2007.

8. The appellant examined herself as P.W.1 and two documents, viz., Marriage Invitation and Legal Notice sent to the respondent were marked as Exs.P.1 and P.2. The respondent examined himself as R.W.1 and marked 137 documents as Exs.R.1 to R.137.

9. The learned Principal District Judge, Thoothukudi, considering the pleadings, oral and documentary evidence and arguments of the learned counsel for the parties, held that the appellant has not proved that the respondent caused mental cruelty and the respondent proved his love and affection for the appellant and dismissed I.D.O.P.No.8 of 2007 filed by appellant and allowed I.D.O.P.No.42 of 2007 filed by the respondent.

10. Against the said common judgment and decree, dated 19.11.2011, the appellant has come out with the present Civil Miscellaneous Appeals.

11. The learned counsel for the appellant referred various averments in the petition, counter statement filed by the appellant and the grounds of appeals. The learned counsel for the appellant submitted that mental cruelty is not defined under the Act and there is no strait-jacket definition for the same. Each case must be decided based on its own facts and circumstances of the case to conclude whether the incidents alleged by the party amounts to mental cruelty or not. In the present case, the appellant has averred various incidents, by which, the respondent has repeatedly caused mental agony and cruelty to the appellant. The learned counsel for the appellant stated that the respondent has admitted in his evidence that he put up 10 locks, not 22 locks to lock the home. Any normal prudent man would not put 10 locks to lock the home. This fact coupled with the fact that the respondent was friendly with the parents of the appellant in their presence and talked about them shows mental illness of the respondent. Only due to the mental cruelty, the appellant has left the matrimonial home and due to the character and attitude of the respondent, it is not safe and advisable for the appellant to join the respondent in the matrimonial home. The appellant and the respondent are living separately for more than 10 years and the marriage has broken irretrievably. The Hon'ble Apex Court in a number of judgments granted divorce on this ground. This case is similar to cases dealt by the Hon'ble Apex Court and therefore, the marriage can be dissolved on this ground also. The respondent has made baseless allegations against the father of the appellant causing mental agony and cruelty.

12. In support of his submissions, the learned counsel for the appellant relied on the following judgments:

(i) 2006 (4) SCC 558 [Naveen Kohli Vs. Neelu Kohli], wherein at paragraph 83, it has been held as follows:

> 83.Even at this stage, the respondent does not want divorce by mutual consent. From the analysis and evaluation of the entire evidence, it is clear that the respondent has resolved to live in agony only to make life a miserable hell for the appellant 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 respondent is bent upon treating the appellant with mental cruelty. It is abundantly clear that the marriage between the parties had broken down irretrievably and there is no chance of their coming together, or living together again.?

(ii) AIR 2005 SC 3297 [Durga Prasanna Tripathy Vs. Arundhati Tripathy], wherein at paragraphs 29 and 30, it has been held as follows:

29.The facts and circumstances in the above three cases disclose that reunion is impossible. Our case on hand is one such. It is not in dispute that the appellant and the respondent are living away for the last 14 years. It is also true that a good part of the lives of both the parties has been consumed in this litigation. As observed by this Court, the end is not in sight. The assertion of the wife through her learned counsel at the time of hearing appears to be impractical. It is also a matter of record that dislike for each other was burning hot.

30.Before parting with this case, we think it necessary to say the following: Marriages are made in heaven. Both parties have crossed the point of no return. A workable solution is certainly not possible. Parties cannot at this stage reconcile themselves and live together forgetting their past as a bad dream. We, therefore, have no other option except to allow the appeal and set aside the judgment of the High Court and affirming the order of the Family Court granting decree for divorce. The Family Court has directed the appellant to pay a sum of Rs.50,000/- towards permanent alimony to the respondent and pursuant to such direction the appellant had deposited the amount by way of bank draft. Considering the status of parties and the economic condition of the appellant who is facing criminal prosecution and out of job and also considering the status of the wife who is employed, we feel that a further sum of Rs.1 lakh by way of permanent alimony would meet the ends of justice. This shall be paid by the appellant within 3 months from today by an account payee demand draft drawn in favour of the respondent - Arundhati Tripathy and the dissolution shall come into effect when the demand draft is drawn and furnished to the respondent.?

(iii) 2010 (2) CTC 214 [Manisha Tyagi Vs. Deepak Kumar], wherein at paragraph 24, it has been held as follows:-

24.This is no longer the required standard. Now it would be sufficient to show that the conduct of one of the spouses is so abnormal and below the accepted norm that the other spouse could not reasonably be expected to put up with it. The conduct is no longer required to be so atrociously abominable which would cause a reasonable apprehension that it would be harmful or injurious to continue the cohabitation with the other spouse. Therefore to establish cruelty it is not necessary that physical violence should be used. However, continued ill-treatment cessation of marital intercourse, studied neglect, indifference of one spouse to the other may lead to an inference of cruelty. However in this case even with aforesaid standard both the Trial Court and the Appellate Court had accepted that the conduct of the wife did not amount to cruelty of such a nature to enable the husband to obtain a decree of divorce.?

(iv) 2010 (3) CTC 785 [Jayakumari Vs. Balachander], wherein at paragraph 30, it has been held as follows:

30.The term 'cruelty' consists of unwarranted and unjustifiable conduct on the part of defendant causing other spouse to endure suffering and distress thereby destroying peace of mind and making living with such spouse unbearable, completely destroying real purpose and object of matrimony. It would of course be difficult to define the expression 'cruelty'. There cannot be any hard and fast rule in interpreting the same. As pointed out, the word "cruelty" cannot be put in a strait-jacket of judicial definition. It must be judged on the facts of each case having regard to the surrounding circumstances. Whether one spouse is guilty of cruelty is essentially a question of fact and previously decided cases have little, if any, value. The term 'cruelty' is not defined in the Act. It is to be judged by taking into consideration the status of life, the standard of living, the family background and the society in which the parties are accustomed to move because particular behaviour may amount to cruelty in one set of circumstances and may not be so in other set of circumstances.?

(v) I (2007) DMC 626 (DB) [Firoz Khan and another Vs. Union of India and others], wherein at paragraphs 97 and 98, it has been held as follows:

97.Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

98.Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.?

(vi) 2012 (2) MLJ 833 [U.Sree Vs. U.Srinivas], wherein at paragraph 88, it has been held as follows:

88.In short, it would be difficult for the parties to bury the past and to begin a new relationship of Husband and Wife. For the past 15 years both parties have remained separately. During these years, they developed their own life style, remained in isolation and grown in their own thoughts. Marriage tie between the parties has become emotionally dead and the same is beyond repair because of the emotionally dead relationship which is a positive act of oppressive mental cruelty, in our considered opinion. There is no chance for both parties to live together in future. In such a context, the decree of Divorce is the only remedy to be passed, so that the parties may choose their life of their own way, when there has been no scope for their reunion.?

13. Per contra, the learned Senior Counsel for the respondent submitted that;

(i) the various allegations made by the appellant against the respondent are frivolous, baseless and imaginary;

(ii) the marriage was arranged marriage and both gave their consent only after meeting and talking to each other. After the betrothal, the appellant and the respondent were constantly talking to each other;

(iii) when the appellant had some trouble with her erstwhile colleagues when she was working in TLM at Kothara, after betrothal, the respondent only went to her work place and brought her to Hyderabad and she stayed with her uncle's home at Hyderabad;

(iv) after marriage when the appellant was staying with the respondent, they visited number of places in and around Hyderabad. Similarly, during their Honeymoon also, they had cordial relationship and there was no misunderstanding between them;

(v) the respondent never said that the appellant was not smart and good looking. On the other hand, he was proud of her and were going together to various places and visited friends' and relatives' home;

(vi) the appellant has written number of letters, wherein she has stated that she is happy to live with the respondent;

(vii) the respondent has produced and marked number of letters and photographs, which proved that the allegations of the appellant are false and averments made by the respondent are true;

(viii) by having number of locks in the house will not amount to mental illness of a person;

(ix) the respondent never suspected the fidelity of the appellant;

(x) the marriage between appellant and the respondent was solemnized according to Christian Customs and Rites and as per Christian Doctrine, a person can seek divorce only on the ground of adultery;

(xi) the contention of the learned counsel for the appellant that the marriage had been broken down irretrievably and therefore, the appellant is entitled to divorce, is not correct. There is no provision in the Act to grant divorce on the ground of irretrievable break down of marriage. The Hon'ble Apex Court has granted divorce on that ground in certain cases, exercising extraordinary power under Article 142 of the Constitution of India. The said power is not available to this Court as well as to the Trial Court. The Hon'ble Apex Court also held in some subsequent judgments that this ground is not a valid ground for granting divorce and earlier judgments cannot be taken as precedent; and

(xii) even now, the respondent wants to live with the appellant and lead a happy married life.

14. In support of his submissions, the learned Senior Counsel appearing for the respondent relied on following judgments:

(i) 1982 (2) SCC 474 [Reynold Rajamani and another Vs. Union of India and another], wherein at paragraphs 4 and 5, it has been held as follows:

4.It cannot be denied that society is generally interested in maintaining the marriage bond and preserving the matrimonial state with a view to protecting societal stability, the family home and the proper growth and happiness of children of the marriage. Legislation for the purpose of dissolving the marriage constitutes a departure from that primary principle, and the Legislature is extremely, circumspect in setting forth the grounds on which a marriage may be dissolved. The history of all matrimonial legislation will show that at the outset conservative attitudes influenced the grounds on which separation or divorce could be granted. Over the decades, a more liberal attitude has been adopted, fostered by a recognition of the need for the individual happiness of the adult parties directly involved. But although the grounds for divorce have been liberalised, they nevertheless continue to form an exception to the general principle favouring the continuation of the marital tie. In our opinion, when a legislative provision specifies the grounds on which divorce may be granted they constitute the only conditions on which the court has jurisdiction to grant divorce. If grounds need to be added to those already specifically set forth in the legislation, that is the business of the Legislature and not of the courts. It is another matter that in construing the language in which the grounds are incorporated the courts should give a liberal construction to it. Indeed, we think that the courts must give the fullest amplitude of meaning to such a provision. But it must be meaning which the language of the section is capable of holding. It cannot be extended by adding new grounds not enumerated in the section.

5.When therefore Section 10 of the Indian Divorce Act specifically sets forth the grounds on which a marriage may be dissolved, additional grounds cannot be included by the judicial construction of some other section unless that section plainly intends so. .....?

(ii) 2009 (10) SCC 415 [Anil Kumar Jain Vs. Maya Jain], wherein at paragraphs 27, 29 and 30, it has been held as follows:

27. In all the subsequent cases, the Supreme Court invoked its extraordinary powers under Article 142 of the Constitution of India in order to do complete justice to the parties when faced with a situation where the marriage-ties had completely broken and there was no possibility whatsoever of the spouses coming together again. In such a situation, this Court felt that it would be a travesty of justice to continue with the marriage ties.

29. In the ultimate analysis the aforesaid discussion throws up two propositions. The first proposition is that although irretrievable break-down of marriage is not one of the grounds indicated whether under Sections 13 or 13- B of the Hindu Marriage Act, 1955, for grant of divorce, the said doctrine can be applied to a proceeding under either of the said two provisions only where the proceedings are before the Supreme Court. In exercise of its extraordinary powers under Article 142 of the Constitution the Supreme Court can grant relief to the parties

without even waiting for the statutory period of six months stipulated in Section 13-B of the aforesaid Act. This doctrine of irretrievable break-down of marriage is not available even to the High Courts which do not have powers similar to those exercised by the Supreme Court under Article 142 of the Constitution. Neither the civil courts nor even the High Courts can, therefore, pass orders before the periods prescribed under the relevant provisions of the Act or on grounds not provided for in Section 13 and 13-B of the Hindu Marriage Act, 1955.

30. The second proposition is that although the Supreme Court can, in exercise of its extraordinary powers under Article 142 of the Constitution, convert a proceeding under Section 13 of the Hindu Marriage Act, 1955, into one under Section 13-B and pass a decree for mutual divorce, without waiting for the statutory period of six months, none of the other Courts can exercise such powers. The other Courts are not competent to pass a decree for mutual divorce if one of the consenting parties withdraws his/her consent before the decree is passed. Under the existing laws, the consent given by the parties at the time of filing of the joint petition for divorce by mutual consent has to subsist till the second stage when the petition comes up for orders and a decree for divorce is finally passed and it is only the Supreme Court, which, in exercise of its extraordinary powers under Article 142 of the Constitution, can pass orders to do complete justice to the parties.?

(iii) 2009 (6) SCC 379 [Vishnu Dutt Sharma Vs. Manju Sharma], wherein at paragraphs 5, 10 and 12, it has been held as follows:

5. The trial Court after examining the evidence came to the conclusion that no case of cruelty had been made out as alleged by the appellant. The Trial Court held that considering that the respondent had been turned out of the matrimonial house and had been given beatings for which she was medically examined, it was the respondent who was treated cruelly by the appellant. Being aggrieved, the appellant preferred an appeal in the High Court.

10. On a bare reading of Section 13 of the Act, reproduced above, it is crystal clear that no such ground of irretrievable breakdown of the marriage is provided by the legislature for granting a decree of divorce. This Court cannot add such a ground to Section 13 of the Act as that would be amending the Act, which is a function of the legislature.

12. If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of the marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Courts. Hence, we do not find force in the submission of the learned counsel for the appellant.?

(iv) 2016 SCC OnLine Delhi 5312 : (2016) 234 DLT 243 (DB) [Mini Appa Kanda Swami @ Mani Vs. M.Indra], wherein at paragraphs 10, 20, 21 and 25, it has been held as follows:

10. The question for consideration is whether the conduct of the respondent/wife in the circumstance of the case, amounted to cruelty, to entitle the husband to divorce. Cruelty could be physical or mental or both. While it is easy to discern physical cruelty, mental cruelty has to be assessed from the overall behavior of spouses as well as other incidental factors. There is no doubt that in a matrimonial setup, a couple, which decides to live together, invariably has different attitudes and opinions, likes and dislikes, and more often than not spouses behave differently when faced with the same situations. While disputes and arguments are normal in a marriage, in order to constitute cruelty, the conduct of the spouse should be something more serious than the ordinary "wear and tear" of a marital life.

20. A person is not allowed to take advantage of his own wrong. The appellant has failed to prove his allegation of cruelty. Not just this, he had also demanded dowry and it is he who

abandoned the respondent. Under the circumstances, there is no infirmity in the order of the learned trial judge inasmuch as the appellant is not entitled to a decree of divorce under Section 13(1)(ia) of the Hindu Marriage Act, 1955. Furthermore, Section 23(1)(a) of the Act makes it abundantly clear that a decree can be granted when the Court is satisfied that the petitioner is in no way taking advantage of his wrong. Such is not the case here, as it is the appellant who abandoned the company of his wife.

21. Lastly, it is urged by learned counsel for the appellant that the parties have been living separately for the last 12 years and the marriage has virtually lost its meaning for them as they have reached a point of no return. She avers that there is no life in the marriage bond and that it should be dissolved for this reason. She has relied on para 26 of the Judgement in K. Srinivas Rao vs. D.A. Deepa, 2013 (2) SCALE 735, reproduced as under:-

"We are also satisfied that this marriage has irretrievably broken down. Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. But, where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, the courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the court's verdict, if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried-up there is hardly any chance of their springing back to life on account of artificial reunion created by the court's decree."

25. This Court thus lacks jurisdiction to dissolve a marriage on the doctrine of ?irretrievable breakdown?.

(v) 2016 (O) Supreme (Del.) 3869 : (2016) 234 DLT 381 [Sandhya Kumari Vs. Manish Kumar], wherein at paragraph 21, it has been held as follows:

"21. Though irretrievable breakdown of marriage is not a ground for divorce but in the judgments reported as 2006 (2) Mh.L.J. 307 Madhvi Ramesh Dudani Vs. Ramesh K.Dudani, 2007 (4) KHC 807 Shrikumar V.Unnithan vs. Manju K.Nair, (1994) 1 SCC 337 V.Bhagat vs. D.Bhagat and (2006) 4 SCC 558 Navin Kohli vs. Neelu Kohli the concept of cruelty has been blended by the Courts with irretrievable breakdown of marriage. The ratio of law which emerged from said decisions is that where there is evidence that the husband and wife indulged in mutual bickering leading to remonstration and therefrom to the stage where they target each other mentally, insistence by one to retain the matrimonial bond would be a relevant factor to decide on the issue of cruelty, for the reason the obvious intention of said spouse would be to continue with the marriage not to enjoy the bliss thereof but to torment and traumatized each other."

15. The learned counsel for the appellant by reply submitted that the appellant and the respondent were living together as husband and wife only for 5 months and there is no possibility for them to live as husband and wife, in view of the facts and circumstances of the case. The long separation coupled with the attitude of respondent would amount to mental cruelty caused to the appellant.

16. I have considered the submissions of the learned counsel appearing for the parties and perused the materials available on record and the judgments relied on by the learned counsel on either side.

17. Both the appellant and the respondent are well educated and they are in medical profession. Both come from respectable family and the marriage between them is an arranged marriage and both gave their consent willingly. In spite of this background, misunderstanding has arisen and the appellant has made allegations against the respondent causing mental cruelty. She has also alleged that the respondent is suffering from inferiority complex and mental illness. The appellant has alleged mental cruelty, not physical cruelty. The issue of mental cruelty has been considered by this Court and the Hon'ble Apex

Court in various judgments. It has been held that mental cruelty is not defined in the Act and it cannot be put on a strait-jacket formula. Facts and circumstances of each case must be considered on merits to decide whether the party alleging mental cruelty has proved the same. Normal wear and tear and minor misunderstanding and irritation in family life, cannot be termed as mental cruelty. The action alleged against other party must be such that which makes it impossible for the party to live with other party as husband and wife. In the present case, the appellant has made various allegations against the respondent which according to her, amounts to mental cruelty and it is not possible for her to live with the respondent as wife any longer. The appellant as P.W.1 deposed about these averments.

18. Per contra, the respondent has marked 137 documents to substantiate his case that he never caused mental cruelty. The learned Principal District Judge, considering each and every allegation made by the appellant, rejected the same holding that the appellant failed to prove the same. The learned Principal District Judge failed to consider the fact that the father of the appellant gave a complaint against the respondent and the respondent made allegations against the father of the appellant that only because of instigation of father of the appellant, the appellant had filed the petition for divorce and the father of the appellant gave a false complaint against the respondent. These allegations coupled with various averments made by the appellant would definitely amount to mental cruelty caused by the respondent.

19. The learned counsel for the appellant contended that divorce can be granted on the ground of irretrievable break down of marriage as per judgments of the Hon'ble Apex Court. This contention is untenable. The Hon'ble Apex Court has granted divorce on that ground exercising its extraordinary power under Article 142 of the Constitution of India. The said power is not available to this Court or to the Trial Court. In the subsequent judgments, the Hon'ble Apex Court held that the earlier judgment, granting divorce on the ground of irretrievable broken down cannot be taken as precedent. It is pertinent to note that the respondent obtained a decree of restitution of conjugal rights. There is nothing on record to show that after obtaining decree, he took steps to make the appellant to live with him as his wife. He has not filed any E.P. as per Order 21 Rule 32 Civil Procedure Code. Where a person, who suffered a decree of restitution of conjugal rights has wilfully failed to obey the decree, the person, who obtained decree can enforce the same by attachment of his or her property. In the circumstances, the fact that the appellant and the respondent are living separately for more than 10 years and the attitude of the respondent even after obtaining a decree of restitution of conjugal rights has not taken steps to enforce the same, but insisting on retaining matrimonial bond would amount to causing mental cruelty and to torment and traumatized the appellant. This has been held so by the Delhi High Court in the judgment reported in 2016 (O) Supreme (Del.) 3869 and the Hon'ble Apex Court in the judgment reported in 2006 (4) SCC 558 [cited supra].

20. The ratio laid down in the said judgments are squarely applicable to the facts of the present case. The insistence of the respondent to continue the matrimonial tie even though he is fully aware that there is no possibility of re-union and living together as husband and wife, amounts to causing mental cruelty to the appellant.

21. For the above reasons, both the Civil Miscellaneous Appeals are allowed. The common judgment and decree, dated 19.11.2011, passed in I.D.O.P.Nos.8 and 42 of 2007, by the learned Principal District Judge, Thoothukudi, are set aside. I.D.O.P.No.8 of 2007 filed by the appellant for divorce, is allowed and I.D.O.P.No.42 of 2007 filed by the respondent for restitution of conjugal rights, is dismissed. No costs.

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LANDMARK JUDGMENTS ON

# CUSTODY OF CHILDREN AND VISITATION RIGHTS

# ARVIND GOPAL KRISHNA CHAWDA VERSUS THE STATE OF TELANGANA REP. BY ITS ...

**Andhra Pradesh High Court**

**Bench : Hon'ble Sri Justice Sanjay Kumar and Hon'ble Sri Justice M. Seetharama**

*Arvind Gopal Krishna Chawda*
*Versus*
*The State Of Telangana Rep. By Its ...*

**WRIT PETITION NO.20709 OF 2015**

**Decided on 21 October, 2016**

- **Petitioner seeks a direction to the 6th respondent to hand over the custody of the minor children to him so that he can take them back to the jurisdiction of the American Court. A further direction is sought to the 6th respondent to deliver to the petitioner the required documents which are in her custody, such as the passports and other travel related documents of the children, to facilitate their return to the USA.**
- **The American Court passed order dated 31.10.2013 granting sole legal and residential custody of the children to the petitioner.**
- **Thereafter, the American Court granted a decree of divorce on 23.01.2014 and also granted sole legal and residential custody of the minor children to the petitioner pursuant to its earlier order dated 31.10.2013.**
- **The Supreme Court noted the following principles regarding custody of minor children:**
  - **(1) The modern theory of the conflict of laws recognizes and prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case;**
  - **(2) Though the Hindu Minority and Guardianship Act, 1956, constitutes the father as the natural guardian of a minor son, it cannot supersede the paramount consideration as to what is conducive to the welfare of the minor;**
  - **(3) The domestic court would consider the welfare of the child as of paramount importance and the order of a foreign court is only a factor to be taken into consideration.**
- **On an application seeking a writ of habeas corpus for custody of minor children, the principal consideration for the court is to ascertain whether the custody of the children is unlawful and whether the welfare of the children required that the present custody should be changed so that the children should be left in the care and custody of somebody else. The comity of courts principle normally ensures that foreign judgments and orders are unconditionally conclusive of the matter in controversy, but interest and welfare of the minor being paramount, a competent court in this country would be entitled and indeed duty-bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication.**
- **This Court finds that the American Court had no occasion to actually have any interaction with the children,**

- **In the meanwhile, the stay of the children in India continued and as matters stand today, Krish, the son, has no inkling of his life or his roots in America, while Kashvi, the daughter, has settled down comfortably in her life at Hyderabad and is happy with her schooling and her activities under her mothers tutelage.**
- **On the above analysis, this Court finds that despite the first interlocutory order of custody having been passed by the American Court as long back as on 20.03.2013, three days after the departure of the children from American soil, the delay on the part of the petitioner in seeking implementation thereof and the later final order of custody dated 23.01.2014, has resulted in the children acclimatizing themselves to Indian life and conditions. Krish, the son, has no contact whatsoever with American life as he came away to India when he was less than two years of age. Kashvi, the daughter, was just over seven years of age when she came to India and has now adjusted comfortably to her life here and is happy and secure with her school, friends and family in India. This Court is therefore of the considered opinion that it is not in the interest or welfare of these children to be displaced from their settled life in India and be transported back to what would now be an alien life in the USA**

## ORDER

**(Per Honble Sri Justice Sanjay Kumar)** Arvind Gopal Krishna Chawda, the petitioner herein, was hitherto married to Pulla Sunita Rani, the 6th respondent. He presently seeks a writ of habeas corpus for production of their minor children, Kashvi Chawda and Krish Chawda, citizens of the United States of America (USA), from her custody and to cause their return to the jurisdiction of the courts in New Jersey, USA, in compliance with the orders dated 20.03.2013, 13.08.2013, 31.10.2013 and 23.01.2014 passed by the Superior Court of New Jersey, Chancery Division, Family Part, Middlesex County, USA (hereinafter, the American Court). In the alternative, he seeks a direction to the 6th respondent to hand over the custody of the minor children to him so that he can take them back to the jurisdiction of the American Court. A further direction is sought to the 6th respondent to deliver to the petitioner the required documents which are in her custody, such as the passports and other travel related documents of the children, to facilitate their return to the USA.

The petitioner and the 6th respondent were married at Hyderabad on 27.04.2002 as per Hindu rites. The petitioner was residing in the USA since 1996 and after their marriage; the 6th respondent joined him there in December, 2002. Kashvi, their daughter, was born on 12.07.2005 in the USA, and was therefore an American citizen by birth. The 6th respondent completed her internship as a pharmacist in the USA at this time. Krish, their son, was born on 11.04.2011 in the USA and was also an American citizen by birth. The 6th respondent left the USA with both the children on 17.03.2013 and came to India. Whether the petitioner had knowledge of this is disputed. According to him, he had no such information and came to know of it only when he called the school on 18.03.2013 to find out about the children and was told that they had not come to school. He claimed that he filed a Missing complaint with the National Centre of Missing and Exploited Children. He filed a petition for divorce and custody before the American Court on 19.03.2013. Thereupon, the American Court passed order dated 20.03.2013 for production and return of the children to its jurisdiction. The petitioner claimed that the 6th respondent received the summons from the American Court but suppressing the same, she filed a complaint under Section 498-A IPC at Hyderabad.

The petitioner asserted that, without disclosing that an interim order of custody had already been granted to him in relation to their children, the 6th respondent filed O.P.No.440 of 2013 before the Family Court, Hyderabad, for divorce and custody, wherein she filed I.A.No.195 of 2013, and obtained an ad-interim injunction dated 02.04.2013 restraining him and his family members from removing the minor children from her custody. The petitioner further asserted that the 6th respondent submitted to the jurisdiction of the American Court and faxed letter dated 11.04.2013, through her counsel, to the American Court seeking time to file her counter. The 6th respondents counsel in the USA informed the American Court, by letter dated 18.04.2013, that the

6th respondent was still finalizing her reservations to return to the USA. A similar plea was taken by the 6th respondents counsel under letter dated 22.04.2013.

The petitioner stated that the 6th respondent also filed an application before the American Court on 24.04.2013 to dissolve its restraint as to the childrens custody as turning over the children to the petitioner was not in their best interest. The American Court passed order dated 06.06.2013 holding that it had competence and jurisdiction to deal with the custody and parenting time in relation to the children. The petitioner claimed that the 6th respondent again submitted to the jurisdiction of the American Court by filing applications on 29.06.2013 and 03.09.2013. He also claimed that a consent order was passed by the American Court on 13.08.2013, recording that the 6th respondent had agreed to return to the USA on 29.08.2013 along with the children and directing the petitioner to purchase their air tickets. The petitioner claimed that he purchased the tickets as directed, but the 6th respondent flouted the order and did not return. He further claimed that he filed contempt proceedings against the 6th respondent in this regard.

While so, the American Court passed order dated 31.10.2013 granting sole legal and residential custody of the children to the petitioner. Thereafter, the American Court granted a decree of divorce on 23.01.2014 and also granted sole legal and residential custody of the minor children to the petitioner pursuant to its earlier order dated 31.10.2013. As the 6th respondent refused to comply with the orders of the American Court, the petitioner stated that he came to Hyderabad, India, in the last week of October, 2014, but found them unavailable at the address furnished to the American Court. The petitioner stated that he submitted a complaint to the police authorities on 17.11.2014 but no action was taken thereupon. The petitioner stated that he approached the Supreme Court of India under Article 32 of the Constitution, seeking a writ of habeas corpus in relation to the children, but the same was dismissed by the Supreme Court, vide order dated 18.12.2014, granting him liberty to approach this Court for the said relief. The petitioner thereupon filed this writ petition asserting that the 6th respondent had unlawfully detained their children in India contrary to the orders passed by the American Court and prayed for relief.

In her counter-affidavit, the 6th respondent asserted that by virtue of the order dated 02.04.2013 passed by the Family Court, Hyderabad, in I.A.No.195 of 2013 in O.P.No.440 of 2013, her custody of the children could not be categorized as unlawful. She stated that the petitioner was contesting the said case and had also filed a petition under Order 7 Rule 11 CPC to dismiss it. Adverting to their matrimonial disputes at length, the 6th respondent stated that she left the USA on 17.03.2013 and returned to India along with both the children, after informing the petitioner and all concerned, including her daughters school, her place of work and her babysitter. She further stated that upon her return to India, she filed O.P.No.440 of 2013 for divorce on the ground of cruelty and sought permanent custody of her children. Therein, interim order dated 02.04.2013 was passed protecting her custody of the children. She stated that she also filed a complaint against the petitioner and others under Sections 498-A and 406 IPC read with Section 34 IPC along with Sections 4 and 6 of the Dowry Prohibition Act, 1961, before the Central Crime Station, Hyderabad. Crime No.151 of 2013 was thereupon registered and a charge sheet was eventually laid before the learned XIII Additional Chief Metropolitan Magistrate, Hyderabad, in C.C.No.283 of 2013. The petitioners family members filed Criminal Petition No.15183 of 2013 before this Court to quash the said criminal proceedings and it was allowed only in relation to the father and brother of the petitioner, against whom the charges were quashed, but A5, the sister of the petitioner, was directed to face trial and prove her innocence, as specific overt acts were attributed to her.

The 6th respondent stated that she came to India on 17.03.2013 because her father was admitted to a hospital owing to a heart problem. She stated that she had packed her luggage in the presence of the petitioner and his friends, including his friends wife, who came to help her pack. She further stated that the petitioner himself sent her an e-mail informing her of the flight details in this regard and therefore denied his claim that she had taken away the children clandestinely. She denied the petitioners claim that she did not disclose the receipt of summons from the American Court while filing a criminal complaint. She said that she had referred in her criminal complaint to the filing of a false complaint by the petitioner. She further stated that she intended to go back to the USA but due to a fall in the bathroom, she had to cancel her tickets as she had suffered a lumbar

spine injury. She denied that she brought away the children without the petitioners knowledge and that her custody of the children was unlawful by virtue of this fact and the subsequent developments in the form of the orders of the American Court.

Sri Prabhijit Jauhar, learned counsel representing Sri T. Anirudh Reddy, learned counsel for the petitioner, would contend that be it on application of the first strike principle or the comity of courts principle, the petitioner would be entitled to custody of the children. Learned counsel would point out that the interlocutory order of custody secured by the petitioner on 20.03.2013 was earlier in point of time to the order secured by the 6th respondent on 02.04.2013 from the local Court, so as to justify application of the first strike principle. He would further state that as the children are American citizens and as the 6th respondent has also filed an application before the Family Court, Hyderabad, for securing the signatures of the petitioner to renew their American passports, her intention to continue with their American citizenship is clear and therefore, the American Court alone would have jurisdiction over them as it would have the most intimate contact with them. He would submit that the 6th respondent can take the benefit of the liberty given to her by the American Court, in the final order dated 23.01.2014, and approach the American Court for resolution of her visitation issues in relation to the children.

Per contra, Sri K.Vivek Reddy, learned counsel for the 6th respondent, would contend that a writ of habeas corpus is not the proper remedy for the petitioner. Learned counsel would point out that the petitioner has already obtained a final order of custody from the American Court and therefore, the distinction drawn between an interlocutory order and a final order of a foreign court, in matters of this nature, would come into play and contend that the only remedy for the petitioner is to seek execution of the said final order of the American Court by way of suitable proceedings instituted before a local court of competent jurisdiction. Learned counsel would further contend that in the light of the interim order dated 02.04.2013 passed by the Family Court, Hyderabad, in relation to the custody of the children, the 6th respondent cannot be said to be in unlawful custody, whereby the petitioner could take recourse to the procedural writ of habeas corpus. He would further contend that even if the order dated 02.04.2013 passed by the Family Court, Hyderabad, is unsustainable in law, it is for the petitioner to get it set aside as per the due procedure and the status of the said order cannot be decided by this Court in exercise of writ jurisdiction and at that, in relation to the procedural writ of habeas corpus. Learned counsel would assert that the children were brought to India by the 6th respondent with the knowledge and consent of the petitioner and before the passing of the first order dated 20.03.2013 by the American Court and therefore, the charge that she kidnapped them or brought them away unlawfully is not proper. Learned counsel would further contend that this Court is not divested of its parens patriae jurisdiction because of the orders passed by the American Court and that it would be well within the power of this Court to determine and decide as to what is in the best interest and welfare of the minor children.

In reply, Sri Prabhijit Jauhar, learned counsel, would contend that the Supreme Court has, time and again, pointed out that it would be the court which has the most intimate contact with the children that would have jurisdiction and in the present case, the American Court must invariably be declared to be the court with the most intimate contact, as the children are American citizens. Learned counsel would point out that though the 6th respondent was aware of the order dated 20.03.2013 passed by the American Court, she filed O.P.No.440 of 2013 without disclosing it and merely mentioned the fact that the petitioner had filed a case for custody before the court at New Jersey. He would further point out that Kashvi, the daughter, spent over 7 years in the USA and therefore, her brief stay of over 3 years in India cannot outweigh the same. Learned counsel would assert that once the 6th respondent submitted to the jurisdiction of the American Court, it is not open to her to simply ignore the mandate of the said court, as embodied in the various orders passed by it, and that the petitioner cannot be driven through a lengthy legal process locally to secure custody of the children pursuant to the American Courts order. Learned counsel would conclude by stating that the petitioner is willing to pay for the tickets and stay of not only the children but also the 6th respondent, so that she may come back and seek resolution of her issues before the American Court. He would further assure this Court that the petitioner

will take all necessary steps for withdrawal of the criminal processes set in motion at his behest against the 6th respondent in the USA and that he would not pursue any coercive measures.

Abundance of case law was pressed into service by both the learned counsel in support of their respective contentions. However, before analyzing precedential edicts, it would be apposite for this Court to consider the factual perspective.

The contents of the pleadings exchanged by the parties demonstrate in no uncertain terms that the relations between the couple were exceedingly bitter and acrimonious even by the time of the departure of the 6th respondent to India on 17.03.2013. So much so that the petitioner got drafted the petition seeking divorce and custody one day after her leaving and filed it on 19.03.2013 itself. The 6th respondent, upon her arrival in India, filed the petition for divorce and custody in the Family Court, Hyderabad, shortly thereafter, on 02.04.2013, but this may have been a counter-blast to the petitioners case, as the 6th respondent mentioned the filing of the said case in her petition. At this stage, this Court must make it clear that the differences between the couple and their allegations and counter-allegations against each other do not fall for independent consideration or resolution in this writ petition. This Court is concerned only with the custody of the minor children at the moment and to the extent the conflict between the parents has an impact on the said issue, it would be of limited relevance.

At the outset, it is patent that the 6th respondent did not violate any court order by bringing the children with her to India. The petitioner approached the American Court only thereafter and secured the first order dated 20.03.2013. Her action in bringing the children to India in the capacity of their natural guardian cannot therefore be said to be unlawful. The question is whether her continued custody of the children after passing of the orders by the American Court would assume that status. In this regard, it would be fitting to understand the scope and import of the relevant orders passed by the American Court.

Perusal of the order dated 31.10.2013 passed by the American Court reflects that as the 6th respondent failed to appear before it on 03.10.2013 and again on 09.10.2013, the American Court inferred that she would not be returning to the USA despite having been ordered to do so under the order dated 20.03.2013. The American Court accordingly granted the petitioner sole legal and residential custody of the children after considering the case.

Thereafter, by Final Judgment of Divorce dated 23.01.2014, the American Court dissolved the marriage between the petitioner and the 6th respondent and confirmed that the petitioner would have sole legal and residential custody of the children pursuant to the earlier order dated 31.10.2013, while leaving it open to the 6th respondent to propose a schedule to exercise parenting time with them and until such time that the petitioner was prepared to agree to such a schedule, all and any parenting time for the 6th respondent was subject to discussion and written agreement with the petitioner. The American Court further recorded that failure to comply with the custody provisions of the order would subject the 6th respondent to criminal penalties, including imprisonment, probation and fines.

The judgment also records that the petitioner was at liberty to sell the residential property at New Jersey which stood in his name and appropriate the complete sale proceeds thereof and also 50% of the sale proceeds of the residential property situated in Kamalapuri Colony, Hyderabad, India, which stood in the name of the 6th respondent. The petitioner was also held entitled to 50% of the sale proceeds of the property jointly held by the parties at Plot Nos.48 and 49, Dubbacherla Village and Gram Panchayat, Maheshwaram Mandal, Ranga Reddy District. The petitioner was held entitled to take sole ownership of all assets which were currently in his name and also the joint bank accounts, apart from the life insurance policy of the 6th respondent, the jewellery of the 6th respondent. Her Rite Aid Plan and her Scottrade IRA were directed to be split up equally between them. The 6th respondent was also held liable to pay child support to the petitioner to the tune of $240 per week and also maintain at least $250,000 in life insurance, naming the petitioner as the trustee, for the benefit of the children until such time they became emancipated. She was also held liable for 50% of the medical expenses of the children, apart from the legal fees of the petitioner, to the tune of $55,008.37. This Court is informed that

the petitioner thereafter moved the American Court seeking to appropriate 100% of the amount payable to the 6th respondent under the her Rite Aid Plan, instead of the 50% that he was held entitled to.

To understand the scope, applicability and import of the legal principles relied upon in this case, it would be appropriate at this stage to study the decisions cited in relation thereto:

1). MARK T. McKEE V/s. EVELYN McKEE : The Privy Council observed that the welfare and happiness of an infant is the paramount consideration while deciding questions of custody and to this paramount consideration, all others must yield. The order of a foreign court of competent jurisdiction is no exception. Such an order has not the force of a foreign judgment; comity demands not its enforcement but its grave consideration. This distinction rests on the peculiar character of the jurisdiction and on the fact that an order providing for the custody of an infant cannot, in its nature, be final. In this case, the father took the child out of the USA in violation of a court order but despite the same, it was held that the interest of the child would prevail over his conduct in doing so.

2). KANU SANYAL V/s. DISTRICT MAGISTRATE, DARJEELING : The Supreme Court observed that a writ of habeas corpus is essentially a procedural writ and deals with the machinery of justice and not substantive law. The object of the writ was to secure the release of a person who is illegally restrained of his liberty and is a command to a person who is alleged to have that person unlawfully in his custody requiring him to bring such person before the court.

3). SMT.SURINDER KAUR SANDHU V/s. HARBAX SINGH SANDHU : The child, a British citizen, was brought to India by the father without the knowledge of the mother. On the same day, the mother obtained an order from the foreign court declaring the child as a ward of the said court. The order required the father to hand over the custody of the minor child to the mother. The mother approached the Supreme Court aggrieved by the order of the Punjab and Haryana High Court dismissing her writ petition for production and custody of her minor son. The Supreme Court observed that jurisdiction was 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 assumption of jurisdiction by another State in such circumstances, per the Supreme Court, would only result in encouraging forum-shopping. In matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offspring of the marriage. The Supreme Court noted the following principles regarding custody of minor children:

(1) The modern theory of the conflict of laws recognizes and prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case;

(2) Though the Hindu Minority and Guardianship Act, 1956, constitutes the father as the natural guardian of a minor son, it cannot supersede the paramount consideration as to what is conducive to the welfare of the minor;

(3) The domestic court would consider the welfare of the child as of paramount importance and the order of a foreign court is only a factor to be taken into consideration.

Taking note of the fact that the matrimonial home was in England, establishing sufficient contact or ties with that State, the Supreme Court ordained that it would be just and reasonable for the court of that State to assume jurisdiction to enforce obligations which were incurred therein by the spouses. The custody of the child was therefore directed to be handed over to the mother.

4). MRS ELIZABETH DINSHAW V/s. ARVAND M.DINSHAW : The Supreme Court observed that a parent doing wrong by removing children out of the country should not be permitted to gain advantage of such wrongdoing and the court should pay regard to the order of the foreign court in relation to the childs custody, unless satisfied beyond reasonable doubt that to do so would inflict serious harm on the child. The Supreme Court further observed that quite independent of the above consideration, whenever

a question arises before a court pertaining to the custody of a minor child, the matter is to be decided not on consideration of legal rights of the parties but on the sole and predominant criterion of what would best serve the interest and welfare of the minor.

5). Y.NARASIMHA RAO V/s. Y.VENKATA LAKSHMI : The Supreme Court observed that the rule for recognizing a foreign matrimonial judgment in this country is as under: The jurisdiction assumed by the foreign court as well as the grounds on which the relief was granted must be in accordance with the matrimonial law under which the parties are married. The exceptions to this rule are:

(1) where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties were married;

(2) where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests the claim which is based on a ground available under the matrimonial law under which the parties were married;

(3) where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties.

6). SARITA SHARMA V/s. SUSHIL SHARMA : In this case, a District Court in Texas, USA, passed an order for the care and custody of the children of a couple of Indian origin. The children were however both American citizens. The children were placed in the care of the father, Sushil Sharma, and only visiting rights were given to the mother, Sarita Sharma. However, Sarita Sharma brought the children to India without informing the Texas Court. Sushil Sharma thereafter obtained a divorce decree from the foreign court and also an order that the sole custody of the children should be with him. He then moved the Delhi High Court for a writ of habeas corpus seeking custody of the children. The writ petition was allowed and the passports of the children were directed to be handed over to the father who was given liberty to take them back to the USA without hindrance. Aggrieved thereby, Sarita Sharma appealed to the Supreme Court. On merits, the Supreme Court held that it was not proper for the Delhi High Court to allow the writ petition and direct the mother to hand over custody of the children to the father so as to enable him to take them to the USA. What was in the interest of the children required a full length thorough inquiry and the Supreme Court therefore opined that the High Court should have directed the father to initiate appropriate proceedings in which such an inquiry could be held. The Supreme Court opined that ordinarily, the mother would be better suited to care for and bring up a daughter as opposed to the father.

7). SYED SALEEMUDDIN V/s. DR. RUKHSANA : The Supreme Court reiterated that on an application seeking a writ of habeas corpus for custody of minor children, the principal consideration for the court is to ascertain whether the custody of the children is unlawful and whether the welfare of the children required that the present custody should be changed so that the children should be left in the care and custody of somebody else.

8). SAIHBA ALI V/s. STATE OF MAHARASHTRA : The Supreme Court observed that custody of minor children, once awarded to the paternal grandmother by a competent court, could not be held to be illegal custody unless and until the said order is set aside and therefore, the mother of the children could not maintain a petition for a habeas corpus to seek custody.

9). V.RAVI CHANDRAN (DR.) V/s. UNION OF INDIA : In this case, the mother removed her minor child, a foreign national, from the USA in violation of a custody order passed by the Family Court, State of New York. This custody order was passed with her consent and the consent of the father, who was also a foreign national. The father applied for modification of the custody order and was granted temporary sole legal and physical custody of the minor child and the mother was directed to immediately turn over the minor child and his passport to the father. Her custodial time with the child was suspended.

The foreign court also ordered that the issue of custody of the child would be heard by the jurisdictional family court in the USA. On these facts, the father moved a petition for a writ of habeas corpus in the Supreme Court for production of the child and for his custody. The Supreme Court, upon considering a large number of decisions, concluded that the comity of nations does not require a court to blindly follow an order made by a foreign court and only due weight has to be given to the views formed by the court of the foreign country, of which the child was a national. The Supreme Court observed that the comity of courts demands not the enforcement of a foreign courts order but only its grave consideration, and the weight and persuasive effect of a foreign judgment would ultimately depend on the facts and circumstances of the case. The Supreme Court reiterated that the welfare of the child is the first and paramount consideration, whatever be the orders that may have been passed by the foreign court, and the domestic court was bound to consider as to what was in the best interest of the child and the order of the foreign court would be only one of the circumstances to be taken into account, though it is not conclusive one way or the other. The Supreme Court cautioned that one of the considerations that a domestic court should keep in mind is that there should be no danger to the moral or physical health of the child in repatriating him or her to the jurisdiction of the foreign country. The Supreme Court stated that while considering whether a child should be removed to the jurisdiction of the foreign court or not, the domestic court may either conduct a summary inquiry or an elaborate inquiry. On facts, it was held that an elaborate inquiry was not required to be conducted in that case as there was nothing on record which could remotely suggest that it would be harmful for the child to return to the native country. Further, though the child was found to have been in India for almost two years since he was removed from the USA by the mother, the Supreme Court took note of the fact that the application for return of the child was made promptly after his removal. The Supreme Court further observed that one of the factors to be kept in mind in exercise of summary jurisdiction in the interest of the child is that the application for custody/return of the child should be made promptly and quickly after the child is removed as delay may result in the child developing roots in the country to which he has been removed. However, on facts, the Supreme Court found that he had been moved from school to school and therefore, the said eventuality also did not arise.

10). SHILPA AGGARWAL V/s. AVIRAL MITTAL : The parents in this case were both British citizens of Indian origin. They had a minor child who was also a foreign national. They had matrimonial differences as a result of which, the mother came to India with the minor child and refused to return. The father thereupon initiated proceedings before the High Court of Justice, Family Division, United Kingdom, and the foreign court directed the mother to return the minor child to its jurisdiction. Soon thereafter, the father filed a writ petition in the Delhi High Court seeking custody of the child. In its decision reported in AVIRAL MITTAL V/s. STATE , the Delhi High Court observed that the interest of the child would always be to have the benefit of the company of both parents but where such an ideal situation is not possible, the question would arise as to which of the parents is in a better position to look after the child. Observing that normally a female child, as observed in SARITA SHARMA6 and the earlier judgment of the Delhi High Court in PAUL MOHIMDER GAHUN V/s. STATE OF NCT OF DELHI , would be better taken care of by the mother, the Delhi High Court cautioned that this would again depend upon the conduct of the parents. In its final conclusion, the Delhi High Court effectively dismissed the writ petition and granted time to the mother to take the child on her own to the United Kingdom and participate in the proceedings before the foreign court, failing which the child was to be handed over to the father to be taken to the United Kingdom as a measure of interim custody, leaving it open to the foreign court to determine which parent would be best suited to have custody of the child. Aggrieved thereby, the mother appealed to the Supreme Court. The Supreme Court observed that there were two contrasting principles of law, namely, comity of courts and welfare of the child and that in matters of custody of minor children, the sole and predominant criterion is the interest and welfare of the minor child. It was further pointed out that the domestic court could not be guided entirely by the fact that one of the parents violated an order passed by a foreign court. On these principles, the Supreme Court

agreed with the view of the High Court that the foreign court had not directed that the custody of the child should be handed over to the father but that the child should be returned to its jurisdiction so as to enable it to determine as to who would be best suited to have the custody of the child.

11). VIKRAM VIR VOHRA V/s. SHALINI BHALLA : The Supreme Court observed that in a matter relating to custody of a child, the court must remember that it is dealing with a very sensitive issue concerning the care and affection that a child requires in the growing stages of his or her life. The Supreme Court stated that this was the reason why custody orders were always considered interlocutory orders and by the nature of such proceedings, custody orders cannot be made rigid and final and would always be capable of being altered and moulded keeping in mind the needs of the child.

12). RUCHI MAJOO V/s. SANJEEV MAJOO : The wife came to India with her child consequent to some differences with her husband. All the members of the family were foreign nationals. After the mother came to India with the child, the father approached the Superior Court of California, County of Ventura in the USA, seeking a divorce and obtained a protective custody warrant order which required the mother to appear before the foreign court. She however did not obey it and instituted proceedings before the Guardian Court at Delhi. The Guardian Court passed an ex parte ad-interim order to the effect that the father should not interfere with the custody of the mother over her minor child. Aggrieved by this order, the father challenged the same under Article 227 of the Constitution before the Delhi High Court and succeeded on the ground that the Guardian Court had no jurisdiction to entertain the matter as the child was not ordinarily resident in Delhi. The Delhi High Court further observed that it was the foreign court that had to decide the childs custody, as the child and the parents were American citizens. Aggrieved thereby, the mother went before the Supreme Court.

The Supreme Court culled out the following principles: (1) The welfare of the child is of paramount consideration and simply because a foreign court had taken a particular view concerning the welfare of the child, it was not enough for the courts in this country to shut out an independent consideration of the matter, as the principle of comity of courts simply demanded consideration of a foreign courts order and not necessarily its enforcement.

(2) One of the factors to be considered whether a domestic court should hold a summary inquiry or an elaborate inquiry for repatriating the child to the jurisdiction of the foreign court is the time gap in moving the domestic court for repatriation. The longer the time gap, the lesser the inclination of the domestic courts to go in for a summary inquiry.

(3) An order of foreign court is one of the factors to be considered for the repatriation of a child to the jurisdiction of the foreign court. But that would not override the consideration of the welfare of the child. Therefore, even where the removal of the child from the jurisdiction of the foreign court goes against the order of the foreign court, giving custody of the child to the parent who approached the foreign court would not be warranted if it were not in the welfare of the child.

(4) Where a child has been removed from the jurisdiction of a foreign court in contravention of an order passed by that foreign court where the parties had set up their matrimonial home, the domestic court must consider whether to conduct an elaborate or summary inquiry on the question of custody of the child. If an elaborate inquiry is to be held, the domestic court may give due weight to the order of the foreign court depending upon the facts and circumstances in which such an order has been passed.

(5) A constitutional court exercising summary jurisdiction for the issuance of a writ of habeas corpus may conduct an elaborate inquiry into the welfare of the child whose custody is claimed and a Guardian Court (if it has jurisdiction) may conduct a summary inquiry into the welfare of the child, depending upon the facts of the case.

(6) Since the interest and welfare of the child is paramount, a domestic court is entitled and indeed duty-bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication.

On facts, the Supreme Court held that the repatriation of the minor to the USA on the principle of comity of courts did not appear to be an acceptable option worthy of being exercised at that hour and his custody was directed to be continued with his mother. The Supreme Court observed that the comity of courts principle normally ensures that foreign judgments and orders are unconditionally conclusive of the matter in controversy, but interest and welfare of the minor being paramount, a competent court in this country would be entitled and indeed duty-bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication. The decisions of the Supreme Court in DHANWANTI JOSHI V/s. MADHAV UNDE and SARITA SHARMA6 were stated to support this proposition. The Supreme Court observed that the duty of a court exercising parens patriae jurisdiction, involving custody of minor children, would be to treat the welfare of the minor as of paramount consideration. The court would therefore approach the issue regarding the validity and enforcement of a foreign decree or order carefully and simply because a foreign court has taken a particular view on any aspect concerning the welfare of the minor, it would not be enough for the courts in this country to shut out independent consideration of the matter. The Supreme Court was of the opinion that objectivity and not abject surrender is the mantra in such cases but that would not mean that the order passed by a foreign court is not even a factor to be kept in view, though it is one thing to consider the foreign judgment to be conclusive and another to treat it as a factor or consideration that would go into the making of a final decision. The Supreme Court further observed that though proceedings in the nature of habeas corpus were summary in nature, nothing prevents the High Court from embarking upon a detailed enquiry in cases where the welfare of a minor was in question, which is the paramount consideration for the Court while exercising parens patriae jurisdiction. The High Court was therefore held to have power, in exercise of its extraordinary jurisdiction, to determine the validity of such custody in cases that fall within its jurisdiction and also issue orders as to the custody of the minor depending upon how the Court views the rival claims, if any, to such custody. The Supreme Court therefore condemned the practice of repatriating a minor child to a foreign country on the comity of courts principle simplicitor.

13). ARATHI BANDI V/s. BANDI JAGADRAKSHAKA RAO : The mother and father were ordinarily residents of the USA and they had a minor child. Their matrimonial differences had already taken shape as a lis before a Seattle court in the USA. In violation of the order passed by the foreign court, the mother brought the child to India. As she did not return the child to the jurisdiction of the foreign court, bailable warrants were issued for her arrest by the foreign court. The father initiated proceedings in this Court for a writ of habeas corpus seeking production and custody of the child to enable him to take the child back to the USA. This Court passed quite a few orders in the case but the mother did not abide by some of them resulting in this Court issuing non-bailable warrants for her arrest. Aggrieved thereby, the mother went before the Supreme Court. Observing that the mother had come to India in defiance of the order passed by the foreign court and had also ignored the orders passed by the High Court, the Supreme Court opined that no relief could be granted to her. The Supreme Court further culled out the following principles:

(1) It is the duty of courts in all countries to see that a parent doing wrong by removing a child out of the country does not gain any advantage of his or her wrongdoing.

(2) In a given case relating to the custody of a child, it may be necessary to have an elaborate inquiry with regard to the welfare of the child or a summary inquiry without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child.

(3) Merely because a child has been brought to India from a foreign country does not necessarily mean that the domestic court should decide the custody issue. It would be in accord with the principle of comity of courts to return the child to the jurisdiction of the foreign court from which he or she has been removed.

14). SURYA VADANAN V/s. STATE OF TAMIL NAIDU : In this case, the Supreme Court was dealing with custody of children who were British citizens. The father, Surya Vadanan, was also a resident and citizen of the United Kingdom but at the time of her marriage, the mother, Mayura, was an Indian citizen. She thereafter joined her husband in the United Kingdom and acquired British citizenship. In effect, the parents as well as the children were all citizens of the United Kingdom. The mother, Mayura, had matrimonial problems and came to India along with her two daughters on 13.08.2012. She thereafter refused to go back and filed for divorce before the Family Court, Coimbatore, on 23.08.2012. She also filed an application for custody of her daughters but no orders were passed thereon. Upon coming to know of her intention not to return with his daughters, Surya tried to solve the issue by coming to India but having failed in this exercise, he returned to the United Kingdom. He thereafter received summons from the Family Court, Coimbatore, in the divorce petition filed by Mayura and decided to initiate legal action. He petitioned the High Court of Justice in the United Kingdom to make his children wards of the Court. On 13.11.2012, the High Court of Justice in the United Kingdom passed an interlocutory order making the children wards of the court and requiring Mayura to return them to its jurisdiction. Mayura filed a written statement in response to this petition and Surya filed his rejoinder thereto. Thereupon, the High Court of Justice in the United Kingdom passed order dated 29.11.2012 reiterating its earlier order and renewing its direction for repatriation of the wards to England, the county of their habitual residence. As Mayura failed to comply with this order also, Surya filed a writ petition in the Madras High Court seeking a writ of habeas corpus on the ground that Mayuras custody of the children was illegal. This writ petition was effectively dismissed by the High Court on the ground that it could not be said that the custody of Mayura was illegal as she was their legal guardian. Aggrieved thereby, Surya approached the Supreme Court. The Supreme Court observed that the comity of courts principle is essentially a principle of self-restraint applicable when a foreign court is seized of the issue of the custody of a child prior to the domestic court. The Supreme Court observed that there may be a situation where the foreign court, though seized of the issue, does not pass any effective or substantial order or direction and in such an event, if the domestic court were to pass an effective or substantial order or direction prior in point of time, then the foreign court ought to exercise self-restraint and respect the direction or order of the domestic court, unless there are very good reasons not to do so. The Supreme Court observed that there was complete unanimity amongst judicial precedents that the best interest and welfare of the child are of paramount importance. The Supreme Court however cautioned that it must be clearly understood that this is the final goal/objective to be achieved and that, it is not the beginning of the exercise but the end. The Supreme Court opined that the principles of comity of courts and best interest and welfare of the child were not contrasting, in the sense of one being the opposite of the other, but were contrasting in the sense of being different principles that need to be applied on the facts of a given case. The Supreme Court opined that the most intimate contact doctrine and the closest concern doctrine are very much alive and cannot be ignored only because their application might be uncomfortable in certain situations. The Supreme Court further opined that it would not be appropriate that a domestic court, having much less intimate contact with a child and having much less close concern with a child and his or her parents, as against a foreign court in a given case, should take upon itself the onerous task of determining the best interest and welfare of the child. A foreign court, having the most intimate contact and closest concern with the child, would be better equipped and perhaps best suited to appreciate the social and cultural milieu in which the child had been brought up rather than a domestic court. This, according to the Supreme Court, is a factor that must be kept in mind. Secondly, the Supreme Court was of the opinion that the principle of comity of courts should not be jettisoned, except for special and compelling reasons. This is more so in a case where only an interim or an interlocutory order had been passed by a foreign

court. Referring to MCKEE1, wherein the Privy Council was not dealing with an interlocutory order but a final adjudication, the Supreme Court observed that the applicable principles would be entirely different in such cases. The Supreme Court specifically pointed out that it was not concerned with a final adjudication by a foreign court in relation to which the principles laid down in Section 13 CPC would have application. The Supreme Court was of the opinion that in the event an interlocutory order has been passed by a foreign court, it must be given due respect and disregarding the same must be only for some special reason. Dealing with situations in which an interlocutory order of a foreign court may be ignored, the Supreme Court stated that very few such situations would arise and that it is of primary importance to determine first, whether the foreign court has jurisdiction over the child whose custody is in dispute, based on the fact of the child being ordinarily resident in the territory over which the foreign court exercises jurisdiction, and if it does, the interlocutory order of the foreign court should be given due weight and respect. In the event jurisdiction of the foreign court is not in doubt, the first strike principle would be applicable. That is to say that due respect and weight must be given to a substantive order prior in point of time to a substantive order passed by another court (foreign or domestic). Finally, dealing with the issue of holding an elaborate inquiry to decide whether the child should be repatriated to the foreign country or whether a summary inquiry should be gone into in relation to the best interest and welfare of the child, the Supreme Court observed that if there was a pre-existing order of a foreign court of competent jurisdiction and the domestic court decides to conduct an elaborate inquiry, it must have special reasons to do so as such elaborate inquiry should not be ordered as a matter of course. While deciding whether a summary or an elaborate inquiry should be conducted, the Supreme Court observed that the domestic court must take into consideration the following factors:

(1) The nature and effect of the interim or interlocutory order passed by the foreign court.

(2) The existence of special reasons for repatriating or not repatriating the child to the jurisdiction of the foreign court.

(3) The repatriation of the child should not cause any moral or physical or social or cultural or psychological harm to the child, nor should it cause any legal harm to the parent, with whom the child is in India. There are instances where the order of the foreign court may result in the arrest of the parent on his or her return to the foreign country. In such cases, the domestic court is also obliged to ensure the physical safety to the parent.

(4) The alacrity with which the parent moves the foreign court concerned or the domestic court concerned is also relevant. If the time gap is unusually large and is not reasonably explainable and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry.

Dealing with the facts of the case before it, the Supreme Court observed that the parents and the children were all foreign nationals and that the children had grown up in that different milieu. It was also noted that the mother had not taken steps to give up her foreign citizenship and had not taken such steps even in relation to her children. That being so, the Supreme Court was of the opinion that there was no reason why the courts in India should not encourage her and the children to submit to the jurisdiction of the foreign court which had the most intimate contact with them and closest concern apart from being located in the country of their citizenship. Further, as the orders passed by the foreign court were only interlocutory in nature, no finality attached to them and nothing prevented the mother from contesting the correctness of the interlocutory orders and to have them vacated or modified or even set aside. The Supreme Court further found that there was nothing on record to indicate that any prejudice would be caused to the children if they were taken to the United Kingdom and subjected to the jurisdiction of the foreign court as the said foreign court had the most intimate contact with them and also the closest concern with their well being. Another crucial aspect that was considered by the Supreme Court was the fact that the children had been in Coimbatore for about two years and the question arose whether

they had adjusted to life in India and had taken root in India, whereby their repatriation to the United Kingdom would not be in their interest. The Supreme Court observed that it is always difficult to say whether a person has taken root in a country other than that of his or her nationality and in a country other than where he or she was born and brought up. From the material on record, the Supreme Court held that it could not be said that life had changed so much for the children that it would be better for them to remain in India than to be repatriated to the United Kingdom. The Supreme Court accordingly directed the father to arrange for the return of the wife and children to the United Kingdom and also pay maintenance to the wife and children until a decision was taken by the foreign court. He was also directed to ensure that all coercive processes that may result in penal consequences against the mother should be dropped or should not be pursued. In the event the mother did not comply with the directions, the father was held entitled to take the children back with him to the United Kingdom for further proceedings.

Before proceeding to consider the factual milieu of the present case in the aforestated legal backdrop, it may be noted that the parens patriae jurisdiction of this Court is traceable to Clause 17 of the Letters Patent which endows this Court with jurisdiction over the person and estates of all infants within its territory. That apart, the common thrust of all the judgments hereinabove is that the welfare and interest of the children should be the paramount consideration that should weigh with this Court while deciding custody battles between parents over their children.

Considering the tender age of Krish, the son, who is just about five years and odd as on date, this Court only met and interacted with Kashvi, the daughter, who is about 11 years of age, in camera. She came across as a warm and friendly child, comfortable in her surroundings. She stated that she is presently studying in Oakridge International School at Hyderabad, while her brother, Krish, is a student of Little Angels School. Kashvi would have been about seven years and three months by the time she left the USA on 17.03.2013 and was brought to India by the 6th respondent. She has hazy memories of her life in the USA but stated with confidence that she is very happy in India. When pointedly asked as to whether she felt happier here or had better memories of the USA, she stated that she feels happier here and that she is doing well in school and has several friends. When asked whether she wanted to have contact with her father, the petitioner herein, she said that she had some recollection of him but showed no particular interest in rebuilding her relationship with him. Speaking for her brother, she stated that he has no recollection whatsoever of his life in the USA. This would be so as he was less than two years of age when he came away to India. She further stated that her mother, the 6th respondent, takes good care of her and that she also has the love and affection of her maternal grand parents. She specifically said that she has no interest in returning to the USA, leaving her life here. This Court found no evidence of tutoring and the childs earnestness and sincerity came through in clear terms.

In the light of the material placed on record and our personal interaction with Kashvi, the older child, we now undertake examination of the legal principles applicable to this case. It is fairly well settled that the fact that a foreign court of competent jurisdiction has passed an order in relation to the custody of the minor child would not, by itself, be a decisive factor for this Court to hold in favour of the party to the dispute who secured such an order. This Court would still have to undertake an enquiry as to what would be in the best interest and welfare of the children. This Court finds that the American Court had no occasion to actually have any interaction with the children, as the American Court was approached only after the children left to India. The order dated 31.10.2013 passed by the American Court puts this beyond doubt, as it observed therein that it could not make any findings as to the childrens preferences because it had not spoken with them and that they were too young to have the capacity and maturity to make an intelligent decision on that issue. As Kashvi is now nearly 11 years of age and appears to be a well-balanced child of good intellect, the latter observation of the American Court may no longer hold good.

As regards the first strike principle, this Court finds that the said principle would have application only between interlocutory orders of custody passed by two different Courts and as per the principle, the

first such order, in point of time, would normally prevail. In the present case, the petitioner has already secured a final custody order from the American Court on 23.01.2014. It is therefore not a fit case to apply the first strike principle at this stage in relation to the interlocutory order dated 20.03.2013 passed by the American Court. The said interlocutory order is deemed to have merged in the final order dated 23.01.2014 and therefore does not survive for independent consideration now. Strong reliance placed on SURYA VADANAN17 is therefore of no avail as that was a case dealing with an interlocutory custody order and not a final one, as pointed out specifically by the Supreme Court itself.

Further, once the final custody order was passed by the American Court, it is for the petitioner to take recourse to appropriate proceedings in terms of Indian law for securing execution thereof. Such an exercise cannot be undertaken by this Court in exercise of writ jurisdiction and more particularly, by way of the procedural writ of habeas corpus. The provisions of Section 13 CPC may also have application in this regard and the 6th respondent cannot be denied the benefit thereof by permitting the petitioner to seek execution of such an order through writ proceedings.

No doubt, the American Courts interlocutory orders and final order would normally be taken into consideration by this Court in its enquiry as to the custody of the children. However, one crucial factor which dilutes the strength of those orders in the present case, in terms of what the Supreme Court ordained time and again, is that the petitioner, having secured custody orders from the American Court, failed to act upon them immediately. The first such custody order secured by him is dated 20.03.2013 but it appears that the petitioner was under the impression that the 6th respondent would appear before the American Court and contest his claim. This understanding and expectation on his part however stood extinguished by 31.10.2013, when the American Court passed an order giving him sole legal and residential custody over the children duly noting the fact that the 6th respondent showed no inclination to return to the USA despite being ordered to do so. In spite of the illusions that he may have had in this regard being dispelled by 31.10.2013, the petitioner did nothing in the matter till December, 2014, when he approached the Supreme Court under Article 32 of the Constitution. This is despite the fact that the petitioner secured the final custody order as long back as in January, 2014. No reasonable explanation whatsoever is forthcoming as to why the petitioner did not choose to take steps immediately and more particularly, after January, 2014.

In the meanwhile, the stay of the children in India continued and as matters stand today, Krish, the son, has no inkling of his life or his roots in America, while Kashvi, the daughter, has settled down comfortably in her life at Hyderabad and is happy with her schooling and her activities under her mothers tutelage. The failure on the part of the petitioner to move with alacrity and the consequential delay would therefore have to count against him. As pointed out by the Supreme Court time and again, this is a vital factor while assessing the best interest of the children. In this regard it may be noted that no hard and fast rule can be laid down as to what length of time would be sufficient for a displaced child to develop roots in and affinity towards the country to which he or she has been removed. Even a year during the formative years would be sufficient in this regard as opposed to several years in an older child. In the present case, Krish, the son, has developed a bond with his mother and his maternal grandparents apart from having no roots whatsoever in the country of his birth. To separate him from those with whom he has such strong emotional bonds and send him to a father, who is a complete stranger to him, would neither be in his best interest nor good for his emotional well-being. Kashvi, the daughter, spent over seven years, a major part of her life, in the USA but her formative years, when she developed consciousness and bonding towards her surroundings and people, were after she left the USA and came to India. Her schooling is taking place in one of the better known schools of Hyderabad and she is clear in her mind as to where and with whom she wants to stay. It is therefore too late in the day for the petitioner to seek to uproot these children on the strength of the American Courts orders secured by him long ago.

That apart, when posed a query by this Court, Sri Prabhijit Jauhar, learned counsel, stated that the petitioner was residing alone in the USA after he divorced the 6th respondent and that he is presently

employed. When asked by the Court as to how he proposes to take care of the children, if they are returned to his custody, the learned counsel stated that the petitioner would take his mother to the USA and that she would care for the childrens well-being. However, the material placed on record indicates that the petitioners father is very much alive and it is not known as to how long he can expect his mother to leave her husband and her life here and devote herself to the care and well-being of his children in the USA.

On the above analysis, this Court finds that despite the first interlocutory order of custody having been passed by the American Court as long back as on 20.03.2013, three days after the departure of the children from American soil, the delay on the part of the petitioner in seeking implementation thereof and the later final order of custody dated 23.01.2014, has resulted in the children acclimatizing themselves to Indian life and conditions. Krish, the son, has no contact whatsoever with American life as he came away to India when he was less than two years of age. Kashvi, the daughter, was just over seven years of age when she came to India and has now adjusted comfortably to her life here and is happy and secure with her school, friends and family in India. This Court is therefore of the considered opinion that it is not in the interest or welfare of these children to be displaced from their settled life in India and be transported back to what would now be an alien life in the USA. This Court however leaves it open to the petitioner to seek suitable orders from the competent court for visitation rights, if he is interested, so that the children are not denied the love and affection of a father, once he establishes such a bond.

Subject to the above observation, the writ petition is dismissed. Pending miscellaneous petitions, if any, shall also stand dismissed. No order as to costs.

**SANJAY KUMAR, J**

**M.SEETHARAMA MURTI, J**

**21st OCTOBER, 2016**

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# PADI TRIGUNSEN REDDY & ORS. VERSUS JYOTHI REDDY & ORS.

**Andhra Pradesh High Court**

**Bench : Hon'ble Mr. Justice D.S.R Varma and Hon'ble Mr. Justice R. Kantha Rao**

*Padi Trigunsen Reddy & Ors.*
*Versus*
*Jyothi Reddy & Ors.*

**Writ Petition No. 23732 of 2008**

**Decided on December 3, 2009**

- **The ultimate consideration should be — the welfare of the child only, notwithstanding the kind of judgment or order or decree passed by the competent Court in the USA. When the children are living in the association of either of the parent in a particular country, other than the country to which they are the nationals, the Courts of such country of their residence have the jurisdiction to pass appropriate orders keeping in view the best interest of the child and while giving such preference to the welfare of the child, the aspect of enforceability of a judgment passed by a competent Court in a foreign country also gets faded or becomes secondly. Nevertheless, the concept of Comity cannot be overlooked in toto, for the simple reason that a judgment passed by a competent Court of a nation with the law of that land, cannot be slighted in any manner and due regard to such judgments have to be accorded by another country, but certainly, not at the cost of the welfare of the child.**
- **For the sake of enforcement of the judgment passed by a competent Court in a foreign country, the welfare of the child or the children, as the case may be, cannot be subjected to sacrifice. The reason is very simple i.e, the children are not parties to the differences of their parents. It is not the children, who ignited such differences, which ultimately led to the estrangement of their parents nor they are parties to the lis before any Court of law. The children, in our considered view, are a distinct class by itself, who have all rights without any obligations. The obligations are on the parents.**
- **In view of the above circumstances, we feel it appropriate to leave the further course of action of their choice, if any, to the parents themselves. In other words, it is for the mother to explore the possibilities and feasibilities to have the orders passed by the competent Court in the USA, whereby the father was made sole custodian of the children modified and till such time, in the best interest of the children, particularly having regard to the facts that they have been prosecuting their studies in one among the best schools available in Hyderabad and also their comforts being looked after by the mother and grandparents reasonably well.**

**Hon'ble Mr. Justice D.S.R Varma:—**

Though the original order was passed on 1-12-2009, the matter has been posted under the caption 'For Being Mentioned', hence the original order shall be read as follows:

2. Heard Sri. K. Vivek Reddy, learned counsel, representing Sri K. Sai Krishna Mohan Rao, learned counsel appearing for the petitioners; Sri D. Prakash Reddy, learned Senior Counsel, representing Sri A. Prabhakar Rao, learned counsel appearing for respondents 1 to 4; and the learned Assistant Government Pleader, representing the learned Advocate General, appearing for respondents 5 and 6.

3. This writ petition is filed by the father and paternal grandparents of the alleged detenues, namely, Kum. Aanchal R. Padi and Kum. Kajal R. Padi, seeking a writ of habeas corpus directing the respondents 1 to 4 to produce Kum. Aanchal R. Padi and Kajal R. Padi before this Court and the said minor girls be forthwith handed over to the petitioners 2 and 3 to enable them to be returned to petitioner No. 1 so that they go back to the United States of America ('the USA', for brevity) i.e the country of their habitual and permanent residence and to issue appropriate directions to respondent No. 5 to provide all appropriate necessary and requisite help to aid and assist in the recovery of Kum. Aanchal and Kum. Kajal from illegal custody of the respondents 1 to 4 and further direct the respondents 5 and 6 to provide police assistance to the petitioners to enable them to have a safe and secure passage to the USA.

4. Petitioner No. 1 is the father and respondent No. 1 is the mother of the alleged detenues, by name Kum. Aanchal R. Padi and Kum. Kajal R. Padi.

5. For convenience, petitioner No. respondent No. 1 and the alleged detenues are being referred to as the, father, mother and children, respectively.

6. The facts shorn of and relevant that led to the filing of this writ petition are as under:

   The parents of the children were married about 19 years ago and started their living in the USA. In the year 1998, the first child, by name Aanchal had born and three years after the birth of the girl, she was moved to Hyderabad in India with the consent of both the parents. The other girl, by name Kajal was born in the year 2003 and even when the child was very young, she also was moved to Hyderabad with the consent of both the parents.

   Thereafter, the children and the mother were frequently moving between India and the USA. After some time, there were differences of opinion between the spouses, which are not relevant for the purpose of the present case and owing to the said squabbles, they approached a competent Court in the USA and obtained a decree for divorce.

   It also is not in dispute that though the second child initially was sent back to India with the consent of the parents, upon the subsequent visit to the USA, the mother wanted to get back to India due to the differences between the spouses along with her child, which was opposed by the father. However, the second child was brought back to India much against the wish and will of the father and has been since then staying at Hyderabad in India. Since then the father has no access to his children. Therefore, the present writ petition came to be filed seeking a writ of habeas corpus.

7. What is to be noted, at the outset, is that the father and both the children are citizens of the USA, whereas the mother is a domicile of the USA and therefore, she alone is governed by the laws of India.

8. It is also not in dispute that despite the fact that the Passports issued by the USA Government and the Visas issued by the Government of India have expired long back, the children are very much in the care and custody of the mother, prosecuting their studies at Hyderabad in India.

9. In view of the said fact, the incidental question that falls for consideration is as to whether the children, who are the citizens of the USA, can stay in India beyond the time prescribed in the Passports and Visas? If so, what are the consequences?

10. As already pointed out by us, since this is only an incidental question, we are not proposing to go deep into this matter for the present nor there is much need for us to probe into this question.

11. The learned Counsel for petitioner No. 1 father raised primarily two questions-

    firstly, whether a Writ of habeas corpus is maintainable when the custody of a foreign citizen is with the parent in India?

    secondly, what should follow when the parent abducts a child contrary to the orders of a foreign Court?

12. At this juncture, it is relevant to note another important factor i.e, after the parents obtained a decree for divorce from the competent Court in the USA, they also obtained an order regarding the custody of the children to the effect that both the parents shall share the custody of the children. The period was also carved out by the said Court as 1½ months in a calendar year with the father and rest of the period with the mother. But, despite the decree for divorce and respective rights of the custody of the children, the mother all through has the custody of the children at Hyderabad in India.

13. As already noticed, the eldest child from the age of three years has been in the association of the mother and grandparents only in India. Subsequently, the mother came back to India forever, whereas the other daughter, barring short spells in the USA and the period during the visits of the mother to the USA, all through has been in the custody of the mother.

14. On the contrary, the learned Senior Counsel for the mother contended that the children virtually have all through been in the custody of the mother only and that the children are very much acclimatized to the Indian conditions and have been prosecuting their studies in a good school. Therefore, the children being minor girls, are desirable to be in the custody of the mother only.

15. The learned Senior Counsel further contended that the judgment or order or decree, as the case may be, passed by a competent Court in the USA does not really take away the right of the mother to have the custody of the children. It is the further contention that the major concern should be the welfare of the children only and as a matter of fact, the children are very much attached to the mother as well as their maternal grandparents and they are very much used to the Indian conditions in all respects and therefore, it is not absolutely desirable to send them back to the USA merely on the ground that they are the citizens of the USA.

16. In other words, as between the citizenship of the children and their welfare, it is only the welfare that should be given primacy, in matters like the present one. Hence, the learned Senior Counsel contends that having regard to the overall facts and circumstances, particularly the conditions and the circumstances that the children are presently placed in, it is imperative for the children to stay with the mother only back in India.

17. Insofar as the first contention that was pointed out by the learned counsel for the petitioners as regards the maintainability of a writ of habeas corpus, it has been fairly conceded by the learned Senior Counsel for the mother that there is no controversy as regards the maintainability of the writ of habeas corpus, even though the issue involved is regarding a foreign citizen. Therefore, there is no necessity for us to go into this aspect nor there is any need to address this question and record our findings.

18. The other question is relating to a mixed question of fact and law as regards the rights of the parents to have the custody of the children.

19. In the present case, the custody undisputedly is with the mother in India and further that the children are having foreign nationality and the mother is only a domicile of a foreign nation. This is the only peculiar area in the present set of facts.

20. In the light of the above peculiar facts, the question is as to whether the decree passed by the competent Court in the USA regarding the custody of the children is to prevail or an Indian mother can claim the custody of the children having a foreign nationality, by birth.

21. Reliance is placed by the learned counsel for the petitioners on the judgment rendered by the Apex Court in writ petition (Cri) No. 112 of 2007 (Dr. V. Ravi Chandran v. Union of India, W.P (Cri). No. 112 of 2007 (Reportable) : 2010 AIR SCW 192. In this case also, the Apex Court had dealt with elaborately various judgments of the Apex Court rendered earlier and also a catena of judgments rendered by various Courts in the USA, the United Kingdom and Canada.

22. Before we enter into further discussion on the judgments relied on by the learned Counsel for the petitioners, we would like to point out an observation that was made by the Privy Council in 1951, in McKee v. McKee, (1951) AC 352 that, "Comity of Courts demanded not its enforcement, but its grave consideration". The said principle had been followed in various cases arising from Canada and the United Kingdom consistently, subsequently. The said view was also prevalent in the USA and Australia, as could be seen from the above judgment referred to.

23. As already pointed out, we have to bear in mind that after the decree for the first time was passed by the competent Court in the USA, since the children were not sent back to the USA by the mother even after the expiration of their Passports and Visas, an application had been made by the father before the competent Court in the USA seeking appropriate orders. Accordingly, a modified order had been passed by the said Court taking stock of the whole situation, particularly, it appeals, in the light of the fact that the mother has not been obeying its orders, giving complete custody of the children to the father. In other words, the father had been recognized as the sole custodian.

24. Now, the question is — whether the earlier order or the modified order passed by the competent Court in the USA can be enforced in India and the children be brought back to the USA?

25. No specific law or procedure has been coming forth from either side as regards the enforceability and the method and manner of such enforcement.

26. Perhaps, that is one among the reasons for the father to file the present writ petition seeking intervention of this Court by issuing a writ of habeas corpus.

27. As already pointed out, even while considering the writ of habeas corpus the prime consideration for any Court in India is — the welfare of the child or children, as the case may be. This aspect has been dealt with, in the judgment above referred to, as under:

> "21. Do the facts and circumstances of the present case warrant an elaborate enquiry into the question of custody of minor Adithy a and should the parties be relegated to the said procedure before appropriate forum in this country in this regard? In our judgment, this is not required. Admittedly, Adithya is an American citizen, born and brought up in United States of America. He has spent his initial years there. The natural habitat of Adithya is in United States of America. As a matter of fact, keeping in view the welfare and happiness of the child and in his best interest, the parties have obtained series of consent orders concerning his custody/parenting rights, maintenance etc. from the competent courts of jurisdiction in America. Initially, on April 18, 2005, a consent order governing the issues of custody and guardianship of minor Adithya was passed by the New York State Supreme Court whereunder the Court granted joint custody of the child to the petitioner and respondent No. 6 and it was stipulated in the order to keep the other party informed about the whereabouts of the child. In a separation agreement entered into between the parties on July 28, 2005, the consent order dated April 18, 2005 regarding custody of minor son Adithya continued. In September 8, 2005 order whereby the marriage between the petitioner and respondent No. 6 was dissolved by the New York State Supreme Court, again the child custody order dated April 18, 2005 was incorporated. Then the petitioner and respondent No. 6 agreed for modification of the custody order and, accordingly the Family Court of the State of New York on June 18, 2007 ordered that the parties shall share joint legal and physical custody of the minor Adithya and, in this regard, a comprehensive arrangement in respect of the custody of the child has been made. The fact that all orders concerning the custody of the minor child Adithya have been passed by American Courts by consent of the parties shows that the objections raised by respondent No. 6 in counter affidavit about deprivation of basic rights of the child by the petitioner in the past; failure of petitioner to give medication to the child; denial of education to the minor child; deprivation of stable environment to the minor child; and child abuse are hollow and without any substance. The objection raised by the respondent No. 6 in the counter affidavit that the American Courts

which passed the order/decree had no jurisdiction and being inconsistent to Indian laws cannot be executed in India also prima facie does not seem to have any merit since despite the fact that the respondent No. 6 has been staying in India for more than two years, she has not pursued any legal proceeding for the sole custody of the minor Adithya or for declaration that the orders passed by the American Courts concerning the custody of minor child Adithya are null and void and without jurisdiction. Rather it transpires from the counter affidavit that initially respondent No. 6 initiated the proceedings under Guardianship and Wards Act but later on withdrew the same. The facts and circumstances noticed above leave no manner of doubt that merely because the child has been brought to India by respondent No. 6, the custody issue concerning minor child Adithya does not deserve to be gone into by the Courts in India and it would be in accord with principles of comity as well as on facts to return the child back to the United States of America from where he has been removed and enable the parties to establish the case before the Courts in the native State of the child, i.e United States of America for modification of the existing custody orders. There is nothing on record which may even remotely suggest that it would be harmful for the child to be returned to his native country."

28. It has been further pointed out in the said judgment as under:

"22. It is true that child Adithya has been in India for almost two years since he was removed by the mother — respondent No. 6 — contrary to the custody orders of the U.S Court passed by consent of the parties. It is also true that one of the factors to be kept in mind in exercise of summary jurisdiction in the interest of child is that application for custody/return of the child is made promptly and quickly after the child has been removed. This is so because any delay may result in child developing roots in the country to which he has been removed. From the counter affidavit that has been filed by respondent No. 6, it is apparent that in last two years child Adithya did not have education at one place. He has moved from one school to another. He was admitted in school at Dehradun by respondent No. 6 but then removed within few months. In the month of June, 2009, the child has been admitted in some school at Chennai. As a matter of fact, the minor child Adithya and respondent No. 6 could not be traced and their whereabouts could not be found for more than two years since the notice was issued by this Court. The respondent No. 6 and the child has been moving from one State to another. The parents of respondent No. 6 have filed an affidavit before this Court denying any knowledge or awareness of the whereabouts of respondent No. 6 and minor child Adithya ever since they left in September, 2007. In these circumstances, there has been no occasion for the child developing roots in this country.……

29. From the above judgment, it is obvious that the Apex Court has taken into consideration the theory of Comity of a foreign judgment in matters like this, particularly while dealing with the writ petitions for habeas corpus.

30. In another judgment in Sarita Sharma v. Sushil Sharma, AIR 2000 Supreme Court 1019 it has been observed by the Apex Court, which is extracted for ready reference to the extent relevant, as under:

"6. Therefore, it will not be proper to be guided entirely by the fact that the appellant Sarita had removed the children from U.S.A despite the order of the Court of that country. So also, in view of the facts and circumstances of the case, the decree passed by the American Court though a relevant factor, cannot override the consideration of welfare of the minor children. We have already stated earlier that in U.S.A respondent Sushil is staying along with his mother aged about 80 years. There is no one else in the family. The respondent appears to be in the habit of taking excessive alcohol. Though it is true that both the children have the American citizen ship 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……

31. From the above observations, it is absolutely obvious that the decree passed by the competent Court in the USA is a relevant factor, still, the welfare of the minor child cannot be ignored.

32. In other words, these two aspects i.e, the order passed by the competent Court in the USA and the welfare of the children are to be reconciled carefully, basing on the various facts and circumstances of each case.

33. If slightly put in a different way, it is something like — USA Law v. Indian Law? or the Law v. the welfare of the children?

34. If the above aspect is to be considered, the ultimate consideration should be — the welfare of the child only, notwithstanding the kind of judgment or order or decree passed by the competent Court in the USA. When the children are living in the association of either of the parent in a particular country, other than the country to which they are the nationals, the Courts of such country of their residence have the jurisdiction to pass appropriate orders keeping in view the best interest of the child and while giving such preference to the welfare of the child, the aspect of enforceability of a judgment passed by a competent Court in a foreign country also gets faded or becomes secondly. Nevertheless, the concept of Comity cannot be overlooked in toto, for the simple reason that a judgment passed by a competent Court of a nation with the law of that land, cannot be slighted in any manner and due regard to such judgments have to be accorded by another country, but certainly, not at the cost of the welfare of the child.

35. For the sake of enforcement of the judgment passed by a competent Court in a foreign country, the welfare of the child or the children, as the case may be, cannot be subjected to sacrifice. The reason is very simple i.e, the children are not parties to the differences of their parents. It is not the children, who ignited such differences, which ultimately led to the estrangement of their parents nor they are parties to the lis before any Court of law. The children, in our considered view, are a distinct class by itself, who have all rights without any obligations. The obligations are on the parents.

36. In the instant case, the children who have been moved to India when they were months' old or a year old, cannot, in fact, shall not be the subject mater of any controversy between the parents. But unfortunately, quite often in matrimonial disputes it is only the children who are unnecessarily being roped into the legal controversies. Therefore, undoubtedly, as between the law and the welfare of the child, the ultimate successor would always be the welfare of the child, inasmuch as the society in its entirety owes an obligation to the child but not the other way round.

37. Therefore, having regard to the facts and circumstances, particularly in the light of the views expressed by the Apex Court and the other views referred to in the above paragraphs, we are of the considered view that the contention of the father that he is entitled to the care and custody of the children pursuant to the judgment rendered by a competent Court in the USA cannot be sustained.

38. Fortunately, the mother is still an Indian having domicile of the USA. Therefore the children, since are being associated with the mother and grandparents, are desirably to have the same comfort and solace with the mother and the present situation, which has been in existence since many years, is inexpedient to be disturbed at this length of time. Any deviation or disturbances from the comfort that the children have been enjoying would only amount to disturbing or interfering, some times may be violently, with the welfare and comfort of the children.

39. Another undisputed fact is that after obtaining divorce statutorily from the competent Court in the USA, the father got remarried and in such a situation, in normal course, the children cannot find themselves in a comfort in the association of a new person and consequently, it will take considerable time for them to get adjusted with new persons and new family atmosphere.

40. Therefore, having regard to the facts and circumstances, we only hope that the custody of the children be remained with the mother, however, since it is not totally desirable to wipe of the passion, emotion, love and affection of the father to the children for all time to time.

41. Therefore, we only feel that the father also is entitled to have the access to his children.

42. In view of the above circumstances, we feel it appropriate to leave the further course of action of their choice, if any, to the parents themselves. In other words, it is for the mother to explore the possibilities and feasibilities to have the orders passed by the competent Court in the USA, whereby the father was made sole custodian of the children modified and till such time, in the best interest of the children, particularly having regard to the facts that they have been prosecuting their studies in one among the best schools available in Hyderabad and also their comforts being looked after by the mother and grandparents reasonably well.

43. As already pointed out, the father shall at least have the access to the children for a total period of 30 days in a calendar year in three spells from 9 a.m to 5 p.m

44. To be more precise, out of 40 days during Summer Vacation of the children — 20 days; 5 days in Dasara Vacation and 5 days in Sankranthi (Pongal) Vacation. The said number of days shall be subject to the adjustment and convenience of the father, mother and children.

45. Further, it has been brought to the notice of this Court that basing on the report lodged by the mother, a case in Crime No. 234 of 2007 of Women Police Station, CCS, Hyderabad for the offences punishable under Sections 498-A, of IPC and Sections 3, 4 and 6 of the Dowry Prohibition Act, was registered against the father and parents of the father, which was taken cognizance of as C.C 158 of 2009 by the XIII Additional Chief Metropolitan Magistrate, Hyderabad and the same is pending.

46. Cri. P.M.P No. 4511 of 2009 in Criminal Petition No. 4902 of 2009 has been filed by the petitioners herein before a learned single Judge of this Court seeking stay of all further proceedings in Cri. M.P No. 3680 of 2008 in C.C No. 158 of 2009, including their appearance. Having regard to the facts and circumstances, the learned single Judge of this Court by order dated 9-7-2009 granted interim stay of further proceedings as prayed for in respect of petitioners 2 and 3 only, who are the parents of petitioner No. 1 father.

47. By virtue of non-granting of any such orders as was granted to the parents of the petitioner, the effect will be that the visitation rights accorded by this Court would become virtually superfluous and frustrated. We do not like that to happen.

48. Earlier, in the present writ petition, a Division Bench of this Court had passed the following interim order on 23-4-2009:

> "Hence, we are of the prima facie opinion that the first petitioner, father of the minor children, being the natural guardian, has got parental rights and that he is entitled to exercise such rights during the Summer Vacation in India. But, however, before passing any orders, we deem it necessary to examine the first petitioner, first respondent and their minor children on 29-3-2009 at 4.10 p.m Accordingly, we direct the first petitioner to be present on the said day at the specified time. There shall also be a direction to the first respondent to be present and also to produce the children on 29-4-2009. As a N.B.W is pending against the petitioner, we also direct the police not to execute the warrant ending against him in C.C No. 158 of 2009 on the file of the XIII Additional Chief Metropolitan Magistrate. Hyderabad, until further orders from this Court." (Emphasis supplied by us)

49. From the above order, it is obvious that Non Bailable Warrants are pending against petitioner No. 1-father and having regard to the facts and circumstances, the Division Bench of this Court by the interim order dated 23-4-2009, directed the Police not to execute the Warrant pending against him in C.C No. 158 of 2009 on the file of the XIII Additional Chief Metropolitan Magistrate, Hyderabad.

50. The cumulative effect of the above orders is that the parents of the father obtained stay of all further proceedings in C.C No. 158 of 2009; whereas, the father had obtained an order to the same effect, slightly in a different manner in the writ petition and as a result, both the father as well as his parents cannot be arrested pursuant to the pendency of C.C No. 158 of 2009.

51. It has been pointed out by the learned counsel for the petitioners that if the father wants to visit India, by virtue of the present orders of the visitation, there is likelihood of his arrest and therefore, seeks passing of appropriate orders in this regard.

52. In this connection, we are of the view that the apprehension of the petitioners is virtually unfounded in the light of the interim orders already passed by the Division Bench of this Court in the present writ petition, dated 23-4-2009.

53. However, we make it clear that it is always open for the father or the other affected parties, who are the parents of petitioner No. 1 father, to work out their remedies in accordance with law.

54. Both the parties agreed for this arrangement, subject to their rights or initiating further proceedings either in India or in the USA.

55. Upon the advice of this Court, both the, parties further agreed that as and when the father makes a telephonic call to have a brief talk with the children, there shall not be any objection for the mother to allow the children the talk to the father.

56. With the above observations and directions, the writ petition is disposed of, at the stage of admission.

57. Registry is directed to furnish copy of the order to the concerned.

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# DANDU SRIDHAR VERSUS POTHAMASHETTY PADMA PRIYA AND ...

**Andhra Pradesh High Court**

**Bench : Hon'ble Mr. Justice T.M. Kumari & Hon'ble Mr. Justice E.D. Rao**

*Dandu Sridhar*
*Versus*
*Pothamashetty Padma Priya And ...*

**2004 (1) ALD 840**

**Decided on 29 December, 2003**

- **Section 9(1) of the Guardians and Wards Act, 1890, the application with respect to the guardianship of the minor has to be made before the District Court having jurisdiction in the place where such minor ordinarily resides. According to the version of the respondents the minor is a resident of Bangalore and, therefore, under Section 9(1) of the Act, the petition has to be filed before the Court having jurisdiction over the place where the minor has resided i.e., Bangalore and not before the Family Court, Hyderabad. Observing so, the Court below held that it has no jurisdiction to entertain the O.P. and thus returned the petition for presentation before appropriate Court.**
- **The minor herein is unmarried girl and by the time the lis with regard to her custody started, she was aged below five years, therefore, in terms of Sections 6 and 13 of the Hindu Minority and Guardianship Act, 1956, it is the welfare of the child which should be given paramount consideration while giving custody of the child. When such is the age of the minor, paramount interest of child lies in giving custody to the mother.**
- **Therefore, having regard to the facts and circumstances of the case, we hold mat Section 25 of the Guardian and Wards Act does not get attracted inasmuch as the minor was never in the custody of the appellant nor she was removed ever from his custody. We further hold that as per Section 9 of the said Act the District Court, having the jurisdiction over the place where the minor ordinarily resides, only can entertain the application. Therefore, having regard to these facts and circumstances and the provisions of law, we are of the considered view that the Court below has rightly returned the petition for presentation before appropriate Court.**

## JUDGMENT

**Hon'ble Mr. Justice E.D. Rao**

1. Aggrieved of the order dated 17.10.2003 passed in I.A. No. 414 of 2003 in O.P. No. 2 of 2003 by the Judge, Family Court, Hyderabad, filed under Section 9(1) of the Guardians and Wards Act, 1890 read with Section 151 of the Code of Civil Procedure for dismissing the OP for want of jurisdiction to the petitioner - husband to file the O.P., the original petition filed by the husband -petitioner herein under Section 6 of the Hindu Minority and Guardianship Act, 1956 read with Section 25 of the Guardians and Wards Act for the custody of the minor, was returned to him for presentation before the proper Court, the husband petitioner preferred this Civil Miscellaneous Appeal contending that the Court below has erred in entertaining the application under Section 9(1) of the Guardians and Wards Act filed by the respondents herein i.e., mother and maternal grand parents of the minor particularly when the Original

petition was filed under Section 25 of the Guardian and Wards Act, that the Court below has erred in returning the application when since none of the circumstances enumerated under Section 9(3) of the Guardians and Wards Act is fulfilled.

2. The factual matrix in a narrow compass is that the petitioner herein filed OP No. 2 of 2003 under Section 6 of the Hindu Minority and Guardianship Act read with Section 25 of the Guardian and Wards Act seeking the custody of the minor against the wife - first respondent herein and his in-laws Respondents 2 and 3 herein. While the matter was thus pending, the first respondent - wife filed petition in IA No. 414 of 2003 with a prayer to dismiss the main petition for want of jurisdiction to the petitioner -husband to file the petition at Hyderabad.

3. The said petition was resisted by the petitioner herein.

4. Admittedly, the wife filed OP No. 136 of 2002 before the Court below under Section 13(1)(ia) and (b) of the Hindu Marriage Act against her husband, which was referred to Lok Adalath and an award was passed on 7.10.2002 granting divorce between the parties imposing certain conditions with regard to the intermittent custody of the minor. Subsequently, the Lok Adalath modified the award by order dated 15.11.2002 regarding the intermittent custody of the minor.

5. It is the contention of the first respondent herein that as contemplated under Section 9(i) of the Guardians and Wards Act, the relief claimed in the main petition has to be agitated in such Court within which jurisdiction such minor ordinarily resides and therefore, the Court below had no jurisdiction.

6. The Court below after hearing both the sides observed that viewed from any angle, it had no jurisdiction to entertain the petition filed for custody of the minor and, therefore, ordered to return the main O.P. to the petitioner herein for presentation before the proper Court, vide impugned order.

7. It is this finding of the Court below, which is under challenge in this appeal.

8. Mr. S. Surender Rao, the learned Counsel appearing on behalf of the appellant - husband/father of the minor attacked the impugned order on the ground that the return of OP No. 2 of 2003 is contrary to law, facts and weight of evidence, the Court below erred in entertaining the application filed under Section 9(1) of the Guardian and Wards Act, that the Court below ought to have seen that the Petition was filed under Section 25 of the Guardian and Wards Act and Section 9 of the said Act has no application to the facts of the case, that under Section 9(2) of the Act no family Court has the jurisdiction to entertain the application and the return of the petition was contemplated only under the circumstances enumerated under Section 9(3) of the Act, that the Court below ought to have seen that the appellant being natural guardian is entitled to file an application at Hyderabad to which place he belongs and that the proceedings for divorce were instituted in the Family Court at Hyderabad and, therefore, the impugned order is illegal and liable to be set aside.

9. As can be gathered from the material placed on record before this Court, OP No. 2 of 2003 was filed seeking a direction to the Respondents 1 to 3 herein to deliver the custody of the minor child Deeksha, to the appellant herein, in view of her welfare. The facts leading to the filing of the said OP in narrow compass are that the marriage between the appellant - husband and the first respondent wife was solemnized on 18.9.1996 at Chittoor in accordance with the Hindu rites and customs, thereafter, the couple lived together at Hyderabad for about two months. Thereafter, the first respondent left for Bangalore to her parents house i.e., Respondents 2 and 3 herein. During the stay at Hyderabad, the first respondent conceived and delivered a female baby on 25.10.1997 named Deeksha at Bangalore and the appellant was away from India on employment at Dubai and came back to Hyderabad, after three months and the first respondent joined him at Hyderabad and stayed for some time along with the minor child and again left for Bangalore. Thereafter, she planned to go to USA and was trying to get visa. In order to get marriage certificate, she insisted the appellant to accompany her to USA, as it is condition precedent to get visa, the first respondent has to produce marriage certificate to go abroad. Accordingly

after obtaining marriage certificate she left for USA in the month of May, 1999, without even informing him. At that time the minor baby was one and half years old and thus she neglected the baby and left at the mercy of her maternal grand parents i.e., the Respondents 2 and 3 herein. It is further stated that whenever, the appellant tried to see his daughter, at Bangalore, the Respondents 2 and 3 did not permit him. While the things stood thus, the appellant got employment in Los Angles in the month of February, 2000. By that time, the first respondent was planning to marry some other person. The appellant's father filed GOP No. 49 of 2001 before the Principal District Judge, Chittoor, seeking appointment of guardian for the minor child during the appellant's stay at USA, but the first respondent persuaded the appellant stating that she is interested to stay with the appellant and to withdraw the above said O.P. Believing the same, the appellant wrote letter dated 14.1.2002 and his father withdrew the said OP on 6.2.2002 by filing a Memo. Thereafter, the first respondent filed OP No. 136 of 2002 seeking divorce for false and frivolous allegations through her General Power of Attorney i.e., father. Meanwhile, she also filed a case before California Court and got an order of dissolution of marital status with effect from 31.10.2002 and on 17.2.2002 on the consent given by the appellant, the matter was referred to Lok Adalath and an award was passed granting divorce and giving visiting rights and interim custody of the minor baby to the appellant and his parents and to spend some time with her. When these directions of the Lok Adalath were flouted by the Respondents 2 and 3 at Bangalore, the appellant, under the authority of the earlier order dated 7.10.2002, passed by the Lok Adalath, approached the Lok Adalath for modification of the order passed in OP No. 136 of 2002. After considering the facts and circumstances of the case, the Lok Adalath modified the order on 15.7.2002 restricting the relief in the earlier order to the effect of divorce only and the petitioner was given a right to approach competent Court for custody of his child under Section 6 of the Hindu Minority and Guardianship Act, 1956.

10. Along with counter, the General Power of Attorney of the first respondent filed I.A. No. 414 of 2003 praying to dismiss the OP on the ground of non-maintainability of the OP in view of the fact that the Family Court at Hyderabad has no jurisdiction.

11. Having regard to the facts and circumstances of the case the Family Court observed that the Hindu Minority and Guardianship Act, 1956 nowhere mentions as to where the petition relating to the controversy has to be filed. But as per Section 9(1) of the Guardians and Wards Act, 1890, the application with respect to the guardianship of the minor has to be made before the District Court having jurisdiction in the place where such minor ordinarily resides. According to the version of the respondents the minor is a resident of Bangalore and, therefore, under Section 9(1) of the Act, the petition has to be filed before the Court having jurisdiction over the place where the minor has resided i.e., Bangalore and not before the Family Court, Hyderabad. Observing so, the Court below held that it has no jurisdiction to entertain the O.P. and thus returned the petition for presentation before appropriate Court.

12. Originally, the father of the appellant filed G.O.P. No. 49 of 2001 before the District Court, Chittoor, for the custody of the minor child, which was subsequently withdrawn. Further OP No. 136 of 2002, filed by the first respondent for grant of divorce, was referred to Lok Adalath and a decree of divorce was granted with visitation rights to the appellant and his parents and when the said decree did not workout, the appellant got it modified by filing a petition before the Lok Adalath and on the liberty given by the Lok Adalath, the appellant filed OP No. 2 of 2003 for the custody of the minor.

13. The provisions of law covering the arena of controversy will be presently discussed. Sub-section (3) of Section 4 of the Guardian and Wards Act defines Ward to mean a minor for whose person or property, or both, there is a guardian. Sub-section 4 hereof defines District Court to mean as assigned to that expression in the Code of Civil Procedure and includes a High Court in the exercise of its ordinary original civil jurisdiction. Sub-section (5) which deals with District Court defines District Court having jurisdiction to entertain an application under this Act for an order appointing or declaring a person to be a guardian.

14. Section 25 of the Act contemplates the title of guardian to the custody of ward. It says that if a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of the opinion that it will be for the welfare of the ward to return to the custody of the guardian, may make an order for his return, and for the purpose of enforcing the order, may cause the ward to be arrested and to be delivered into the custody of the guardian.

15. A look at Section 9 of the Guardian and Wards Act, 1890 is also relevant for the purpose of deciding the jurisdiction for filing the petition. Section 9 deals with the Court having jurisdiction to entertain the application. It mandates that if the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

16. A combined reading of the provisions of Sub-section (1) of Section 9 and Section 4(5)(a) and 4(5)(b)(ii) is that an application with respect to the guardianship of the person of a minor or any matter pertaining to the person of the minor for whom no guardian has been appointed, should be made to the District Court having jurisdiction in the place where the minor ordinarily resides. The words ordinarily resides is not defined in the Act. The Oxford Dictionary defines it to mean dwelling permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place. In the instant case, though the minor has not permanently resided, she resided at Bangalore for considerable time along with the maternal grand parents, even as per the admission of the appellant. The Kerala High Court in T.J. Chandy v. Mary Baneena, (1988) 2 HLR 436, has held that it is not the place of residence of the natural guardian that gives jurisdiction to the Court under Section 9(1), but it is the place of ordinary residence of the minor and the Legislature has designedly used the words where the minor ordinarily resides. Hence, the actual residence of the minor, having regard to the circumstances under which the minor happens to reside at a particular place must be taken into consideration in deciding the place where the minor ordinarily resides.

17. In order to give the Court jurisdiction both for the purpose of appointment of a guardian under Sub-section (1) of Section 9 and for the purpose of an order under Section 25, the minor must be ordinarily resident within the local limits of the jurisdiction of that Court.

18. As per Section 25 of the Act, the expression Court which has been defined to mean the District Court having jurisdiction to entertain an application under the Act for an order appointing or declaring a person to be a guardian. Under Section 9(1) if the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides. Therefore, the Legislature has statutorily defined the Court for the purpose of Section 25(1) as the District Court having jurisdiction in the place where the minor ordinarily resides. The legislative tests of the Court, which has jurisdiction in the matter is the Court where the minor ordinarily resides and not the Court where the father resides and with whom the minor must be deemed to have been in constructive custody. If the application is made immediately after the removal from the father's custody, the place where the father resides would be the place where the minor ordinarily resides and there would be no difficulty. Similarly, if there are two places where it could be held that the minor was ordinarily residing, the question would be one of convenience because the legislative test would be fulfilled and the question cannot be decided on presumptive legal or construction custody but by application of the statutory test of the ordinary residence of the minor.

19. Evidently, to invoke the provision of Section 25, two limbs 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 the custody of the guardian, it may make an order of return of the ward to his custody. Admittedly, in the present case, the minor baby Deeksha, was born at Bangalore and for a short while, after the return of appellant from Dubai, she was at Hyderabad and thereafter she was taken back to Bangalore, even after the first respondent left for USA

in search of employment, the minor was in the custody of her maternal grand parents i.e., Respondents 2 and 3 at Bangalore. The fact that the father of the appellant filed OP No. 49 of 2001 for the custody of the minor before the District Judge, Chittoor, further substantiate that the minor was never in the custody of the appellant or that she was removed from the custody of the appellant, nor did she reside at Hyderabad, to invoke the jurisdiction of the Family Court at Hyderabad, nor particularly when it is not the contention of the appellant that the minor child originally was in the custody of the appellant or that she was removed from his custody. Thus, the question of the appellant invoking the jurisdiction of the Family Court at Hyderabad does not arise.

20. Apart from that, Section 6 of the Hindu Minority and Guardianship Act, 1956 mandates that the natural guardian of a Hindu minor in respect of the minor's person as well as in respect of the minor's property, in the case of a boy or an unmarried girl, the father and after him, the mother; provided that the custody of minor who has not completed the age of five years shall ordinarily be with the mother.

21. Admittedly, the minor herein is unmarried girl and by the time the lis with regard to her custody started, she was aged below five years, therefore, in terms of Sections 6 and 13 of the Hindu Minority and Guardianship Act, 1956, it is the welfare of the child which should be given paramount consideration while giving custody of the child. When such is the age of the minor, paramount interest of child lies in giving custody to the mother. We are fortified in this view by a judgment of the Supreme Court in Pushpa Singh v. Inderjit Singh.

22. Therefore, having regard to the facts and circumstances of the case, we hold mat Section 25 of the Guardian and Wards Act does not get attracted inasmuch as the minor was never in the custody of the appellant nor she was removed ever from his custody. We further hold that as per Section 9 of the said Act the District Court, having the jurisdiction over the place where the minor ordinarily resides, only can entertain the application. Therefore, having regard to these facts and circumstances and the provisions of law, we are of the considered view that the Court below has rightly returned the petition for presentation before appropriate Court. We do not see any illegality in the impugned order warranting our interference.

23. Consequently, the Civil Miscellaneous Appeal fails and is accordingly dismissed. No order as to costs.

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# PHILIP DAVID DEXTER VERSUS STATE NCT OF DELHI AND ANR

**Delhi High Court**

**Bench : Hon'ble Mr. Justice Pradeep Nandrajog &**
**Hon'ble Ms. Justice Pratibha Rani Pradeep Nandrajog**

*Philip David Dexter*
*Versus*
*State Nct of Delhi and anr*

**W.P.(CRL.) 1562/2012**

**Decided on 02 April, 2013**

**Guardians and Wards Act 1890**

**Section 7, 8, 10 and 11—No evidence to prima-facie justify risk of grave danger—Petition filed by wife for being appointed as a guardian of the minor girl child born to her during the subsistence of her marriage with the respondent and for custody of the minor girl child had been dismissed by Family Court—Divorce by mutual consent was granted—Both agreed to joint custody of child—Case of an abducting parent approaching the Court in India—Wife abducted child and brought her to India violating the joint custody order—Wife had no evidence to prima-facie justify risk of grave danger which child would be facing on return to the Republic of South Africa—Held: Court accepted view of Family Court that Courts at Delhi did not have territorial jurisdiction to entertain the petition because when the petition was filed neither wife nor her daughter were ordinarily residents of Delhi—Where the couple submits to the jurisdiction of the home country where they resided when the matrimonial bond was intact, the burden of proof would lie on the spouse who opposes the return of the minor child—Court directed that upon wife returning to the Republic of South Africa, husband would not move for the warrants of arrest to be executed for at least a period of two months—Petitions partly allowed.**

Reserved on : March 19, 2013

Judgment Pronounced on: April 02, 2013

1. Since learned counsel for the parties had argued on the merits of their respective stands, we dispose of CM No.1107/2013 condoning the delay in filing FAO No.29/2013. FAO No.29/2013 and WP(Crl.) No.1562/2012 1. Dr.Neeta Misra, the appellant in FAO No.29/2012, challenges the order dated April 03, 2012 passed by Shri K.S.Mohi, Family Court Judge. Her petition filed under Sections 7, 8, 10 and 11 of the Guardians and Wards Act 1890 registered as G.P.No.49/2011, for being appointed as a guardian of the minor girl child born on June 19, 2006 to her during the subsistence of her marriage with the respondent, Philip David Dexter, and for custody of the said minor girl child has been dismissed. The view taken by the learned Judge, Family Court is that the Family Court at Delhi lacks territorial jurisdiction, inasmuch as Section 9 of the Guardians and Wards Act 1890 confers territorial jurisdiction on such District Court within jurisdiction whereof the minor ordinarily resides. The respondent in the Appeal, Philip David Dexter is the writ petitioner in WP(Crl.) No.1562/2012. He prays therein that the minor daughter be directed to be produced in Court by Dr.Neeta Misra and her custody be given to him.

2. In the appeal and the writ petition, we are therefore concerned with a little girl child born on June 19, 2006, who would be aged 6 years and 9 months as of date; far away from the age of adolescence. To respect the anonymity of the child and at the same time not to undermine her persona by labeling her with a letter, we shall give her a name for the purpose of our decision. We shall call her: Hope.

3. We must confess at the outset that we had heard arguments at length spread over the afternoon session on three days i.e. March 01, 2013, March 05, 2013 and lastly on March 19, 2013, on which date the appeal and the writ petition were reserved for judgment as also pending applications therein; notwithstanding that for the purposes of the appeal we were required to adjudicate the limited point pertaining to the jurisdiction of the Family Courts at Delhi. Thus, we were not to hear any argument on the sustainability of the claim of Dr.Neeta Misra in Guardianship Petition No.49/2011. But, while deciding the writ petition filed by Philip David Dexter, and for considering the prima-facie claim of Philip David Dexter for a direction that Dr.Neeta Misra should produce Hope in Court and her custody be entrusted to him, it became necessary to consider the factual aspect of the matter and thus we were compelled to hear learned counsel for the parties at considerable length with respect to not only the legal position, but also the factual backdrop of the litigation; and we unhesitatingly record that learned counsel for Dr.Neeta Misra, Ms.Malvika Rajkotia and learned counsel for Philip David Dexter, Mr.Anil Malhotra, presented the rival viewpoints with the forensic expertise which one would expect from lawyers appearing before Courts of Record. We go back, therefore, to the year 2004 when Dr.Neeta Misra married Philip David Dexter in December 2004. It was the first marriage of Dr.Neeta Misra and the second for Philip David Dexter, who was married for the first time in the year 1991 and was blessed with a son aged 13 years or so as of December 2004, who was living with Philip David Dexter after his parents obtained a divorce. From a live-in relationship, a son was blessed who was aged around 6 years as of December 2004 and was living with Philip David Dexter after his parents separated. Hope came into the world of the living when Dr.Neeta Misra and Philip David Dexter were blessed on June 19, 2006.

4. Relationship soured between Dr.Neeta Misra and Philip David Dexter. They took recourse to legal help. The Solicitors engaged by the two had a meaningful dialogue on the terms of separation. Both moved an application for divorce by mutual consent to snap the matrimonial bond; requiring Philip David Dexter to pay monthly maintenance of 3000 Rand to Dr.Neeta Misra. The couple agreed to the joint custody of Hope as also how Hope would share her invaluable time with the two separated parents.

5. Divorce by mutual consent was granted on October 11, 2010 by the High Court of South Africa (Western Cape High Court), inter-alia, binding the parties as under (While reproducing verbatim the relevant terms of the consent order dated October 11, 2010 to protect the anonymity we have changed the name of the baby girl to Hope):2.1 Guardianship It is recorded that the parents are co-guardians of the minor child, HOPE RACHEL DEXTER, born 19 June 2006, (hereinafter referred to as HOPE) as provided in sub-sections 18(2)(c), 18(4) and 18(5) of the Childrens Act 38 of 2005. Neither parent shall remove HOPE from the Republic of South Africa for any purpose without the other parents written consent, which shall not be unreasonably withheld. X X X 2.2.4 The parents shall make joint decisions in respect of any choice of or change in HOPEs schools and tertiary education, extra-mural activities, major medical interventions, choice of religion, and decisions which are likely to significantly change HOPEs living conditions or to have an adverse effect on her well- being. 2.31. It is specifically recorded that both Philip and Neeta agree in principle that it may be in HOPEs best interests to reside equally with both parents. Neeta records that she may in the future apply for HOPE to relocate with her and Philip records that he shall oppose any such relocation which prejudices or affects his rights of contact. 2.3.2 The parties agree to refer the issue Philips contact to the Facilitator who shall be appointed as per paragraph 8 below. 2.3.3 The Facilitator shall first attempt to mediate a solution to the issue together with the parties. If this appears to be impossible, the Facilitator shall be requested to make a directive, with the assistance of an expert report to be obtained, if necessary, from a child psychologist to be appointed by the Facilitator and paid for in equal shares by the parties. The Facilitator may nevertheless, following receipt of the expert

report, order that the apportionment of the costs of such expert be paid by one or other of the parties. X X X

8.1 In order to resolve disputes arising from the parties exercising their parental rights and responsibilities, maintenance or proprietary consequences as set out herein, the parties agree that a facilitator be appointed in accordance with the following:

8. 1.1 The facilitator shall be Astrid Martalas, or failing her, a jointly-appointed facilitator accredited by the Family Mediators Association of the Cape (FAMAC). Should the parties fail to reach agreement regarding the appointment of a facilitator, they shall approach the chairperson for the time being of FAMAC to appoint a facilitator. 8.1.2 The facilitator shall continue to act until he/she resigns, or both parties agree in writing that his/her appointment shall be terminated, or his/her appointment is terminated by an order of a Court having jurisdiction. If the facilitators appointment is terminated or he/she resigns, he/she shall be substituted by another facilitator appointed in accordance with the terms of this Agreement.

8.1.3 If the parties are unable to reach agreement on any issue concerning HOPEs best interests and/or any issue where a joint decision is required in respect of HOPE, the dispute shall be formulated in writing and referred to the facilitator who shall attempt to resolve the dispute by way of directive, as speedily as possible. X X X

8.1.3.7 The facilitator is authorized to appoint such other person as may be necessary in order for the facilitator to make a decision in respect of the issue in dispute, including the appointment of experts if he/she deem it appropriate or necessary. X X X 8.6 In the event that a party fails to participate in any facilitation despite having been requested to do so by the facilitator, or fails to attend a facilitation session, or fails to reply to the facilitators communications within 5 (FIVE) days, which communications may be by telephone, email or fax, or fails to pay the facilitators costs upon request, or fails to co-operate with the facilitation process in any other way, the facilitator shall proceed with the facilitation in the absence of that party. The facilitator shall be entitled to issue a directive and his/her decision shall be binding on both parties as if they had both participated in such facilitation until such decision has been varied by a court of competent jurisdiction. X X X 11.1 The parties hereby acknowledge that the aforegoing constitutes a full and final settlement of all outstanding difference between them. The parties agree to withdraw all Protection Order Proceedings currently instituted by them one against the other, forthwith upon signature of this document. Both parties further undertake and agree to withdraw the complaints of assault which they have laid criminally against one another and to do all that is reasonably possible to discourage the State from proceeding with such charges.

6. It is apparent that Dr.Neeta Misra and Philip David Dexter agreed to Hopes joint custody. They also agreed that Hope would be with her mother, but every Wednesday at 04:00 PM she would be with her father who would send her to school the next morning. Hope would spend the evening and the night of Wednesday with her father. At 05:00 PM evening every alternative Friday, Hope would be in the custody of her father, to be returned to the mother on Sunday at 04:00 PM. It was agreed between the couple that Hope would not be removed by either parent from the Republic of South Africa without the written consent of the other parent. The parents agreed to take joint decisions regarding Hopes school, education, extra mural activities, choice of religion, major medical interventions etc. Expecting that there may be issues which may arise in the future regarding Hope, which may embrace the joint custody including relocating Hope to another city or a country, the parties agreed that if said issue could not be amicably resolved, a facilitator named Astrid Martalas would attempt to resolve the dispute by mediation. Failing which, the parties could request the facilitator to make a directive with the assistance of an expert child psychologist to be appointed by the facilitator. The parties agreed to be bound by the directions issued by

the facilitator until the decision of the facilitator was varied by a Court of Competent Jurisdiction ( para 8.6).

7. Things did not move smoothly and it appears that Philip David Dexter had some issue with Dr.Neeta Misra not truthfully disclosing her income in South Africa and he being required to pay 3000 Rand per month to her. He stopped making payments resulting in Dr.Neeta Misra moving an application for warrants of attachment to be issued to satisfy her claim for maintenance. She also filed an application apprehending violence to her person. She was granted protection order on March 10, 2011. Philip David Dexter moved an application on March 27, 2011 to reduce the maintenance granted to Dr.Neeta Misra.

8. In June 2011, a theft took place at the residence of Dr.Neeta Misra and since, apart from other things, research material gathered by Dr.Neeta Misra pertaining to the subject she was researching upon for her Doctorate (Ph.D.) was stolen. She suspects that Philip David Dexter had a hand in the incident.

9. Dr.Neeta Misra claimed that on September 08, 2011, a Thursday, when she went to school to pick up Hope, she heard Hope tell her friend Stella that she must not ask her boyfriend to suck on his pee pee (sex organ). When she asked Hope where she had heard this. Hope told her that while standing on the top floor of her fathers house she heard her father ask his girlfriend Bregje to perform oral sex, and as she quizzed for more details Hope told her that she had seen Bregje perform oral sex on her father on more than one occasion. On September 09, 2011 Dr.Neeta Misra sent an e- mail to Astrid Martalas with a request to refer the incident to Rob Sandenbergh, a child therapist, for the reason, if it was true, it was indeed a serious matter since Hope was five years old and ought not be exposed to see oral sex between two consenting adults. Philip David Dexter claims this to be a figment of Dr.Neeta Misras imagination and a ploy; the foundation of a contrivance to abduct Hope from the Republic of South Africa and flee to India.

10. Astrid Martalas referred the issue to one Rob Sandenbergh, a Clinical Psychologist and Child Therapist, who associated one Juana Horn and Kate Scott, the former a Clinical Psychologist and the latter an Educational Psychologist, and submitted, if we may say some kind of an interim opinion in October 2011, which suggests that initially Hope denied having told any such kind of a thing to her mother but at the second breath said that she did, but refused to use the same phrase which she allegedly used while conveying to her mother the oral sex escapades which she claimed to have seen involving her father and his girlfriend. The report records that the retracted second stage incriminating statement was claimed to be made by Hope to her mother in a car when her friend Stella was present i.e. the place of the narration and the child friend of Hope i.e. Stella being present, being corroborative of what was claimed by Dr.Neeta Misra. The report suggests that Hope could possibly have said imaginary things about her father, because Hope had said that everyone is talking too much about this and so saying she changed the topic. The report concludes by noting that Rob Sandenbergh can make no further progress because Hope was no longer in the country.

11. But something of importance had taken place prior to October 2011, by when Rob Sandenbergh could furnish a tentative interim report. Dr.Neeta Misra had addressed an e-mail to Philip David Dexter seeking his permission to take Hope for a holiday to United Kingdom informing him that her sister with her daughter were to be in London in the first week of October 2011 and she desired that Hope should meet her aunt and her cousin. Philip David Dexter did not give the consent and thus Dr.Neeta Misra moved an application on September 07, 2011 in the Court seeking permission to take Hope for a holiday to the United Kingdom requiring Hope to be absent from the Republic of South Africa from September 27, 2011 to October 02, 2011. In the application Dr.Neeta Misra inter-alia pleaded as under:4. That insofar as Respondents signature is necessary for the purpose of obtaining a visa or any other travel documentation, such requirement be dispensed with and Applicant be authorized to sign any such documentation on behalf of Respondent in his stead.

5. That the Respondent forthwith hand over possession of the said minor childs Sought African passport to the Applicants attorney of record, failing with the Sherriff of the above Honourable Court is directed and authorized to take possession of the passport and hand it over to Applicants attorneys of record.

12. Required to depose to an affidavit in support of the application, Dr.Neeta Misra, inter-alia, deposed as under:4. I am a citizen of the United States of America. I am resident in the Republic of South Africa. I am a Post Doctorate Fellow at the University of Cape Town. I am also under contract to a local publisher to write a book on South African Trade Unions. I have been granted temporary residence and am permitted to work in the Republic of South Africa until 2013. X X X 12.HOPEs school holidays commence on 28 September 2011 and end on 9 October 2011. We are booked to leave on the evening of 27 September 2011 and to return to South Africa on 2 October 2011. She will not be missing any school time. I annex hereto marked NM3 a copy of our travel itinerary as provided by the travel agent.

13. I am advised that I require Respondents consent to remove HOPE from the Republic of South Africa in terms of sections 18(5) and 18(3) of the Childrens Act 38 of 2005. X X X 20.Respondent cannot have any fears of Hope travelling abroad, as HOPE accompanied Respondent on a 14 day holiday to Bali, Indonesia in January 2011. May travelled with me to New York in December 2010. We spent two weeks in New York. In March 2011 HOPE accompanied me to India where we visited my family. Respondent willingly gave his consent for these trips. Since August 2010 HOPE has been to Durban at least six times with Respondent.

13. Disposing of the application filed by Dr.Neeta Misra to take the minor child, Hope, for a holiday to United Kingdoms, the learned Judge of the Western Cape High Court passed an order on September 15, 2011 which, inter-alia, reads as under:5. The Respondent shall forthwith hand over possession of the said minor childs South African passport to the Applicants attorney of record. The Applicant shall hand over the minor childs Indian and USA passports to the Applicants attorneys of record for safe keeping. The Applicant, on her return to the Republic of South Africa shall hand over the minor childs South Africa and UK passports to her attorneys of record, who shall hold all these passports until the parties otherwise agree in writing.

14. But, what did Dr.Neeta Misra do? She was obliged to hand over Hopes Indian and US passport to her attorney for safe keeping. She did not do so. As regards Hopes South African passport which was with her father and who gave it to the attorney of Dr.Neeta Misra, on the strength thereof Hope left the shores of the Republic of South Africa on September 27, 2011 with Dr.Neeta Misra and reached Heathrow Airport (London) the next day on September 28, 2011. She never went outside the Airport. She took a connecting flight for Mumbai the same day and reached Mumbai the day next i.e. September 29, 2011. The passports would evidence that on the strength of the South African passport, Hope flew out of Cape Town with her mother and flew out of London on the American passport. With much hesitation, to which fact we would be referring to a little later, Dr.Neeta Misra now admits that she had already purchased a round trip ticket on September 21, 2011 for herself and her daughter Hope which was used by her to reach Mumbai from London. She contacted a lawyer at Delhi on September 30, 2011, got drafted, and on October 05, 2011 filed a petition under the Guardians and Wards Act 1890 with which we are dealing, pleading therein that she and her minor daughter were residing at 234, Westend Marg, Said-ul-ajab, New Delhi.

15. There are gross suppressions in the petition. There is no reference to the joint custody order dated October 11, 2010 passed by the competent Court at Cape Town. There is no reference to the undertaking given by Dr.Neeta Misra to the Court in Cape Town to return to the Republic of South Africa along with Hope on October 02, 2013. From a perusal of the petition it becomes clear that Dr.Neeta Misra has complained about Philip David Dexter not paying her maintenance and the fear of violence at his hand and for which she annexed the complaints filed by her in the Court in South Africa and the protection order which she had obtained as also the application filed by her to seek warrants of attachment to realize

her maintenance dues. She referred to the trauma caused to Hope at the hands of Philip David Dexter, to whom she attributed statements of telling Hope that he would see that Hope and her mother were sent to jail. She referred to the fact that Philip David Dexter has a half sister having a daughter named Hayley; a stated drug addict and suffering from Bipolar Disorder. She made a grievance that Philip David Dexter used to occasionally send Hope to sleep, without parental supervision, with Hayley; thereby endangering Hope. She referred to Hopes half-brother, the child born during a live-in relationship of Philip David Dexter, slapping Hope and bullying her as also that Philip David Dexter permitting the adolescent half-brother of Hope to sleep in the same room with Hope. Dr.Neeta Misra pleaded that so traumatized was she that she had to escape from the long arms of Philip David Dexter, whom she referred to as a politician in the Republic of South Africa. She pleaded that she left United Kingdom for a short holiday in September 2011 (date has not been mentioned by her). She claims that at the departure, when the Immigration Authorities found that she was a divorcee but was on a spousal visa in the Republic of South Africa, she was told that her return to South Africa would be a problem. The reason to reach India, as pleaded in paragraphs 38, 39 and 40 of the petition, would be better noted by us in the language used by Dr.Neeta Misra. She pleaded as under:38. At the time of her departure the Petitioner was shocked when the Immigration Authorities told her that as she was living in South Africa under a spouse visa and as her marriage with the Respondent had been dissolved in October 2010, the Petitioner would not be entitled to return to South Africa on the said visa. The Petitioner has a modest grant for research till March 2012 which is soon to expire.

39. After clearing immigration in the UK the petitioner enquired at the South African consulate in London and was told that it would take 4-6 months to get a new visa and that she must return to her country of residence to apply. In these circumstances, although, the petitioner was in the U.K. she decided to come to India initially to apply for a new visa to come to South Africa which application for Visa could have been applied from the U.S. or from the India. As the Petitioner would need a residence permit/visa and not a tourist visa, the Petitioner realized that she could not lose time and needed to come to India and cancel her UK holiday as the Petitioner has limited means and living in the US is far more expensive than living in India. Petitioner has thus come to India, has cancelled her return ticket to South Africa and has decided to permanently reside in India along with her minor Daughter Hope.

40. That the petitioner has the advantage of having her mother and family on whom she can depend in her time of need. The Petitioner has thus come to India as a result of an emergency which came to the fore. At the time of the Petitioner leaving South Africa for the U.K. the Immigration Authorities warned the Petitioner that she would not be allowed to re-enter South Africa. The Petitioner does not know what to do. The Petitioner has the custody of the minor daughter Hope. The Petitioner has no objection to supervised visitation rights by the Respondent. The Respondent is a man of low moral value and high political influence, Petitioner cannot hope to compete with the Respondent either in terms of money or in any other manner.

16. Listed before the learned Judge Family Courts on October 05, 2011; kept in the dark about the order dated October 11, 2010 passed by the Western Cape High Court as also Dr.Neeta Misras undertaking to the said Court when she was permitted to take Hope for a holiday to United Kingdom and also kept in the dark about the order dated September 15, 2011 passed by the Western Cape High Court, the learned Judge Family Courts passed an order restraining Philip David Dexter to remove the minor child from the custody of Dr.Neeta Misra. The said injunction order was passed because Dr.Neeta Misra expressed an apprehension that Philip David Dexter would kidnap Hope.

17. We need to highlight at this stage that the pleadings of Dr.Neeta Misra suggest to the Court that in view of the information she received at the departure by the Immigration Authorities and further information received by her from the South African Consulate in London, it was her compulsion to fly to India. She has not disclosed that she flew to Mumbai and reached Mumbai on September 29, 2011 because her

mother resides in Mumbai. Her pleadings are suggestive as if she flew to Delhi, meaning thereby, this was her plea to confer territorial jurisdiction in the Courts at Delhi.

18. All this while Philip David Dexter was distressed because Hope never crossed out from the precincts of Heathrow Airport at London. Since Dr.Neeta Misra had indicated that she would be staying with her sister at the house of a friend named Sameena Zaidi at 90 Exmouth Road, London, E 17.Philip David Dexter tried to locate Hope at said address and had to contact a Solicitor in London to do the needful who got in touch with Sameena Zaidi and received information from her that Dr.Neeta Misra nor her daughter had reached her house. She informed that Dr.Neeta Misra had told her of having some matrimonial problem and took her permission to use her address limited to bring Hope to the United Kingdom.

19. On October 07, 2011 the Solicitor of Dr.Neeta Misra at Cape Town informed the Solicitor of Philip David Dexter that henceforth he had no authority to act on behalf of Dr.Neeta Misra and henceforth her attorneys in India would be doing the needful; and along with the communication he enclosed a copy of the ex-parte ad-interim order passed by the learned Judge, Family Courts on October 05, 2011. The communication dated October 07, 2011 reads as under:We refer to previous correspondence herein. We have been instructed to forward a copy of the Indian court order dated 5 October 2011 to your offices, a copy of which has been attached hereto. We have furthermore been instructed to advise that we shall no longer be representing our client and that all queries will have to be set to our clients attorneys in India, who shall be making contact with you shortly.

20. It was followed soon thereafter by an ex-parte ad-interim order dated October 20, 2011 obtained by Dr.Neeta Misra in C.S.No.382/2011 wherein she sought an injunction against Philip David Dexter to approach her and Hope, expressing a fear of physical harm. The order restrains Philip David Dexter to be within 100 metre of Dr.Neeta Misra and Hope. It needs to be highlighted that even in the said suit facts pertaining to the consent orders passed by Court of Competent Jurisdiction in Cape Town which had a bearing on Hopes custody and not to be brought to India were suppressed. For record, said suit ultimately came to be dismissed on April 24, 2012. It was held that the matter had to be adjudicated by the Guardianship Court.

21. Pertaining to Guardianship Petition with which we are concerned, Philip David Dexter opposed the prayers made, on merits as well as on jurisdiction; pleading that there was contrivance by Dr.Neeta Misra who had already made up her mind to remove Hope from the Republic of South Africa. He pleaded that the story weaved by Dr.Neeta Misra in paragraphs 38 to 40 of the petition was a ruse, for the reason there was no time for Dr.Neeta Misra, as pleaded by her in paragraph 39 of her petition, to approach the South African Consulate in London inasmuch as she never stepped out of Heathrow Airport. Flying out of Cape Town on September 27, 2011 and reaching London the next day on September 28, 2011, she flew out of Heathrow Airport with Hope the same day and reached Mumbai on September 29, 2011. He pleaded that since Dr.Neeta Misras mother resides at Mumbai, she reached Mumbai. She treats Mumbai as her abode and her residence, evidenced by income tax returns filed all these years at Mumbai. Philip David Dexter referred to income tax returns till the assessment year 2011-2012 filed at Mumbai showing Dr.Neeta Misras address at Mumbai. He drew the attention of the Court to the documents filed by Dr.Neeta Misra and especially at Serial No.4 to 16 of the petition, the documents being: (i) Marriage certificate of the parties; (ii) Hopes birth certificate; (iii) Copy of legal notice sent by his Solicitor to Dr.Neeta Misra on May 11, 2006; (iv) Copy of hospital records; (v) Copy of an e-mail dated September 08, 2011; (vi) Copy of divorce proceedings; (vii) Details of the trips made by Philip David Dexter; (viii) Copy of profile of Philip David Dexter; (ix) Copy of newspaper cutting in THE CAPE TIMES pertaining to Philip David Dexter; and (x) Copy of Domestic violence complaint filed by her, to highlight the patent absurdity in Dr.Neeta Misras story for the reason as per her she was compelled to reach Mumbai due to the Immigration Authority at the Departure of the Airport at Cape Town telling her about the status of her visa i.e. spousal visa and information that she could not return to South Africa on the visa with further information

received from the South African Consulate in London. He pleaded that if Dr.Neeta Misra was an innocent traveler as claimed by her why would she be travelling with aforesaid documents? Obviously, she was pre-armed to reach India and open a battlefront after abducting Hope. Territorial jurisdiction was opposed by pleading that there was no evidence to even prima-facie suggest that Dr.Neeta Misra and Hope had made up their mind to have a permanent residence at Delhi and thus the sine qua non for jurisdiction i.e. the place where the minor ordinarily resided was not Delhi. Philip David Dexter relied upon the quick succession of events to not only bring out contrivance but even the fact that Dr.Neeta Misra and Hope could not claim to be ordinarily residing at Delhi. Of course, he opposed the relief prayed on merits.

22. Unfortunately for us, the learned Judge, Family Courts, has not discussed afore- noted facts and the evidence save and except the proceedings at South Africa. It has been held that in his opinion it could not be said that Hope was ordinarily a resident of Delhi.

23. In FAO 29/2013 Dr.Neeta Misra had stood by her story as disclosed by her in paragraphs 38 to 40 of the Guardianship Petition filed by her, containing her reasons to leave Republic of South Africa for good and set up residence at Delhi.

24. In WP(Crl.) No.1562/2012, an order was passed on January 21, 2013 directing Dr.Neeta Misra to deposit her and Hopes passport (passports) with the Registrar General of this Court. Order dated March 12, 2013 passed in the writ petition required inspection of the passports to be given to learned counsel for Philip David Dexter in the presence of the counsel of Dr.Neeta Misra.

25. As noted by us herein above, we had heard arguments in the appeal on March 01, 2013 as also March 05, 2013, on which dates Ms.Malavika Rajkotia Advocate, has made submissions in the appeal filed by Dr.Neeta Misra. By March 05, 2013, learned counsel for Dr.Neeta Misra had completed submissions. The appeal and the writ petition were adjourned for March 12, 2013, on which date arguments could not be advanced in reply by Philip David Dexter resulting in the matters being adjourned for March 19, 2013. On March 12, 2013, inspection of the passports deposited with the Registrar of this Court was granted and it was at this stage that it was revealed that Dr.Neeta Misra had already purchased a round trip ticket on September 21, 2011 for herself and Hope; enabling the two to travel to Mumbai and this was after she had obtained the order on September 15, 2011 from the Court at Western Cape Town. The passports evidenced that she and her daughter flew out of Cape Town on September 27, 2011. They departed on the strength of the South African passport. Reaching Heathrow Airport the next day on September 28, 2011, the mother and daughter simply crossed over the terminal from Heathrow Arrival to Heathrow Departure and same day flew out to Mumbai, where they reached on September 29, 2011. Dr.Neeta Misra then realized that the cooked up story containing reason to reach with her daughter to Mumbai was up. The cat was out of the bag. She made a confessional statement in the form of an affidavit deposed to by her on March 19, 2013, realizing that it would be better to state the truth voluntarily. She did so, but not with the candour expected of a person who wants to make a confession. She confessed in paragraph 16 of the affidavit that she had already made up her mind to be with her mother in Mumbai to discuss the situation in which she was, to try and find a solution, and that was the reason why she had purchased a round ticket on September 21, 2011. But in the very next paragraph i.e. paragraph 17, she reiterated the reason, being the fact statedly disclosed to her at the Immigration counter before she left South Africa. She admitted in the next paragraph i.e. paragraph 18, that landing at London she took the flight from the Airport to Mumbai; thereby admitting that she never had an occasion or the time to contact the South African Consulate in London. In the next paragraph i.e. paragraph 19 of the affidavit she stated that she came to Delhi on September 30, 2011 and approached the Courts to ensure that her daughter was not separated from her. But in the same breath she stated that she contacted the South African Embassy who told her that she could obtain a non- spousal visa to visit the Republic of South Africa where she was a fellow at the University pursuing her Doctorate.

26. In an affidavit deposed to on March 19, 2013, after Dr.Neeta Misras counsel had concluded submissions and learned counsel for Philip David Dexter had to commence reply arguments, in paragraph 16 to 19, she disclosed as under:16. I requested permission to take Hope on a holiday to London in October, 2011 as I was entitled to as per the divorce agreement. My former husband refused on financial grounds. I took him to the high court and won permission to leave the country. Following this on 21.09.2011 I bought a round trip ticket from London to Mumbai. I had permission to travel to London from 27.09.2011 to 04.10.2011. I bought a round trip ticket to Mumbai from London leaving September 28.09.2011 to 02.10.2011 that would allow me return to South Africa. I planned to visit my mother who lived in Mumbai to discuss this situation and try and find a solution.

    17. As I was leaving South Africa at the immigration counter I asked the officer if my existing South African visa was valid and he asked me if I was still married to a South African citizen. When I answered in the negative he advised me that I would need to apply for a fresh visa from my country of residence and could not come back to South Africa on my existing spousal visa.

    18. I landed in London and got on a flight to Mumbai. Once I got there I met with my mother and decided together that Delhi would be the best place for me to go to while I resolved these issues for work reasons and my mother agreed to re-locate to Delhi with me to give Hope support during this difficult time.

    19. Around 30.09.2011, I arrived in Delhi and approached the courts to ensure that my daughter was not separated from me while I investigated the issues around my visa. It became apparent after I contacted the South African embassy that it would almost impossible for me to get a new visa for South Africa and that by the time I did so my existing employment contact would have ended and I would have no source of income in South Africa. In any event the Respondent has taken out an arrest warrant against me in South Africa thus rendering me unemployable.

27. We find that Dr.Neeta Misras stand that she was permitted to reside in South Africa on a spousal visa is incorrect inasmuch as the category of visa was changed, when permission was accorded to her to reside in South Africa till May, 2013, to one under Section 11 of the Immigration Act, 2002 in the Republic of South Africa. She holds a visitors visa on the strength of her being engaged in the Republic for research work. She can return to the Republic of South Africa.

28. In the aforesaid factual backdrop we need to consider whether Dr.Neeta Misra has prima facie established a case warranting a summary or a regular inquiry to be held i.e. evidence recorded to determine whether she and her daughter are ordinarily residing at Delhi.

29. Ms.Malvika Rajkotia, with reference to the decision of the Supreme Court reported as AIR 201.SC 195. Ruchi Majoo v. Sanjeev Majoo vehemently urged that a person being ordinarily a resident in a place is primarily a question of intention, which in turn is a question of fact. Thus, learned counsel submitted that without holding an inquiry to determine the fact i.e. the intention, the learned Judge of the Family Court could not have non-suited the petitioner.

30. Blacks Law Dictionary defines the word ordinary to mean : Regular; usual; normal; common; often recurring; according to establish order; settled; customary; reasonable; not characterized by peculiar or unusual circumstances; belonging to, excercised by or characteristic of, the normal or average individual.

31. The dictionary defines the word reside as : live; dual, abide, sojourn, stay, remain, lodge. The decision 129 F2d 135 Western Knapp Engineering Co. v. Gillbank CCA defined reside : To settle oneself or a thing in a place, to be stationed, to remain or stay, to dwell permanently or continuously, to have a settled abode for a time, to have ones residence or domicile; specifically, to be in residence, to have an abiding place, to be present as an element, to inhere as a quality, to be vested as a right.

32. To put it simply, reside means more than a flying visit to, or a casual stay at a particular place.

33. What makes residence a matter of intention and hence a matter of fact is that it relates to a person choosing to make a particular place his/her abode.

34. To wit : A person decides one day to seek premature retirement. In furtherance of the intention, the person applies to the employer, giving notice envisaged by the terms of engagement, to be voluntarily retired from service. Anticipating acceptance, the noticee visits a small town where he intends to reside post-retirement and negotiates a lease for a house. He opens an account with the bank in the said small town. He returns to the city of his work place and closes the bank account. He surrenders the gas connection and determines the lease. Voluntary retirement request is accepted and in the evening the office colleagues give the farewell party. Bag and baggage, the same evening this man leaves for the small town. He becomes an ordinary resident of the small town the moment he reaches the town for the reason the conduct of the person shows his intention to have his abode in the small town.

35. If all these facts are admitted, it would be only a question of law : Whether from the said admitted facts an intention to have the abode in the same town stands evinced. No trial would be needed on said admitted facts.

36. Law recognizes the difference between proof of a fact being a matter of evidence and an inference to be drawn from a fact proved, which would be a question of law.

37. Meaning thereby, it all depends on what facts are projected by a party and whether or not the same are admitted. If all the facts projected by a party are admitted by the opposite party or are not put in dispute, no evidence whatsoever would be required; because no fact in issue arises warranting evidence to be led. Only the question of law would remain : Whether on the admitted facts or on the facts which are not traversed by the opposite party, in law, one can infer that the residence of the person is as claimed.

38. It is with this legal understanding that we proceed to consider the undisputed facts pertaining to Dr.Neeta Misras claim that she and her daughter were ordinarily residents of Delhi.

39. The facts noted by us hereinabove would reveal that Dr.Neeta Misra had nothing to do with the city of Delhi and nor Hope. The two left Cape Town on September 27, 2011; reaching London the next day on September 28, 2011, the mother and daughter flew the same day to reach Mumbai on September 29, 2011. As deposed to in her affidavit dated March 19, 2013, contents whereof have been noted by us in paragraph 26 above, Dr.Neeta Misra reached Delhi on September 30, 2011 to investigate issues regarding her visa and engaged a counsel who drafted the petition which was filed on October 05, 2011. Dr.Neeta Misra has disclosed her residential address as 234 West End Marg, Said-ulAjaib, New Delhi, but has furnished no proof of having taken on rent the premises in question. The tax returns filed by her of all these years, and the last one being for the Assessment Year 2011-2012 would reveal that she had been filing the tax returns at Mumbai showing herself to be a resident of Mumbai at the flat where her mother was residing.

40. So telling are the facts which emerge from Dr.Neeta Misras pleadings and the undisputed documents that no trial is warranted. The conclusion would be that take all the facts in favour of Dr.Neeta Misra, in law it cannot be said that the same evidence an intention to set up the abode at Delhi.

41. Thus, on the facts of the instant case we concur with the view taken by the learned Judge Family Court that Courts at Delhi did not have territorial jurisdiction to entertain the petition because when the petition was filed neither Dr.Neeta Misra nor her daughter Hope were ordinarily residents of Delhi.

42. That would be the end of FAO No.29/2013 filed by Dr.Neeta Misra, which we dismiss.

43. With respect to the Habeas Corpus petition filed by Philip David Dexter, we would be constrained to discuss all relevant facts pertaining to the custody issue of Hope and this would mean a virtual adjudication on the merits of Dr.Neeta Misras claim that Courts in India should decide the issue of Hopes custody. But it cannot be helped.

44. Though, the fact has to be kept in mind, but without being blown out of proportion, that it is a case of an abducting parent approaching the Court in India.

45. When the abducting parent is the mother, it is common for her to claim that the matrimonial bond has broken down, and more often than not the allegation would be ill-treatment and domestic abuse by the male spouse. There are bound to be allegations that the conduct of the male spouse was of a serious kind with grave likelihood of risk to the mental or the physical health of the child born during the wedlock. Invariably, as an excuse to abduct the child from the foreign shores, she is bound to say that she resorted to a secret operation i.e. resorted to a stratagem of contrivance; pulling wool over the eyes of her spouse and even taking the Courts of that country for a ride; too afraid to do otherwise, she was left with no option but to flee to the country where her kith and kin by birth were available to provide her with comfort and support.

46. We would thus not be overtly influenced by the fact that Dr.Neeta Misra has abducted Hope and has brought her to India violating the joint custody order dated October 11, 2010 and in the teeth of the order dated September 15, 2011 of the High Court of South Africa (Western Cape High Court) as also her solemn undertaking given to the Court under an affidavit, relevant parts whereof have been noted by us in para 12 above.

47. We do not burden ourselves with extensive case law cited by learned counsel for the parties for the reason learned counsel agreed that in parental abduction cases, where a spouse is residing separately or otherwise from the opposite spouse, in a particular country, and flees from the said country to her original home country along with the minor child born to the parties, and the issue of custody arises in the Court within territorial jurisdiction whereof the spouse and the minor child ordinarily reside, post abduction, the legal principles to be kept in mind are that irrespective of whether the country of the Court concerned is or is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction 1980 (popularly known as the Hague Convention), principles embodied in the Convention must be kept in mind. This would mean that if there is an order of a Court of competent jurisdiction in the country wherein the abduction took place, the said order has to be respected. The disadvantage to the other spouse has also to be kept in view. One has to keep in mind the injury caused to the mind of the child who is uprooted all of a sudden from a familiar surrounding; the psychological damage caused to the child due to sudden removal from a familiar environment to an unfamiliar environment. Injustice caused to the opposite spouse. The welfare principle i.e. the risk of harm while returning the child to the foreign shores; the welfare and interest of the child.

48. The bond between a mother and her child has always been held, especially in India, standing on a higher pedestal vis--vis the bond between a father and his child. From times immemorial, the Indian ethos gives the highest place in the life of a child to the mother, followed by the teacher and at third place comes the father.

49. But, this is only a starting point of discussion, or to put in legal language : The onus cast is against the father.

50. But, there are no easy solutions for the reason an organized civil society and an orderly world order require : (i) It being the object of every law to deter either parent from taking law into in their own hands; and (ii) respecting the principle of comity of nations and Courts.

51. It has to be kept in mind that the principles of status quo ante require a Court to restore parties to the same position in which they were before one party, acting illegally and unlawfully, changed the status quo. He who violates the law and does an act to change the status quo should not be permitted to gain an unfair advantage. These principles of civil law, when transposed to the family dispute of parental abduction would mean that the object of the law and hence the legal debate would be : (i) To deter either

parent from taking the law into his/her own hand; (ii) Restore the child as soon as possible to the home country; (iii) Status quo ante to be restored; (iv) Abducting parent should not gain any unfair advantage.

52. And the aforesaid three, to a considerable extent, shift the onus which is cast against the father on the weight of the mother-child bond; if the abduction is by the mother. The reason being that unilateral action should not be permitted to pre-empt anybodys claim and that even the left behind parent has a legitimate interest in the future welfare of the child : without the existence of such a person the removal can never be wrongful. Restoring a child to the familiar surroundings is seen as likely to be a good thing in its own right and hence the assumption that the best interest of the child would be served by a prompt return to the country where the child is habitually resident. And this explains a catena of authorities where the thumb rule of a year lapsing after the abduction and the other spouse seeking return of the child is treated as defeating the equities and the presumptions in favour of the spouse aggrieved. The reason is : Children are malleable and easily adjustable. They adapt to changed environments very quickly and thus the very principle that a child should be taken back promptly to familiar surroundings operates in the converse i.e. the child not to be removed in the surroundings with which the child has become familiar over the one year. Of course, all these assumptions may be rebutted.

53. What resolves the issue of onus then?

54. Learned counsel for the parties rightly conceded that it is the best interest of the child.

55. Now, what does that mean?

56. Children, especially of a tender age, and by that we mean children who have not entered their teens, do not always know what is best for them though they may have acute perception of what is going on around them. They may profess to have authentic views about the right and the proper way to resolve matters, but the same would be hazy.

57. When we speak about a childs interest we understand the same to be comprising of two distinct parts. Part I : Maintaining family ties. Part II : Ensuring the childs development within a sound environment and least not such as would harm the development of the child. It is the second which is inherent in the rule requiring a prompt return of the abducted child, unless there is a grave risk that the childs return would expose the child to a physical or a psychological harm or otherwise place the child in an intolerable situation and its converse that if one year elapses from the date of the abduction when the aggrieved spouse moved for return of the child, the Courts should be reluctant to return the child.

58. Having understood what would be the interest of the child to be kept in mind, we need to lodge a caveat. The law requires that the best interest of the child shall be a primary consideration. The law does not require that the interest of the child shall be the primary consideration. The law also does not require that the best interest of the child shall be a paramount consideration. Thus, the distinction between a primary consideration; the primary consideration; and the paramount consideration has to be kept in mind.

59. It is clear that where the couple, as in the instant case, have submitted to the jurisdiction of the home country where they resided when the matrimonial bond was intact, the burden of proof would lie on the spouse who opposes the return of the minor child and it is for the said spouse to produce evidence to substantiate the exception. Of course, the standard of proof would be of the ordinary balance of probabilities. Secondly, the inquiry has to be quick and fast, preferably summary in nature, a long drawn out inquiry being the exception, for the reason law presumes that the best interest of the child would be served by restoring the child to the familiar environment i.e. the place where the child was residing before being plucked away from the familiar environment. Thus the need to send back the child as early as possible. Thirdly, with respect to evidence relied upon by the spouse who opposes the return, the risk to the child must be established not only as real but also grave. Fourthly, the real risk, which has to be grave, may relate to a physical or a psychological harm to the child. Fifthly, since the Court is looking to the future, the situation in which the child will find herself on return has to be kept in mind; and this

would embrace such measures protective of the child against the risk, if the Court decides that the child must return.

60. We clarify these are the principles to be kept in mind while deciding a petition under Section 9 of the Guardians and Wards Act 1890 in a case of parental abduction.

61. The inquiry has ordinarily to be a summary inquiry, and if inferences can be drawn from the facts which are brought before the Court, no evidence whatsoever is required to be led. Further, if the nature of factual dispute is such that the best evidence thereto would be available in the home country, parties have to be relegated to the remedies before the home country.

62. Dr.Neeta Misra and Philip David Dexter obtained divorce by mutual consent on October 11, 2010. On consent terms they agreed to Hopes joint custody. As per Dr.Neeta Misra, Philip David Dexter started disobeying the consent order when he did not pay the monthly agreed maintenance of 3000 Rand. But she has taken recourse to remedy in the home country. Attachment warrants were obtained and the amount was recovered. As per Dr.Neeta Misra, when she went to Hopes school to pick her up on September 08, 2011 she heard Hope tell her friend Stella that she must not ask her boyfriend to suck on his sex organ and on quizzing Hope as to where she heard of this, was horrified to learn that Hope had seen her father and his girlfriend perform oral sex. As per Dr.Neeta Misra, returning Hope to the Republic of South Africa would expose her to said psychological harm inasmuch as Philip David Dexter has a right to Hopes custody every Wednesday evening and night followed by every alternative Friday evening, the night thereof, the whole of Saturday including night thereof till Sunday 04:00 PM. As per Dr.Neeta Misra, Philip David Dexter sends Hope to the house of his half sister who has a drug addict daughter and when Hope is in Philip David Dexters house he permits her to sleep in a room with an adolescent half brother of Hope. Dr.Neeta Misra claims the real risk of a physical harm i.e. Hope being physically abused by her half brother.

63. Admittedly, Dr.Neeta Misra had sought intervention from Astrid Martalas, the agreed facilitator, when she sent an e-mail to him on September 09, 2011. Dr.Neeta Misra had required Astrid Martalas to refer, what Hope allegedly told Dr.Neeta Misra on September 08, 2011, to one Rob Sandenbergh, a child therapist, for the reason, if what Hope told was true, it indeed was a serious matter. Admittedly, Astrid Martalas not only referred the issue to Rob Sandenbergh but also ensured that a Clinical Psychologist named Juana Horn and an Educational Psychologist named Kate Scott were associated. Admittedly, all three i.e. Rob Sandenbergh, Juana Horn and Kate Scott looked into the issue. They had sittings with Hope and submitted an interim opinion in October 2011, which did not rule out the possibility of Hope saying imaginary things about her father. We highlight that the interim report is not conclusive for the reason on September 27, 2011, Dr.Neeta Misra fled; Hope in tow from the Republic of South Africa and thereby prevented the matter from being taken to its logical conclusion.

64. The scattered material which Dr.Neeta Misra relies upon to discharge the onus cast upon her to establish a real risk of grave harm to Hope is thus not only ex-facie insufficient but more than that, and which is of importance, is that the best evidence of whatever happened in the Republic of South Africa is available in the Republic of South Africa. The best evidence would be Rob Sandenbergh, Juana Horn and Kate Scott giving expert evidence on the issue.

65. Further, Dr.Neeta Misra has no explanation as to why she did not move the Court in the Republic of South Africa to vary the joint custody order. And we must confess that the system in place in the Republic of South Africa on future custody issues, in the form of an agreed facilitator being appointed to find a solution firstly by mediation and lastly be a directive for which he has to obtain assistance of Child Psychologist is far better than what we have in India, in the form of Court adjudications. What we intend to say is that Dr.Neeta Misra had a better forum available for resolution of the issue in the Republic of South Africa.

66. Contrivance on her part is writ large. Her pleadings that at the Immigration at Cape Town she learnt about her spousal visa and hence not being permitted to return has now been accepted by her to be a ruse. She admits in the affidavit deposed to by her on March 19, 2013 that she had much earlier made up her mind to flee from the Republic of South Africa with Hope and find a solution to the problem in India after consulting her mother. She has perjured herself when she pleaded on oath that when she reached London on September 28, 2011 she received further information from the South African Consulate in London that it would take her a few months to obtain a visa which would entitle her to return. She now admits of never having left the precincts of Heathrow Airport where she landed on September 28, 2011 and flew out the same day to Mumbai. We find that the visa with her is a non-spousal visa entitling her to return to the Republic of South Africa.

67. We have noted suppression of relevant facts by Dr.Neeta Misra, which disentitle her to any discretionary relief.

68. Any issue which Dr.Neeta Misra had which affected the physical or the psychological condition of Hope could certainly have been brought before the Court at Cape Town.

69. In our opinion Dr.Neeta Misra, for the moment, has no evidence to prima-facie justify risk of grave danger which Hope would be facing on return to the Republic of South Africa. By her act of contrivance, Dr.Neeta Misra has prevented the three experts : Rob Sandenbergh, Juana Horn and Kate Scott to interact further with Hope and identify the truth. Having aborted the inquiry by the three, she cannot claim the benefit of any scattered evidence which she projects.

70. It may be true that more than one year has elapsed since Hope came to India, but the scheming design of Dr.Neeta Misra has prevented Philip David Dexter from taking recourse to the Habeas Corpus Petition filed by him. By suppressing relevant facts she not only obtained the interim custody order from the Family Court on October 05, 2011 but also obtained an ex-parte ad-interim order on October 20, 2011 preventing Philip David Dexter to be within 100 metre of herself and Hope, and in respect of which order, Philip David Dexter had an apprehension that if he visited India for legal help to recover his daughter, Dr.Neeta Misra would sue him for contempt by falsely alleging that he had tried to breach the line of security i.e. 100 metre distance from herself and Hope. The suit came to be ultimately dismissed on April 24, 2012. Thereafter, WP(Crl.) 1562/2012 was filed by Philip David Dexter.

71. Hope must therefore return to the Republic of South Africa.

72. Learned counsel Ms.Malavika Rajkotia had repeatedly requested us to have a chamber hearing with Hope. We declined to do so for the reason Hope is aged 6 years and 9 months as of today. She is far away from the age of adolescence. She may have an acute perception of what is going on around her and may have her own views about the right and proper way to resolve matters concerning her, but in our opinion she would not know what is best for her. Besides, the possibility of her being tutored by her mother was looming large in the realm.

73. We have kept in mind the entire family situation, the factual, emotional, psychological and other material placed before us. We have to strike a fair balance between the competing interests of Hope : to return her to her familiar surroundings in the Republic of South Africa as also the alleged grave risk which she may be exposed to if required to be returned. Finding evidence of the latter being scanty, further finding Dr.Neeta Misra to have prevented a fair inquiry by the three experts after having sittings with Hope, noting further the walls created by Dr.Neeta Misra which prevented Philip David Dexter to seek redressal within one year of Hopes parental abduction, respecting the comity of Courts, we find case made out in favour of Philip David Dexter in WP(Crl.) No.1562/2012.

74. But a preventive measure has to be put in place. When Dr.Neeta Misra returns to the Republic of South Africa and takes recourse to legal remedies there, a warrant of her arrest having been obtained by Philip David Dexter for having violated undertaking submitted by her to the Court in the Republic of South

Africa when she filed the application seeking permission to take Hope for a holiday to United Kingdom, she should be protected lest she is handicapped in taking recourse to her judicial remedies.

75. Accordingly, we direct that upon Dr.Neeta Misra returning to the Republic of South Africa, Philip David Dexter would not move for the warrants of arrest to be executed for at least a period of two months to enable Dr.Neeta Misra to seek cancellation thereof.

76. We dismiss FAO No.29/2013.

77. We allow WP(Crl.) No.1562/2012 and issue a direction to Dr.Neeta Misra to produce Hope before the Registrar General of this Court on April 30, 2013. Hopes custody would be handed over by the Registrar General of this Court to Philip David Dexter. This direction would not be carried out if within two weeks from today Dr.Neeta Misra files an affidavit containing an undertaking that she would return to the Republic of South Africa with Hope, and along with the said affidavit she would furnish proof of having purchased return tickets to fly back to Republic of South Africa for not only herself but even Hope. In said eventuality the passports deposited by Dr.Neeta Misra pursuant to the order dated January 21, 2013 passed in WP(Crl.) No.1562/2012 shall be returned to her. Failing which the passports of Hope shall be handed over to Philip Davit Dexter.

78. WP(Crl.) No.1562/2012 was listed before us on being transferred by the Roster Bench since we were seized of FAO No.29/2013. Since the appeal has been dismissed, we direct that should an application be filed by either party in WP(Crl.) No.1562/2012 the same be listed before the Roster Bench.

79. Noting gross suppression of facts by Dr.Neeta Misra and acts of contrivance, one would have been constrained to impose heavy costs on her, but we refrain from so doing because we are of the opinion that she has been led into the desert of folly by wrong legal advice given to her by her counsel in India who have chosen to suppress relevant information which Dr.Neeta Misra must have provided them while drafting pleadings on behalf of Dr.Neeta Misra. We give her the benefit of doubt. Therefore, there shall be no order as to costs. Crl.M.A.No.18499/2012 The application stands disposed of as infructuous since directions regarding passports have already been issued herein above while deciding WP(Crl.) No.1562/2012 and as regards access to Hope we direct that till mandamus issued in the writ petition is complied with, Philip David Dexter would continue to have the benefit of the consent order dated November 05, 2012. Crl.M.A.No.1908/2013 The application is dismissed as infructuous since directions have been passed while deciding the writ petition pertaining to Hopes passport.

**(PRADEEP NANDRAJOG) JUDGE**

**(PRATIBHA RANI) JUDGE**

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# ROMANI SINGH VERSUS LT.COL.VIVEK SINGH

**Delhi High Court**

**Bench : Hon'ble Mr. Justice Pradeep Nandrajog & Hon'ble Ms. Justice Veena Birbal**

*Romani Singh*
*Versus*
*Lt.Col.Vivek Singh*

**FAO 39/2012**

**Decided on 2 April, 2013**

**Guardians and Wards Act, 1890**

**Section 13—Custody of minor daughter—Interest and welfare of minor to be paramount consideration—Respondent being an Army Officer unable to maintain child with active service—Custdy granted to mother while father granted visitation rights during school holidays.**

Judgment reserved on: January 31, 2013

Judgment delivered on:April 2, 2013

**Hon'ble Ms. Justice Veena Birbal**

1. This is an appeal under Section 47 of The Guardianship and Wards Act, 1890 (hereinafter referred to as the Act') wherein challenge has been made to the order dated December 7, 2011 passed by the learned Principal Judge, Family Courts, Dwarka, New Delhi whereby the petition of the appellant under Section 25 read with 10 and 12 of the aforesaid Act for the grant of custody of minor daughter, namely, Saesha Singh and for appointment of appellant as a guardian of the said child, has been dismissed.

2. The marriage between the parties was solemnised on November 25, 2007 as per Hindu rites and ceremonies. A daughter Saesha Singh was born from their wedlock at Base Hospital, Delhi on October 29, 2008. When the petition seeking custody and appointment of guardianship of the minor Saesha Singh was filed, the child was 18 months of age. Presently she is about 4 years and 5 months of age. Appellant is a teacher in Kendriya Vidyalaya-3, INA Colony, New Delhi. Respondent is an Army Officer. The appellant has alleged that respondent had harassed her from the beginning of marriage for not bringing sufficient dowry, jewellery, etc. and due to inability to fulfil his demands he had been harassing and ill-treating her. She had stated that during the posting of respondent outside Delhi, the appellant had been staying in a rented Government accommodation and had been maintaining herself and the child. On September 08, 2009 the respondent was posted in Delhi and was allotted a Government accommodation at P-30, Pratap Chowk, Delhi and the appellant also shifted in the said house.

3. The respondent due to his duties used to come from office late. After returning from office respondent invariably used to drink and thereafter used to beat the appellant and was also using filthy language. She had alleged that on December 29, 2009 respondent gave her beating and had thrown her out of the house. She had alleged that with the intervention of neighbour she was permitted to enter the house. Again on February 03, 2010 respondent had beaten her and had taken out an army dagger. The appellant saved herself and her child with great difficulty. In the scuffle respondent injured his hand and was treated in military hospital. Again on August 04, 2010 respondent in a drunken state gave beatings to her and

threw her out of the house along with the child. The appellant had called police. The police personnel called the military police and a complaint was lodged. Appellant had also called her parents who had come to her house from Noida. Her parents took hold of the child and the appellant and when they were about to leave, the respondent pulled out the child from the hands of her mother and went inside the house and locked himself. He was drunk at that time. The police suggested not to do anything otherwise respondent would harm the child. It was assured that the child would be returned to her in the morning. Accordingly, the appellant and the respondent were instructed to come to the police along with the child in the morning. The respondent did not bring the child and threatened that he would not give the child to her. Since then, she had been running from pillar to post to get back the child but respondent had been refusing.

4. Appellant has alleged that she had been in continuous possession, care and protection of the child since her birth and respondent has no love and affection for the child. In his absence, when he is away for duty his Orderly looks after the girl child. Respondent leaves for his office at 8.30 A.M. and returns back late in the evening and he is not in a position to look after the basic needs of the child. She had alleged that after school hours she had been devoting all her time to the child and during her duties in the school the child is being looked after by her parents who have been frequently visiting her house. It is in the mental well being of the child that the custody of the minor child Saesha Singh be given to her, being her natural mother and she be also appointed as guardian of the person of the said child.

5. Respondent had filed written statement before the Family Court opposing the petition filed by her. The respondent has taken the stand that the appellant is not in a position to look after the child as there is nobody to look after the child when she is away for work. Her parents are residing at Noida and she is working and living in Delhi. He has denied having made demands of dowry or harassing appellant as is alleged. According to him, their marriage was solemnized at Arya Samaj Mandir and there was no demand of dowry. He has alleged that appellant herself had given an affidavit at the time of marriage that no kind of dowry was demanded from her.

6. The respondent has alleged that from the beginning of marriage he has provided all the comforts to the appellant and had taken her to various places outside Delhi. The child was born at Base Hospital, Delhi Cantt. and he had taken leave at that time. He had been providing the necessary expenses to her for maintaining her as well as the child as the respondent was having his salary account with her and she was having ATM card and had been constantly withdrawing the money. He had provided her with various other facilities the details of which are given in the written statement. He had alleged that the appellant invariably was getting drunk on their visits to Army Officer's Mess in the parties. The appellant used to call him Doom' meaning scheduled caste in Garhwali language and the appellant herself is a Garhwali Rajput' and used to call herself Khandani.

7. The respondent has denied the allegations of beating as are alleged by her. As per him, on August 04, 2010 appellant and the respondent had gone to Army Mess where she had two drinks and on returning home she asked for more drinks and on refusal by him she called her parents and a colleague on telephone. They all came within one hour in two cars. Police was also called. The policemen called Military Police which also came at the spot. Thereafter, the appellant and her parents had packed the belongings and had left the house along with the appellant and her mother had thrown the minor child on the floor by saying "Ye Doom ki aulad hai hum khandani log hain" and appellant's mother told the respondent "Hum apni ladki ko le ja rahe hain tu apni ladki to apne aap pal le, is ladki ko iski dadi palegi woh apna farz nibhayegi."(We are taking back our daughter, you take care of your own daughter, now her grandmother will take care of her and will do her duty.)

8. The brother of the respondent who is also in Armed Forces and was staying at a distance of 4-5 kms. from his house had rushed to the respondent. However, the appellant left the child and went with her parents. His brother had taken the photographs at that time and has alleged that appellant has no love

and affection for the child and she had abandoned the child and thereafter had not bothered for her well being. The child is being looked after by the respondent and his parents and the child is getting love and affection and is very happy as such petition is liable to be dismissed.

9. Appellant has filed the rejoinder denying all the allegations made therein and has reiterated the contents of her petition.

10. On the pleadings of the parties, the following issues were framed on January 13, 2011:-

    1. Whether the petitioner is entitled to the custody of the child as prayed by him? (OPP)

    2. Relief.

11. The parties led their respective evidences. The appellant had examined herself as PW1 and the respondent had examined himself as RW1.

12. After hearing the counsel for parties and perusing the record the learned Principal Judge, Family Courts has dismissed the petition.

13. Aggrieved with the same, the present appeal is filed.

14. Learned senior counsel for appellant has contended that the finding of the learned Principal Judge, Family Court that the appellant had abandoned the child on August 04, 2010 is a perverse finding. It is contended that it is the respondent who had snatched the child from the hands of her mother. It is submitted that it has come in the evidence that the appellant had also taken the child's clothes with her. It is submitted that the same falsifies the stand of the respondent that she had abandoned the child. It is further submitted that the trial court has relied upon CD Ex.R-19 which was not proved in accordance with law. It is further contended that the same is a fabricated document as whatever was uttered by the respondent to her mother has been deleted. It is further submitted that the child is below 6 years of age and is of tender age and is also a girl child. The custody of girl child of tender age is ought to be given to the mother as she is the best person who can look after the comforts of the minor child. It is submitted that the learned Family Court has not appreciated the evidence in a proper manner and has not considered the totality of facts and circumstances. It is further submitted that during the pendency of present petition, respondent has also filed a divorce case against her. It is submitted that in the facts and circumstances of the present case the impugned order is liable to be set aside.

15. On the other hand, learned senior counsel appearing for respondent has contended that the child is very comfortable with the respondent. When the respondent attends his office, his parents take care of the child. It is submitted that child is getting all love and affection from them. It is submitted that even when the parties were living together the respondent was taking care of the child and the child is very much attached to him. It is further submitted that there is no perversity or illegality in the finding of the trial court. The learned trial court has rejected the petition after appreciating the evidence on record. It is further submitted that it is the appellant who had abandoned the child on August 04, 2010 and the petition has been filed to harass the respondent as such she is not entitled for any relief.

16. Sector 7 of the Act deals with the power of the court to make order as to the guardianship. The same reads as under:-

    7. Power of the Court to make order as to guardianship-

        (1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made-

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

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

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

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

17. Section 8 of the Act enumerates persons entitled to apply for an order as to guardianship. Section 9 empowers the Court having jurisdiction to entertain an application for guardianship. Sections 10 to 16 deal with procedure and powers of Court. Section 17 is another material provision and may be reproduced 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 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 and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

18. While appointing guardian, the court should be guided by the sole consideration of the welfare of the minor.

19. Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as 1956 Act) is another equally important statute relating to minority and guardianship among Hindus. Section 4 defines minor as a person who has not completed the age of eighteen years. Guardian means a person having the care of the person of a minor or of his property or of both his persons and property, and inter alia includes a natural guardian. Section 2 of the Act declares that the provisions of the Act shall be in addition to, and not in derogation of 1890 Act.

20. Section 6 of aforesaid Act enacts as to who can be said to be a natural guardian. It reads as under:-

6. Natural guardians of a Hindu Minor- The natural guardians of a Hindu Minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are -

(a) in the case of a boy or an unmarried girl--the father, and after him, the mother; provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl - the mother, and after her, the father;

(c) in the case of a married girl - the husband;

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section--

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

Explanation.--In this section, the expressions father and mother do not include a step-father and a step-mother.

21. Section 8 enumerates powers of natural guardian. Section 13 is extremely important provision and deals with welfare of a minor. The same may be quoted in extensor as under:-

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 provisions of 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. (emphasis added)

22. It is well settled position in law that in deciding the custody of the child it is not the welfare of the father, nor the welfare of the mother that is the paramount consideration for the court. It is the welfare of the minor and the minor alone which is paramount consideration.

23. In (2008) 9 SCC 413 Nil Ratan Kundu & Anr. v. Abhijit Kundu, while deciding the matter on the custody of the minor child, the Supreme Court has dealt with various decisions on the subject by taking into account interest and well being of the minor as paramount consideration. Some of the important cases discussed in the aforesaid judgment are as under:-

42. In Rosy Jacob v. Jacob A. Chakramakkal, (1973) 1 SCC 840, this Court held that object and purpose of 1890 Act is not merely physical custody of the minor but due protection of the rights of ward's health, maintenance and education. The power and duty of the Court under the Act is the welfare of minor. In considering the question of welfare of minor, due regard has of course to be given to the right of the father as natural guardian but if the custody of the father cannot promote the welfare of the children, he may be refused such guardianship.

43. The Court further observed that merely because there is no defect in his personal care and his attachment for his children-- which every normal parent has, he would not be granted custody. Simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him. The Court also observed that children are not mere chattels nor are they toys for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions must yield 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.

44. Again, in Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka, (1982) 2 SCC 544, this Court reiterated that only consideration of the Court in deciding the question of custody of minor should be the welfare and interest of the minor. And it is the special duty and responsibility of the Court. Mature thinking is indeed necessary in such situation to decide what will enure to the benefit and welfare of the child.

45. In Surinder Kaur Sandhu (Smt.) v. Harbax Singh Sandhu, (1984) 3 SCC 698, this Court held that Section 6 of the Hindu Minority and Guardianship Act, 1956 constitutes father as a natural guardian of a minor son. But that provision cannot supersede the paramount consideration as to

what is conducive to the welfare of the minor. [See also Elizabeth Dinshaw (Mrs.) v. Arvand M. Dinshaw, (1987) 1 SCC 42; Chandrakala Menon (Mrs.) v. Vipin Menon (Capt), (1993) 2 SCC 6].

46. Recently, in Mausami Moitra Ganguli v. Jayant Ganguli, JT 2008 (6) SC 634, we have held that the first and the paramount consideration is the welfare of the child and not the right of the parent.

47. We 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 care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. Indubitably the provisions of law pertaining to the custody of 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 are predominant 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 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 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 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 al the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration."

24. In AIR 2009 SC 557 Gaurav Nagpal v. Sumedha Nagpal, the Supreme Court while deciding the issue of custody of minor held that prime consideration in deciding such matter is the welfare of the child and not the right of parents under statute. The relevant para of the judgment is reproduced as under:-

42. When the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The Court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mousami Moitra Ganguli's case (supra), the Court has to due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.

25. For deciding the present petition the paramount consideration for the court is to see with whom the welfare of the child lies.

26. As noted above, the child is presently 4 years and 5 months old. It is admitted position that parties are living separately since August 04, 2010 and since that day the child is living with the respondent and her grandparents at Meerut. Presently respondent is also posted at Meerut. The learned Principal Judge, Family Court during the pendency of petition, had given appellant/wife and her parents visitation right of the child on 1 st, 3rd and 4th Saturday of every month between 2.30 P.M. to 5 P.M. in court. The aforesaid order was passed with the consent of parties. While dismissing the petition only visitation rights for the aforesaid days and duration have been given to the appellant.

27. During the pendency of the present appeal, interim custody of the child has been given to appellant on every Friday at 3.30 PM and she has been returning the child at 6.00 PM on every Sunday and the appellant has been keeping her daughter for about two days in a week with her.

28. It is also admitted position that the appellant is M.A. English (Hons.) and B.Ed. and is a TGT Teacher in Kendriya Vidyalaya, INA Colony, New Delhi for the past 9 years. Respondent is an Army Officer. Presently, he is posted at Meerut. The Family Judge has mainly relied upon the incident of August 4, 2010 to deny the custody of the child to her on the ground that she herself had abandoned the child on the said date. The evidence in this regard is perused. Appellant has stated in her affidavit Ex.PW1/A that respondent after getting drunk at night used to beat her without any reasons. She has given the dates in the affidavit when she was beaten. She has stated that on August 04, 2010 also he had become very aggressive and had given beating to her. When she could not tolerate the beatings she called the police at about 11.30 P.M. and called her parents to save herself. The police arrived which also called the military police. She gave written complaint to the police since she was asked to give the same and while she was going out of the house with the daughter and was about to enter her parents car the respondent pulled the daughter from the arms of the appellant and ran inside the house and locked himself and did not hand over the child to her. It was about 2 AM at that time. On the other hand, the stand of the respondent in affidavit Ex. RW1/A is that on August 4, 2010 the appellant had taken two drinks with him in the Officer's Mess and on reaching home she insisted for more alcohol and thereupon arguments started and she called her parents and colleague on phone and they all came within one hour. He has denied the allegations of beating. The deposition of the respondent about the cause of quarrel is not believable. It is not believable that on being refused for more alcohol, she would call her parents as is stated by respondent in his cross-examination. He has also stated in cross-examination that the appellant had gone with her personal belongings and clothing of the child in presence of police. The stand of the appellant is that the child was snatched by the respondent. If the child was abandoned by appellant as is alleged by respondent, in that event she would not have taken the clothes of the child with her. The stand of respondent that child was abandoned does not inspire confidence. Further, appellant has also given an explanation that the police had called them next day in the police station and it was assured that respondent would bring the child whereas he did not bring the child. The Family Court ought to have seen the background in which the appellant had to leave the house at midnight. It is also admitted position that on that day a quarrel had taken place between the parties.

    It is also admitted position that her parents had come all the way from Noida in the house of the respondent at Pratap Chowk, Delhi Cantt. The appellant has also stated her condition in which she was standing. According to respondent the mother of the appellant had left the child and uttered certain words against the respondent. Assuming what respondent is saying is correct, if in the aforesaid circumstances the mother of the appellant had left the child and uttered some words that does not mean that the appellant who is her mother be deprived of her custody forever. The learned Family Judge has not appreciated the fact that from the birth of the child i.e. from October 29, 2008 till August 04, 2010 i.e. for 21 months the child had throughout been with the appellant who has been attending her school as well as taking care of the child after school hours. There is nothing on record to show that the appellant had neglected the child for a single day during that period. Neither the same is the stand of respondent.

29. The other reason given by the trial court in denying the custody of the child to her is that appellant has been posted at Balmer, Rajasthan since June 28, 2011 for 3 years and is living there in a rented accommodation along with her father and in these circumstances it will not be appropriate to give the child to her. However, during the pendency of the appeal it has been informed that the appellant has been transferred back to Kendriya Vidyalaya, INA Colony, Delhi with effect from 11/13.10.2011 and is presently teaching in aforesaid school. In view of above change in circumstances, the said fact cannot be taken against the appellant.

30. Further the learned Principal Judge has also taken into consideration CD(video recording) Ex.R-19 in coming to conclusion that child was left by appellant of her own with respondent on 04.08.2010, as such the custody of the child cannot be given to her. The transcript of aforesaid CD is on record. We have perused the same. It is stated by respondent that his brother had videographed from 12.30 AM

to 2.30 AM on the midnight of 04.08.2010 from his video camera. The ld.counsel for the appellant has contended that CD Ex.R-19 is a fabricated document. It is contended that respondent and his brother were admittedly present at that time. It is not believable that they had not uttered a single word at that time. It is contended that whatever they had uttered has been deleted in Ex.R-19. It is contended that CD Ex.R-19 being a fabricated document cannot be taken into consideration. On the other hand stand of respondent is that same is genuine one. It is true that transcript of CD Ex.R-19 on record does not show anything spoken by respondent or his brother at that time. It is not believable that in the moment of heated arguments they were silent spectators. In these circumstances, CD Ex.R-19 cannot be free from suspicion. For the sake of arguments assuming CD Ex.R-19 is genuine, even then nothing has been said therein by appellant. Even if out of anger something is said by her mother, the same should not deprive appellant of the relief which she is otherwise entitled.

31. The role of the mother in the development of a child's personality can never be doubted. A child gets the best protection through the mother. It is a most natural thing for any child to grow up in the company of one's mother. The company of the mother is the most natural thing for a child. Neither the father nor any other person can give the same kind of love, affection, care and sympathies to a child as that of a mother. The company of a mother is more valuable to a growing up female child unless there are compelling and justifiable reasons, a child should not be deprived of the company of the mother. The company of the mother is always in the welfare of the minor child.

32. It may be noticed that the stand of the appellant is that since August 4, 2010 she had been pursuing for the custody of her child. She had also visited the police station and approached the CAW Cell. It is also admitted position that within 22 days i.e. on August 26, 2010 the petition for the grant of custody of child was filed by her. Had she abandoned the child of her own she would not have pursued continuously thereafter for getting the custody of the child. Even she had requested the learned Principal Judge, Family Court for interim custody of the child which was given to her in the form of visitation rights thrice in a month and she and her family had been meeting the child during that period. After filing the appeal, the appellant has been taking the interim custody of the child as is stated above. In these circumstances, it cannot be said that the appellant has not cared for the child. Further, respondent is an Army Officer. During the course of his service he will be also getting non-family stations and it will be difficult for him to keep the child. Further, even though as per him his parents are looking after the child but when the natural mother is there and has knocked the door of the court without any delay and has all love and affection for the child and is willing to do her duty with all love and affection and since the birth of the child she has been keeping the child. In these circumstances, she should not be deprived of her right especially considering the tender age and child being a girl child. The grandparents cannot be a substitute for natural mother. There is no substitute for mother's love in this world. The grandparents are old. Old age has its own problems. Considering the totality of facts and circumstances, the welfare of the child lies with the mother i.e. appellant who is educated, working and earning a good salary and after school hours has ample time to spent with the child. In these circumstances, impugned order is set aside and the request of the appellant for the grant of custody of the said child to her being natural mother is allowed and the appellant is also appointed as guardian of her child being a natural guardian/mother.

33. Since the child is a school going child and respondent is living at Meerut, in these circumstances, respondent will be at liberty to take the child from the appellant on every 4th Friday of the month at 5.30 P.M. and the child shall spend two days with the respondent. The child shall remain with the father on Friday followed by Saturday and Sunday. The child shall be returned safely to the mother on Sunday at 6.00 P.M.

34. Each year during Summer vacation custody of Baby Saesha Singh would be entrusted by the appellant to the respondent for a period of 15 days to be inter-se agreed upon between the parties and in case of any non- agreement, the dates to be decided by the learned Family Court.

35. Each year during Winter vacations Baby Saesha Singh would be entrusted by the appellant to the respondent for a period of 4 days to be inter-se agreed upon between the parties and in case of any non-agreement, the dates to be decided by the learned Family Court.

36. On the birthday of child, custody of Baby Saesha Singh would be entrusted to the respondent for a period of 4 hours in the evening, the exact hours to be mutually agreed upon by the parties.

37. The appeal stands disposed of accordingly.

38. No costs.

1. This contempt petition is filed by the appellant/wife wherein it is alleged that respondent/husband has violated the order of this court dated 21st February, 2012 passed in the aforesaid FAO whereby this court has given interim custody of the child to the appellant on every Friday from 2.30 pm uptil Sunday 6 pm. It is alleged that as per the said order, respondent/husband was to hand over the child to the appellant/wife at her school i.e., Kendriya Vidyalaya, INA Market at 2.30 p.m. on every Friday. It is alleged that in terms of the said order, respondent did not bring the child on February 24, 2012, March 2, 2012 and March 9, 2012, as such, he has violated the court order and he be punished for wilful and deliberate disobedience of the aforesaid order. The contempt petition is supported by her affidavit.

2. Respondent/husband has filed reply denying the allegations made in the said application. According to him, on February 24, 2012, the child had developed rashes on her body and was sick. The doctor had advised the respondent to keep the child in confinement and not to send her to school. Despite that, he along with the child had gone to the school of the appellant at about 3 p.m. and waited outside the school but applicant did not come to take the child, as such, he was compelled to return back as the child was sick. Thereafter, on March 2, 2012, after returning from office, he picked up the child and reached the school gate of the appellant at 2.15 pm. The school gate was closed. After great difficulty, he had called the appellant and when she came out, he asked her as to what arrangement she had made to take the child to a far off place like Noida. On hearing that, appellant misbehaved with him. As a result of which, he came back with the child. On March 9, 2012, he could not bring the child to the school as due to Holi holidays there was lack of attendance, as such, on March 6, 2012, he had called appellant on her mobile phone but she did not pick up the call of the respondent. Even the appellant is having his mobile phone but she did not call back. The reply is supported by the affidavit of respondent. According to respondent/husband, there is no wilful disobedience by him.

3. There is an affidavit against affidavit. Prima facie appellant has not filed any proof in support of her allegations. The interim order of this court has continued till today. There is no violation alleged by the appellant after March 6, 2012. The main matter has already been decided in favour of the appellant wherein the custody of the child has been ordered to be handed over to her and she has been appointed as guardian of the minor child and respondent/husband has been given the visitation/meeting rights as are detailed in the said order. In these circumstances we are of the view that no orders are required on this contempt petition. The same stands disposed of accordingly.

**(VEENA BIRBAL) JUDGE**

**(PRADEEP NANDRAJOG) JUDGE**

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# SMT. DIMPLE LISA ALVARES VERSUS STATE OF KARNATAKA & OTHERS

**Karnataka High Court**

**Bench : Hon'ble Mr. Justice N. Kumar and Hon'ble Mr. Justice Arali Nagaraj**

*Smt. Dimple Lisa Alvares, W/o Vinai Eren Alvares, Aged about 33 years, R/a. No. 42/2, 6th Cross, Wilson Garden, Bangalore-560 027 ..... Petitioner (Jayna Kothari, Adv.)*

*Versus*

*1. State of Karnataka, Department of Home Affairs, Vidhana Soudha, Bangalore - 560 001, Represented by its Principal Secretary.*

*2. The Commissioner of Police, Office of the Commissioner of Police, Infantry Road, Bangalore - 560 001.*

*3. The State of Karanataka, Though the Wilson Garden Police, Wilson Garden, Bangalore - 560 027.*

*4. Vinai Eren Alvares, S/o late Denis Sebastian Alvares, Aged about 37 years, Presently r/a.c/o. Mr. Ozwald & Mr. Agnes Menezes, Revere Mansion, Behind Canara Bank, Near Ganesh Theatre, Suntikoppa, North Coorg District, Having permanent R/a. Masood Real Estate, B. Block, Flat No. 401, 2nd Floor, Al-Quasis, Sahara Building, Bur Dubai, UAE.*

*5. Mrs. Rosy Alvares, W/o late Mr. Denis Sebastian Alvares, Aged about 73 years, Last r/a. Bin Masood Real Estate, B Block Flat No. 401, 2nd Floor, Al-Quasis, Sahara Building, Bur Dubai, UAE ..... Respondents*

**W.P No. 123/2010 (HC)**

**Decided on December 7, 2010**

- **The petition is filed seeking a writ of habeas corpus directing the respondents to produce the minor child of the petitioner, Master Dallan Joel Alvares, aged about 5 years enabling the petitioner to meet him being his natural mother and for other direction.**
- **Learned counsel for the petitioner contended that it is settled law that the welfare of the child is paramount consideration. Mere filing of proceedings in various courts for custody of the child would not take away the jurisdiction of this Court under Article 226 of the Constitution of India for securing child and handing over the same to the mother, the petitioner herein. The child is now missing. She submitted that the child is not in the custody of the husband. It is stated that it is in the custody of the 5th respondent, mother-in-law. It is further stated that it is in the custody of the sister of the husband. Therefore, the child is in the custody of the persons, who are connected with the child and not his natural parents. Hence, she submits that a case for writ of habeas corpus is made out.**
- **In these circumstances, when the competent Courts are seized of the matter and in fact the order has been passed for custody of the child, the petitioner has to pursue those remedies and secure the custody of the child. In fact the statement of objections filed in the proceedings initiated by the petitioner under the provisions of the Protection of Women From Domestic Violence Act, 2005 and in the divorce petition which is filed by the husband against the wife gives an impression to us that**

**the petitioner prima facie appears to have not shown any interest in taking care of the child. The allegations, which are made in those petitions, also give an impression to us that the interest and welfare of the child would be well protected if the custody of the child continues with the persons in whose custody the child is at present. Therefore, we are satisfied that the welfare of the child would be protected by allowing the child to continue in the custody of the father grand-mother and in her absence with the sister of the 4th respondent. Therefore, the child is not in illegal custody and it is in legal custody. Hence, we do not see any justification to entertain this habeas corpus petition. Accordingly, it is rejected.**

## ORDER

The petition is filed seeking a writ of habeas corpus directing the respondents to produce the minor child of the petitioner, Master Dallan Joel Alvares, aged about 5 years enabling the petitioner to meet him being his natural mother and for other direction.

2. The petitioner was married to the 4th respondent on 15-2-2004 at St. Patrick's Church, Bangalore. On 25-6-2005, she delivered a male child viz: Dallan Joel at Bangalore. Though the 4th respondent/ husband hails from Mangalore, he is staying at Baroda. Therefore, she left her parental house and started living with her husband, mother-in-law from August, 2005 at Baroda and from there moved to Dubai alongwith her mother-in-law and started residing with her minor child. It appears that the dispute arose between the husband and wife when she was staying at Baroda. On 10-4-2009, the petitioner left Baroda to Bangalore leaving her child with her husband. On arriving at Bangalore on 16-4-2009, she filed an application under Section 12 of Protection of Women from Domestic Act, 2005 before the learned VI Addl. Chief Metropolitan Magistrate, Bangalore and in the said proceeding, she sought for custody of the child in April, 2009, after filing the said petition, she alongwith her parents went to Dubai and met the 4th respondent in the Indian Consulate in Dubai and sought for custody of the child. The custody was not given. In the first week of June, 2009, she found that the child was taken to Baroda by the 5th respondent alongwith grand-mother of the child. The petitioner went to Baroda to take her minor child from the 5th respondent and she could not succeed. On 16-6-2009, she filed a complaint under Sections 498A, 504 and 506 of IPC, 1860 and under Sections 3, 4 and 6 of Dowry Prohibition Act before the learned VI Additional Chief Metropolitan Magistrate, Bangalore, which was registered as private complaint. On 22-6-2009, FIR was filed by the Wilson Garden Police Station, complaining of missing of the child. On 5-10-2009, one more missing complaint was filed by the petitioner with the Police Station at Fatehgunj, Baroda. On 22-1-2010, the 4th respondent was arrested at Mangalore Airport and the child was not with him. Again on 15-3-2010, a complaint was filed with the Wilson Garden Police Station regarding missing child of the petitioner. By order dated 21-3-2010, the custody of the minor child was granted in a proceeding initiated before the Dubai courts in lawsuit No. 60/2009 as she was natural guardian and mother. In spite of the same, the custody of the minor child has not been handed over to the petitioner. In those circumstances, she moved before this Court for a writ of habeas corpus.

3. Learned counsel for the petitioner contended that it is settled law that the welfare of the child is paramount consideration. Mere filing of proceedings in various courts for custody of the child would not take away the jurisdiction of this Court under Article 226 of the Constitution of India for securing child and handing over the same to the mother, the petitioner herein. The child is now missing. She submitted that the child is not in the custody of the husband. It is stated that it is in the custody of the 5th respondent, mother-in-law. It is further stated that it is in the custody of the sister of the husband. Therefore, the child is in the custody of the persons, who are connected with the child and not his natural parents. Hence, she submits that a case for writ of habeas corpus is made out.

4. Per contra, learned State Public Prosecutor contended that it is a dispute between the husband and wife. The child is not in illegal custody. It is in the custody either husband or grand-mother or sister of the 4th respondent. Therefore, the petition filed for writ of habeas corpus is not maintainable.

5. Dealing with the similar situation, the Apex Court has laid down the law without any ambiguity. In the case of Syed Saleemuddin v. Dr. Rukhsana reported in (2001) 5 SCC 247, the Apex Court has held as under:

"In an application seeking a writ of habeas corpus for custody of minor children the principal consideration for the court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that the present custody should be changed and the children should be left in the care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration for the court. In the present case the High Court has not paid any attention to these important and relevant questions. The High Court has not considered whether the custody of the children with their father can, in the facts and circumstances, be said to be unlawful. The Court has also not adverted to the question whether for the welfare of the children they should be taken out of the custody of their father and left in the care of their mother. However, it is not necessary to consider this question further in view of the concession made by the counsel that the appellant has no objection if the children remain in the custody of the mother with the right of the father to visit them as noted in the judgment of the High Court till the Family Court disposes of the petition filed by the appellant for custody of his children."

6. The next judgment of the Apex Court in the case of Rajesh K Gupta v. Ram Gopal Agarwala reported in (2005) 5 SCC 359 at para-7, it is held as under:

"7. It is well settled that in an application seeking a writ of habeas corpus for custody of a minor child, the principal consideration for the court is to ascertain whether the custody of the child can be said to be lawful or illegal and whether the welfare of the child requires that the present custody should be changed and the child should be left in the care and custody of someone else. It is equally well settled that in case of dispute between the mother and father regarding the custody of their child, the paramount consideration is welfare of the child and not the legal right of either of the parties. It is therefore, to be examined what is in the best interest of the child Rose Mala and whether her welfare would be better looked after if she is given in the custody of the appellant, who is her father."

7. The latest judgment on the point is in the case of Nirmaljit Kaur v. State of Punjab reported in (2006) 9 SCC 364, wherein the Apex Court has reiterated the aforesaid legal position.

8. In this case, first we have to consider whether the child is in illegal custody and whether the welfare of child requires that the present custody should be changed? The birth of the child is not in dispute. It is also not in dispute on the day the petitioner left Dubai to India that the child was in the custody of the father. The material on record shows that when the 4th respondent/husband is not in station, the child is in the custody of grand-mother or in her absence, the sister of the 5th respondent will take care of the child. Neither the custody of the child with the father, grand-mother or sister of the 4th respondent could be stated to be illegal custody. It only shows that in the absence of the father, the interest of the child is fully protected. Therefore, it is not possible to hold that as on today the child is in illegal custody.

9. In so far as the welfare of the child is concerned, the facts setout disclose that the petitioner has initiated the proceedings under the provisions of the protection of Women From Domestic Violence Act, 2005. She initiated the proceedings against her husband under Sections 498A, 504 and 506 of IPC and under Sections 3, 4 and 6 of Dowry Prohibition Act before the learned VI Additional Chief Metropolitan Magistrate at Bangalore. In view of the said proceedings, her husband was arrested at Mangalore Airport. The attempts were also made to arrest the mother of the 4th respondent in view of the order passed in the proceeding initiated by the petitioner before the Dubai Courts for custody of child. In these circumstances, when the competent Courts are seized of the matter and in fact the order has been passed for custody of the child, the petitioner has to pursue those remedies and secure the custody of the child. In fact the statement of objections filed in the proceedings initiated by the petitioner under the provisions of the Protection of Women From Domestic Violence Act, 2005 and in the divorce petition which is filed

by the husband against the wife gives an impression to us that the petitioner prima facie appears to have not shown any interest in taking care of the child. The allegations, which are made in those petitions, also give an impression to us that the interest and welfare of the child would be well protected if the custody of the child continues with the persons in whose custody the child is at present. Therefore, we are satisfied that the welfare of the child would be protected by allowing the child to continue in the custody of the father grand-mother and in her absence with the sister of the 4th respondent. Therefore, the child is not in illegal custody and it is in legal custody. Hence, we do not see any justification to entertain this habeas corpus petition. Accordingly, it is rejected.

However, we made it clear that the courts before whom the proceedings are initiated by the petitioner shall decide those cases on merits and in accordance with law without in any way being influenced by any of the observations made by this Court as they are only prima facie observations without going into the legal evidence on record for the limited purpose.

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# PADMA JOSEPH VERSUS RANA JOSEPH

**Kerala High Court**

**Bench : Hon'ble Mr. Justice Antony Dominic and Hon'ble Mr. Justice P.D Rajan**

*1. Padma Joseph, W/o Rana Joseph, Chemmaraparambil House, Kochuparambil, Near Pallurpadi Manganam P.O, Vijayapuram Village, Kottayam District. 2. C. Jacob Joseph, S/o Late Joseph, Chemmaraparambil House, Kochuparambil, Near Pallurpadi Manganam P.O, Vijayapuram Village, Kottayam District.*
*3. Mariakutty Joseph, W/o C. Jacob Joseph, Chemmaraparambil House, Kochuparambil, Near Pallurpadi Manganam P.O, Vijayapuram Village, Kottayam District ..... Appellants/Respondents (By Advs. Sri. N. Subramaniam Sri. M.S Narayanan Sri. P.T Girijan Smt. Usha Narayanan)*
*Versus*
*Rana Joseph, S/o Joseph, Thonipurackal Kaithayil House Pariyaram P.O, Puthupalli Village, Kottayam District, Presently Residing at Flat No. 202 "A" Wing, Dosti Coral - 5, Dosti Residency Vasai West, Thane District, Maharashtra - 400 202 ..... Respondent/Petitioner (By Adv. Sri. Abraham George Jacob)*

**Mat. Appeal Nos. 278/2012 & 279/2012**

**Decided on January 23, 2014**

Against the Judgment in O.P 67/2010 of Family Court, Kottayam at Ettumanoor Dated 19/03/2012

**A. Family and Personal Laws — Custody of child — Rival claims by parents — Plea that wife is guilty of cruelty not only to child but also to husband by denying treatment to child — Wife was willfully avoiding to give required treatment and medicines to the elder child — Evidence showed that during period when couple were residing together at Mumbai, it was only the husband, who was giving medicines to the child — Despite separate residence of couple subsequently and admitted necessity of child to have continuous treatment, wife could not produce any evidence indicating that she was giving proper medical care to the child — Condition of child had deteriorated while he was in her custody — Conclusion of Family Court that wife was guilty of declining treatment to the child, is justified — Continued custody of child with the mother was not in his welfare, which has to be the paramount consideration — Divorce Act, 1869, S. 43**

**B. Family and Personal Laws — Divorce Act, 1869 — S. 10(1)(x) — Divorce — Mental cruelty by wife — Husband and wife had lived separately for more than sixteen and a half years — Averments, accusations and character assassination of husband attributed to the wife in written statement and during examination of parties constitute mental cruelty — Wife guilty of making reckless, unfounded and unproved allegations against husband that he has sexually abused elder child — Judgment of Family Court dissolving marriage on ground of cruelty, held, justified**

**JUDGMENT**

Hon'ble Mr. Justice Antony Dominic

These appeals are filed by the respondents in O.P (G&W) No. 67/2010 and the respondent in O.P No. 66/2010 on the file of the Family Court, Kottayam at Ettumanoor.

2. O.P (G&W) No. 67/2010 was filed by the respondent in M.A No. 278/2012, the husband, seeking custody of the two minor children born in his wedlock with the 1st appellant. By the impugned order, the Family Court granted custody of the elder male child 'Yuhan Jose Joseph' to the respondent and ordered that the younger female child 'Hanna' be continued in the custody of the 1st appellant.

3. Mat. Appeal No. 279/2012 arises from the judgment of the Family Court, Kottayam at Ettumanoor in O.P No. 66/2010, which was also filed by the respondent husband seeking divorce against the 1st appellant wife on the ground of cruelty. By the impugned judgment, the O.P was allowed and the marriage was dissolved by a decree of divorce. It is challenging these judgments, the appeals are filed.

4. For convenience, we shall first deal with Mat. Appeal No. 279/2012 arising out of the judgment in O.P No. 66/2010. The marriage between the couple was solemnized on 19.8.2002 as per the Christian religious rites and ceremonies. The husband was employed at Mumbai and the couple lived there in an apartment. In the wedlock, the wife gave birth to two children, a male and a female, on 28.1.2004 and 16.12.2009 respectively. The couple separated on 6.1.2010 and since then the wife and children were residing with her parents. It was subsequently that O.P No. 66/2010 was filed by the husband seeking divorce on the ground of cruelty as provided under Section 10(1)(x) of the Divorce At 1869.

5. The main grounds urged by the husband were two. The first one was that the wife denied treatment to the elder child 'Yuhan', who was diagnosed on the 40th day of his birth as suffering from 'Congenital Adrenal Hyperplasia' (CAH). The second ground urged was that by making reckless and unfounded allegations against him that he had sexually abused the elder child 'Yuhan', she had caused mental cruelty to him.

6. Before the Family Court, the wife denied the allegations in its totality. In support of the case canvassed by the parties, they were examined as PW1 and RW1 and Exts.A1 to A11 and B1 to B12 were also marked. It was thereafter that the Family Court accepted both the grounds and granted decree of divorce on the ground of cruelty.

7. We heard the learned counsel for the appellants and the learned counsel appearing for the respondent. While, according to the learned counsel for the appellants, the respondents before the Family Court, there was no substance in the case pleaded by the husband against the wife, as also her parents and that the Family Court rendered the judgment without appreciating the case canvassed by her and the evidence tendered on her side, the learned counsel appearing for the respondent husband sought to sustain the findings in his favour.

8. As we have already stated by us, the 1st contention accepted by the Family Court was that the wife is guilty of cruelty not only to the child but also to the husband by denying treatment to the child. This contention of the parties has been considered by the Family Court in paragraphs 21 to 24 of its judgment. The discussion in the judgment and the evidence available before the Family court show that on 40th day of his birth, the child was diagnosed as suffering from severe dehydration leading to his admission and treatment at various hospitals such as Bharat Hospital, Kottayam, Paret Mar Ivanious Hospital, Puthuppally, Kottayam, Matha Hospital, Ettumanoor, Amrutha Institute of Medical Science, Kochi and Christian Medical College, Vellore. All this led to the confirmed diagnosis that the child was suffering from CAH, a life threatening condition and that he required continued expert treatment by paediatrics endocrinologist.

9. The fact that the child is suffering from CAH is not a matter which disputed by either of the parties. According to the husband, while he was spending much of his time for saving the life of the child by giving expert treatment at various reputed hospitals, the wife was not co-operating with the treatment and, in fact, was not even giving the medicines that were prescribed, which according to him, was on the advice of a God Woman from whom she and her parents were taking advice. The fact that she had suggested an alternative treatment to the allopathic treatment chosen by the husband has been admitted by herself in the objections filed by her and also in her evidence. It is also in evidence that during the period when the couple were residing together at Mumbai, it was only the husband, who was giving

medicines to the child and the wife also does not have a case otherwise. The evidence before the Family Court also indicated that despite separate residence of the couple subsequent to 6.1.2010 and admitted necessity of the child to have continuous treatment, the wife could not produce any evidence indicating that she was giving proper medical care to the child.

10. Insofar as the paediatrician, who, according to her, was treating the child is concerned, on her own showing, it was found by the Family Court that he was a person, who was not having specialized knowledge in 'paediatric endocrinology'. Therefore, the evidence available before the Family court in sum and substance definitely indicated that the wife was willfully avoiding to give the required treatment and medicines to the elder child. In fact, photographs that are produced before us showing the condition of the child during the period when the couple were residing together and while he was in the custody of the mother also shows the deteriorated condition of the child. All this would show that the conclusion of the Family Court that the wife was guilty of declining treatment to the child is supported by the evidence available before the Family Court. Therefore, we do not find any illegality in that conclusion of the Family Court.

11. The second contention which found favour with the Family Court is that the wife is guilty of making reckless, unfounded and unproved allegations against the husband that he has sexually abused the elder child 'Yuhan'. In paragraph 9 of the objection filed by the wife to O.P No. 66/2010, she has stated thus:

"…….Then, one day the counter petitioner herself discovered that the minor son Yuhan was trying to expand his genitals in the bath room. When the counter petitioner questioned Yuhan and Yuhan disclosed that his father, the petitioner was doing that for some time back and compelled him to do himself. That outrageous instance put the counter petitioner in severe grief and when it was told to the petitioner initially he admitted that, such act was necessary for the proper development of sexual capacity as Yuhan is suffering from CAH. But when the counter petitioner disagreed with that opinion, the petitioner became violent and declared that the counter petitioner would be put in a mental asylum."

In paragraph 12 of the objection filed by her in O.P No. 67/2010 also, she has averred thus:

"Since the petitioner committed physical and mental cruelty, the petitioner sexually abused the minor son Yuhan and the baby Hanna is still having breast feeding there is no bonafides in the prayer for the custody of the minor children. Further if the custody is given to the petitioner, that would become detrimental to the interest and welfare of the minor children. There is a chance of vengeance on the part of the petitioner towards the minor son for disclosing the sexual abuse of the petitioner and the counter petitioners are having apprehension of harassment of the minor Yuhan if custody is given to the petitioner."

12. In the proof affidavit filed by her, she has averred in paragraph 15 thus:

,((.
C.A H (Congenital Adrenal Hyper Plasi) sexual capacity
When PW1, the husband was cross examined, he was asked thus:
"sexually abuse
. (Q) (A)."
When the wife was examined as RW1, in her cross examination it is stated thus:
(
((Q).
(A).

Thus the fact that she has raised allegations that the husband has sexually abused the elder child cannot be disputed and in fact was not disputed before us also.

13. Reading of her cross examination as RW1 shows that even according to her, there was no basis for those allegations. The question whether making of reckless and unfounded allegations amounts to cruelty has

come up for consideration of this Court as also the Apex Court. In Latha Kunjamma v. Anil Kumar [2008 (2) KLT 545], in paragraphs 10 & 15, this Court has held thus:

10. False, defamatory, scandalous, malicious, baseless and unproved allegations made against the spouse in the written statement may amount to cruelty. The irresponsible insinuation and allegations which were made during the course of litigation against the wife cannot be brushed aside. Such a view was taken by the Rajasthan High Court in the decision reported in Parihar v. Parihar (AIR 1978 Raj. 140). Pushparani v. Krishan Lal (AIR 1982 Del. 107) is a case where the wife had in her written statement alleged that an illicit relationship existed between her husband and one Smt. Bindra Devi. When the husband appeared in the witness box the said statement was directly suggested to him in the cross-examination. This imputation was not a ground pleaded in the petition by the husband. It was held by the Delhi High Court that the allegations of adultery made by the wife in the written statement and at the time of cross-examination could be taken into consideration for granting a decree of divorce on the ground of cruelty. The learned Judge had followed the principle that cruelty subsequent to the institution of the petition could be taken into account to prevent multiplicity of proceedings.

15. The question that requires to be answered based on the submissions made by the appellant is as to whether the averments, accusations and character assassination of the husband attributed to the wife in the written statement and during examination of the parties constitute mental cruelty for sustaining the claim for divorce under S.13(1)(i-a) of the Hindu Marriage Act. Allegations and accusations made in the written statement or suggested in the course of examination and by way of cross-examination if not proved, would amount to worst form or insult and cruelty warranting the claim of the wife being allowed and the same would satisfy the requirement of law. A well behaved, educated, disciplined wife who started married life with her lover under no circumstance can tolerate him who attributes extra-marital relationship. Such disgusting accusations certainly will cause mental pain, agony and suffering amounting to the reformulated concept of cruelty in matrimonial law causing profound and lasting disruption and leaving the wife to feel deeply hurt and reasonably apprehend that it would be dangerous for her to live with the husband who was taunting her like that and rendered the maintenance of matrimonial home impossible.

Recently, the Apex Court also had occasion to deal with the same question in its judgment in Srinivas Rao v. D.A Deepa [2013 (1) KHC 647 (SC)], where in paragraphs 10 to 14 held thus:

"10. Under Section 13(1)(i-a) of the Hindu Marriage Act, 1955, a marriage can be dissolved by a decree of divorce on a petition presented either by the husband or the wife on the ground that the other party has, after solemnization of the marriage, treated the petitioner with cruelty. In a series of judgments this Court has repeatedly stated the meaning and outlined the scope of the term 'cruelty'. Cruelty is evident where one spouse has so treated the other and manifested such feelings towards her or him as to cause in her or his mind reasonable apprehension that it will be harmful or injurious to live with the other spouse. Cruelty may be physical or mental.

11. In Samar Ghosh this Court set out illustrative cases where inference of 'mental cruelty' can be drawn. This list is obviously not exhaustive because each case presents it's own peculiar factual matrix and existence or otherwise of mental cruelty will have to be judged after applying mind to it. We must quote the relevant paragraph of Samar Ghosh. We have reproduced only the instances which are relevant to the present case.

"101. No uniform standard can even 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) xxx xxx xxx

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse.

The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) xxx xxx xxx

(viii) xxx xxx xxx

(ix) xxx xxx xxx

(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) xxx xxx xxx

(xii) xxx xxx xxx

(xiii) xxx xxx xxx

(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."

It is pertinent to note that in this case the husband and wife had lived separately for more than sixteen and a half years. This fact was taken into consideration along with other facts as leading to the conclusion that matrimonial bond had been ruptured beyond repair because of the mental cruelty caused by the wife. Similar view was taken in Naveen Kohli.

12. In V. Bhagat v. D. Bhagat in the divorce petition filed by the husband the wife filed written statement stating that the husband was suffering from mental hallucination, that this was a morbid mind for which he needs expert psychiatric treatment and that he was suffering from 'paranoid disorder'. In cross-examination her counsel put several questions to the husband suggesting that several members of his family including his grandfather were

lunatics. This Court held that these assertions cannot but constitute mental cruelty of such a nature that the husband cannot be asked to live with the wife thereafter. Such pleadings and questions it was held, are bound to cause immense mental pain and anguish to the husband. In Vijayakumar Bhate disgusting accusations of unchastity and indecent familiarity with a neighbour were made in the written statement. This Court held that the allegations are of such quality, magnitude and consequence as to cause mental pain, agony and suffering amounting to the reformulated concept of cruelty in matrimonial law causing profound and lasting disruption and driving the wife to feel deeply hurt and reasonably apprehend that it would be dangerous to live with her husband. In Naveen Kohli the respondent-wife got an advertisement issued in a national newspaper that her husband was her employees. She got another new item issued cautioning his business associates to avoid dealing with him. This was treated as causing mental cruelty to the husband.

13. In Naveen Kohli the wife had filed several complaints and cases against the husband. This Court viewed her conduct as a conduct causing mental cruelty and observed that the finding of the High Court that these proceedings could not be taken to be such which may warrant annulment of marriage is wholly unsustainable.

14. Thus, to the instances illustrative of mental cruelty noted in Samar Ghosh, we could add a few more. Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the Court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse."

14. In the light of the legal principles and also taking into account the allegations that were raised by the wife, which even according to her, has no basis, we find that the conclusion of the Family Court that this amounted to mental cruelty to the husband, deserves to be upheld and we do so.

15. In the result, the judgment of the Family Court, Kottayam at Ettumanoor dissolving the marriage between the 1st appellant and the respondent on the ground of cruelty does not suffer from any illegality and therefore, Mat. Appeal No. 279/2012 filed against the judgment of the Family Court, Kottayam at Ettumanoor in O.P No. 66/2010 deserves only to be dismissed and we do so.

16. Against the judgment of the Family Court, Kottayam at Ettumanoor in O.P (G&W) No. 67/2010, Mat. Appeal No. 278/2012 is filed by the wife and her parents. In the O.P filed by the husband, he sought custody of both the two minor children, who were then with the mother and her parents. By the impugned judgment, the Family Court allowed the claim, insofar as the elder child 'Yuhan' is concerned and the reason for that order is that the wife was not providing treatment to the child and therefore, the continued custody of the child with the mother will not be to his welfare. It is aggrieved by this judgment that the wife and her parents have filed the appeal in question.

17. While dealing with Mat. Appeal No. 279/2012, we have already endorsed the finding of the Family Court that the wife was not giving proper treatment to the child, who admittedly is suffering from CAH. This, therefore means that the continued custody of the child with the mother was not in his welfare, which has to be the paramount consideration, when the rival claims are made by the parents for the custody of the minor children.

18. Consequently, the order passed by the Family Court, Kottayam in O.P (G&W) No. 67/2010 also has to be upheld and we do so. Mat. Appeal No. 278/2012 will also stand dismissed.

For the aforesaid reasons, both these appeals are dismissed without any order as to costs.

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# K.ANEESH VERSUS THE SUB INSPECTOR OF POLICE

**Kerala High Court**

**Bench : Hon'ble Mr. Justice Kurian Joseph & Hon'ble Mr. Justice C. T. Ravikumar**

*K.Aneesh*
*Versus*
*The Sub Inspector Of Police*

**WP(C).No. 32646 of 2009(A)**

**Decided on 24 November, 2009**

**Love should not end by marriage, it should continue unto death. They have a child also. Disputes started far later. More than misunderstanding, there is lack of understanding between the parties. In conjugal relationship unless there is a give and take attitude and a free and fair approach in the human relationship, the marriage will not work successfully. We request the parties, having regard of the fact that they have a child to forget the past and forgive each other and try to build up restore the original warmth they had to each other and put an end to all the litigations once for all.**

**JUDGMENT**

Kurian Joseph.J Petitioner approached this court complaining of police harassment. Finding that the issue pertains to matrimonial disputes we directed the parties to approach Kerala Mediation Centre.The Mediator Adv.P.R.Shaji has reported that the disputes have been settled. The following are the terms of settlement.

1. Both parties (petitioner and respondents 5 and 5) shall withdraw all cases filed against each other i.e. Crime No.364 of 2006 of Thenjipalam Police Station and other cases, if any.

2. Originals of all certificates of Mrs. Sibi shall be handed over to her by Mr.Aneesh through their counsel.

3. Petitioner husband and 5th respondent wife shall life separately for 6 months from today onwards for probing the possibility of reconciliation, meanwhile both of them and their family members shall consult a psychologist and co-operate with the conciliation. Both parties shall undertake that they will not take away the child to any foreign county or any remote place without the consent of the other. Hereinafter, from Monday to Friday father will take the custody of the child from 9.30 a.m to 7.p.m. All week end days except first and third Sunday the custody of the child will be with the mother, on first and third Sunday the custody of the child will be with the father (9.30.am. to 7.p.m).During Christmas holidays W.P.(C). No.32646 of 2009 mother will take the custody for five days and she will take the child to her home at Iritty and rest of the five days with the father. (9.30.am to 7.p.m). On March 24, the birthday of the child, the custody of the child will be with mother and she will be the custodian of the child. The child will be with mother from 23rd to 25th and in the next Sunday the custody of the child will be with father (9.30. am to 7.p.m). On Malayalam Era birthday (Meenam, Rohini), the custody of the child will be with the father (9.30.a.m to 7.p.m). During Vishu holidays, on the 1st day of the Vishu, the custody of the child will be with father (9.30.a.m to 7.p.m) and on the next day with mother.

2. The above terms are recorded. Having interacted with the parties we also find that there is still room for improvement. The parties are close relatives. They have contracted a marriage which is popularly known as 'love marriage'. Love should not end by marriage, it should continue unto

death. They have a child also. Disputes started far later. More than misunderstanding, there is lack of understanding between the parties. In conjugal relationship unless there is a give and take attitude and a free and fair approach in the human relationship, the marriage will not work successfully. We request the parties, having regard of the fact that they have a child to forget the past and forgive each other and try to build up restore the original warmth they had to each other and put an end to all the litigations once for all. We also hasten to add that parents W.P.(C). No.32646 of 2009 of both sides have to necessarily render support to sustain the marriage. They shall not allow the support or encourage the parties to pick up new quarrels. Both sides shall pay an amount of Rs.3,000/- (Rupees Three Thousand only) each to the mediator within 10 days. In terms of the compromise the petitioner will hand over the certificates of the fifth respondent through her counsel immediately. Since the parties have purchased peace between them both sides submitted that the criminal case already instituted on the complaint of the fifth respondent need not be pursueded and it is also submitted that for securing the ends of justice, the proceedings may by quashed. Having regard to the entire facts and circumstances of the case and also to the fact that allegation of kidnapping is raised against the father of the child and in view of the settlement between the parties, it is only appropriate that the criminal proceedings are also terminated, for securing ends of justice.

Therefore we quash the proceedings in CC.No.368/2009 on the file of Thenjippalam Police Station.The writ petition is disposed of accordingly.

**KURIAN JOSEPH,JUDGE**
**C.T.RAVIKUMAR,JUDGE**

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# DR.SMITHA MATHEW VERSUS DR.PRASOON KURUVILA

**Kerala High Court**

**Bench : Hon'ble Mr. Justice K. M. Joseph & Hon'ble Mr. Justice M. L. Joseph Francis**

*Dr.Smitha Mathew*
*Versus*
*Dr.Prasoon Kuruvila*

**Mat.Appeal.No. 263 of 2010()**

**Decided on 5 July, 2011**

- **In Mat.A.No. 263 of 2010 the learned counsel for the appellant mainly raised the following contentions. The Court below failed to take note of the actual problems between the parties and instead of addressing it with a view to save the marital relationship between the parties, proceeded to dissolve the marriage. In paragraph 18 of the impugned judgment, the Family Court wrongly found that 'the petitioner/husband' has succeeded to prove that the wife behaved cruelly and indifferently towards him and a complete reading of the said paragraph will show that the Court below has not assigned any reason whatsoever to arrive at the said conclusion.**
- **Section 10(1)(x) of the Divorce Act, 1869 provides that the marriage be dissolved on the ground that the respondent has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent. The cruelty as a ground of matrimonial relief has been defined as conduct of such a character as to have caused danger to life, limb or health, bodily or mental, so as to give rise to a reasonable apprehension of such danger. The concept of cruelty varied from time to time, from place to place and from individual to individual in its application to social status of persons involved and economic condition and other matters.**
- **while dealing with the custody of the child, the Family Court had not considered about the welfare of the child. Presently the child is with the first appellant/mother. The Family Court has not given any reasons to disturb the present status quo and handing over the custody of the minor child to the respondent/father. The Mat.A..Nos. 263 & 265 of 2010 learned counsel for the appellants submitted that the observation of the Family Court that the mother expressed her willingness to give custody of the child to the father b y e-mail message is incorrect and the said conclusion is drawn out of contract and that it is wrong to observe that the first appellant mother permitted the child to be handed over permanently to the respondent/husband and in fact she was expressing occurrence to the respondent to take custody of the child as a stop gap arrangement till she completes her studies.**
- **Admittedly the 1st appellant mother is working in a far away place in Anchal leaving the male child having an age of 7 years with her mother in a rented accommodation in Thiruvananthapuram.**
- **The father of the first appellant is now working at Pathanamthitta as an approved Valuer of the State Bank of India and State Bank of Travancore and therefore he is staying permanently at Pathanamthitta and his presence is not there in the rented accommodation at Thiruvnanthapuram. In O.P. No. Mat.A..Nos. 263 & 265 of 2010 492 of 2009 it is alleged by the petitioner/husband that he is working as a Physician at Carithas Hospital, Kottayam and his parents are healthy and they can**

**look after the child well and the child can continue his studies at Marian Senior Secondary School, Kottayam, which is situated near to the petitioner's house. Considering all these aspects of the matter, we are of the view that the judgment passed by the learned Family Court Judge regarding the custody of the child is reasonable and we find no reason to interfere with the judgment.**

## JUDGMENT

**Hon'ble Mr. Justice Joseph Francis**

Mat.A. No.263 of 2010 is filed by the respondent/wife in O.P. 491 of 2009 on the file of the Family Court, Kottayam. The respondent in this appeal is the petitioner in that petition, which was filed by him under Section 10(1)(x) of the Divorce Act for divorce on the ground of cruelty. Mat. A.No. 265 of 2010 is filed by respondents 1 to 3 in O.P.No. 492 of 2009 on the file of the Family Court, Kottayam. The respondent in that appeal was the petitioner in that Original Petition, which was filed by him for the custody of the child. The first respondent in that Original Petition is his wife and respondents 2 and 3 are the parents of the first respondent.

2. The averments in O.P.No.491 of 2009 are briefly as follows: The petitioner is the husband and the respondent is the Mat.A..Nos. 263 & 265 of 2010 wife and their marriage was solemnised on 3.2.2003 as per the Christian rites. After the marriage they lived together in the house of the petitioner. A male child was born in this wedlock on 20.2.2004. The petitioner is a doctor by profession and was doing his MD in General Medicine at Kottayam at the time of marriage. The respondent is also a doctor preparing for the entrance examination for MD course. It was an arranged marriage.

3. During the initial days of the marriage itself the respondent behaved very much indifferently with the petitioner and his family. She did not like the lifestyle and eating habits of the petitioner and his parents. She was not ready to mingle with the family members of the petitioner and she always preferred to remain inside the bed-room. She was not even ready to have food together with the family members of the petitioner. The respondent was in the habit of humiliating and insulting the petitioner. She claimed better financial and social status than the petitioner. She stated that she married the petitioner only on the compulsion of her parents.

4. About three months after the marriage the respondent became pregnant, but she abused the petitioner saying that he spoiled all her life and career and it was her misfortune to marry a man like the petitioner. Her mother also supported this view and created a lot of embarrassment in the matrimonial life. After the baptism of the child the petitioner requested the respondent to come back to the matrimonial home, but the respondent and her parents were not ready for the same. In June 2004, the petitioner and his father discussed about the issue, but during that period the respondent took an adamant stand that she will not return to the matrimonial home and she had no intention to bring up the child.

5. When the child was five months old the respondent began to stay in a hostel at Kottayam after leaving the child under the custody of her aged mother without informing the petitioner. She gave her career more importance than the family life. In September 2004, the petitioner was suffering from jaundice and he was very serious and bed ridden, but the respondent who was staying at YWCA hostel was not willing to look after him and she came only on two occasions. The Mat.A..Nos. 263 & 265 of 2010 illness of the petitioner was very serious, but the attitude of the respondent was highly irresponsible. The petitioner rejoined his MD course on 13.3.2005 after recovering from his illness. In the meantime the respondent also got admission for DMRD course at Medical College, Kozhikode. The petitioner and his parents requested the respondent to come to her matrimonial home during holidays and vacation, but the respondent was not willing. She has not even entrusted the child with the petitioner. The petitioner noticed that the respondent was getting a lot of phone calls during odd hours in the night.

6. In 2007 May the respondent completed her course. The petitioner brought her back from the hostel to the matrimonial home, but on the next day itself the respondent insisted to go to the her parental house at Pathanamthitta and she left the place with all her belonging brought from her hostel. The petitioner

and his family members made several attempt to bring back her, but she was adamant. The respondent had no love and affection to the petitioner and the child. In January 2008 the petitioner brought her to his house, but she Mat.A..Nos. 263 & 265 of 2010 did not even talk with the petitioner's mother. When the petitioner questioned it, the respondent slapped him on his cheek and it caused much mental agony to the petitioner. She joined for DNB course in Thiruvananthapuram without the consent of the petitioner in February 2008. In July 2008 also when the petitioner made attempt to bring the respondent to his house, she was not willing. So the petitioner is constrained to live separately from the respondent. Hence the petitioner is entitled to get a decree of divorce on the ground of cruelty.

7. The respondent filed objection contending as follows. The allegation that the respondent behaved in differently with the petitioner is absolutely false. The cruelty alleged is also not true. The respondent never insulted or humiliated the petitioner or his family members. The respondent never made any complaint regarding the financial position and social status of the petitioner's family. The allegation that the respondent had no love and affection to the husband and child is absolutely false. The child was given proper care and attention by the respondent's mother. Actually there was no quarrel between the petitioner and the respondent. The respondent resided in YWCA hostel Mat.A..Nos. 263 & 265 of 2010 for the purpose of entrance coaching. Actually the respondent preferred to stay in the petitioner's house, but during that period the petitioner contracted hepatitis in 2004. So the petitioner refused to allow the respondent and child to stay with him at Kottayam. Because of that reason the child was entrusted with the parents of the respondent. It was on the petitioner's insistence that the respondent decided to stay in a hostel at Kottayam. The respondent used to visit the petitioner on every 3 days while he was suffering from illness. The petitioner's medical conditions was not at all serious. The marital relationship has not been broken irretrievably. The reason for misunderstanding is the behavioural aberrations of the petitioner and his psychological problem. If the petitioner is ready and willing to solve his behavioural and psychological problem it is possible to resume the marital life. The allegation of cruelty against the respondent is baseless. The divorce prayed for is not allowable.

8. The averments in O.P. No. 492 of 2009 are briefly as follows. The petitioner is the husband and the first respondent is the wife. The respondents 2 and 3 are the parents of the first respondent. Mat.A..Nos. 263 & 265 of 2010 The child is in the custody of respondents 2 and 3. The first respondent behaved very indifferently and she always wanted to avoid the love and affection of the petitioner to the child. She allowed her parents to look after the child against the interest of the petitioner and the child. The respondent was not at all willing to reside in the matrimonial home with the child. The respondents are refusing to return the custody of the child without any reason and it caused much mental pain to the petitioner. Because of the cruelty of the respondent he filed divorce case.

9. The first respondent is not at all interested for the welfare of the child. The third respondent is suffering from breast cancer and second respondent is a heart patient. They are being looked after by the servants. The first respondent is doing her DNB course at Medical College Hospital, Thiruvananthapuram. The petitioner is very much interested in the welfare of the child. At present he is working as a physician at Caritas Hospital, Kottayam. The petitioner is having financial capacity to look after the child. For the welfare of the child the custody is to be given to the petitioner.

10. The respondents filed objection contending as follows. The allegation that the first respondent behaved cruelly towards the petitioner and she wilfully refused to come to the house of the petitioner is absolutely false. The respondents never abandoned the child. The first respondent entrusted the child with her parents for the reason that the petitioner suffered illness. The allegation that the respondents are not interested in the welfare of the child is absolutely false. After completing her study she joined the ESI Hospital, Kadambanad, Adoor and for that purpose she has to stay at Pathanamthitta in her parental house. The minor was admitted to Vimala Matha Nursery School, Pathanamthitta in June, 2006 and he remained there till February, 2008 and it was with the knowledge and consent of the petitioner. It is true that the third respondent is suffering from breast cancer and she was undergoing treatment from Amritha

Hospital. The minor child was brought to Pathanamthitta only periodically and he was at Kottayam. The allegation that the respondents are not at all interested for the welfare of the child is absolutely false. The first respondent is interested in resuming marital Mat.A..Nos. 263 & 265 of 2010 relationship, but because of the adamant stand taken by the petitioner they are living separately.

11. In the Family Court both the above Original Petitions were tried jointly and evidence was recorded in O.P. 491 of 2009. Pws 1 to 3 were examined on the side of the petitioner and Exts.A1 to A9 were marked. On the side of the respondent Rws.1 and 2 were examined and Exts.B1 to B3 were marked. The learned Family Court, on considering the matter, allowed O.P.No.491 of 2009 and the marriage between the petitioner and the respondent was declared as dissolved w.e.f. 18.2.2010. O.P.No.492 of 2009 was disposed of directing that the child will be in the custody of the mother during the academic year till 30.4.2010 and during that period the father will be having visitation right twice in a month, the first and third Sundays during day time for a period of two hours and from 30.4.2010 onwards the custody of the child is to be given to the father and during that period the mother will be having visitation right twice in a month i.e. on the 1st and 3rd Sundays during day time for a period of two hours. Both parties shall not oppose the right of the other party to exercise the visitation right Mat.A..Nos. 263 & 265 of 2010 ordered as above. Against the judgment in O.P. 491 of 2009 the respondent/wife filed Mat.A.No. 263 of 2010 and against the judgment in O.P. 492 of 2009 respondents 1 to 3 filed Mat.A. No. 265 of 2010.

12. Heard learned senior counsel for the appellants and the learned senior counsel for the respondent.

13. In Mat.A.No. 263 of 2010 the learned counsel for the appellant mainly raised the following contentions. The Court below failed to take note of the actual problems between the parties and instead of addressing it with a view to save the marital relationship between the parties, proceeded to dissolve the marriage. In paragraph 18 of the impugned judgment, the Family Court wrongly found that 'the petitioner/husband' has succeeded to prove that the wife behaved cruelly and indifferently towards him and a complete reading of the said paragraph will show that the Court below has not assigned any reason whatsoever to arrive at the said conclusion.

14. The learned senior counsel for the appellant wife submitted that the finding in paragraph 18 of the judgment is to the effect that the wife wanted to stay away from the matrimonial home. She disliked Mat.A..Nos. 263 & 265 of 2010 parents-in-law and failed to look after the husband even while he was suffering from serious illness - jaundice' is entered into contrary to evidence on record. The circumstance under which the appellant stayed away from home i.e., in connection with the education, work etc, was not considered while arriving at the conclusion. The Court below also failed to take note of the fact that the particular course in Radiology specialized by the appellant is offered only in Medical Colleges at Thiruvananthapuram and Kozhikode. Appellant if at all stayed away from home, is under compulsions of education or work. That by itself cannot be treated as a reason to arrive at the finding that the 'respondent avoided to stay in matrimonial home'. Instead of finding that the wife stayed away from husband during his illness, the court below ought to have found that it is the husband who compelled the wife to stay away from him so as to avoid their child from being infected with jaundice. The evidence adduced in this connection is not taken note of by the court below.

15. The learned senior counsel for the appellant submitted that the finding in paragraph 18 of the judgment that the illness of the Mat.A..Nos. 263 & 265 of 2010 husband started in September 2004, but the wife opted to stay in the hostel at Kottayam from July 2004 onwards is contrary to evidence on record. Even the petitioner did not advance such a case. It has come out in evidence that the husband contracted hepatitis in September 2004 and the appellant stayed in hostel from October 2004 onwards as insisted by the husband for protecting the child from possible infection. Court below also failed take note of the fact that even during this period, the appellant used to regularly visit the husband and used to accompany him for his regular blood tests.

16. The learned senior counsel for the appellant submitted that the further finding in paragraph 18 of the impugned judgment that the appellant 'slapped the husband on his face twice' is entered into only based on the stray averment of the respondent. Even the uncle of the respondent (PW3) deposed that he is not having any direct information about this incident. The Court below ought not to have entered into this finding. Even the petitioner does not have a case that the appellant 'tortured' him, but surprisingly the court below found that the 'denial of torture of the wife is not with bonafides'. Mat.A..Nos. 263 & 265 of 2010

17. The learned senior counsel for the appellant wife submitted that the aspect relating to the taking of room in Hotel at Thiruvananthapuram on 4.4.2009 is not analysed by the Court below in its proper perspective. The findings in paragraph 18 that 'she continued her habit of avoiding the husband and in laws' is wrong and perverse. The court below failed to take note that on 5.4.2009 the respondent abandoned the child at Thiruvananthapuram and rushed back to Kottayam and within few weeks (on 21.5.2009) filed the Original Petition for divorce. Therefore the court below went wrong to find that the 'wife continued' her habit of avoiding the husband and in-laws. Therefore the dictum laid down in Chathu v. Jayasree (1990(1) KLT 604) is having no application to the facts and circumstances of this case. The court below failed to take note of the fact that the respondent actually avoided the company of the appellant and the child.

18. The learned senior counsel for the wife submitted that the conclusion in paragraph 18 of the judgment that 'from the evidence it can be seen that the wife behaved cruelly towards the petitioner both mentally and physically' is without any support from evidence on Mat.A..Nos. 263 & 265 of 2010 record and the court below ought not to have arrived at such a conclusion.

19. The learned senior counsel for the respondent husband submitted that the Family Court is fully justified in granting a decree of divorce on the ground of cruelty on the basis of evidence on record.

20. Section 10(1)(x) of the Divorce Act, 1869 provides that the marriage be dissolved on the ground that the respondent has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent. The cruelty as a ground of matrimonial relief has been defined as conduct of such a character as to have caused danger to life, limb or health, bodily or mental, so as to give rise to a reasonable apprehension of such danger. The concept of cruelty varied from time to time, from place to place and from individual to individual in its application to social status of persons involved and economic condition and other matters.

21. The parties have relied on a large body of case law. We Mat.A..Nos. 263 & 265 of 2010 need only refer to a fiew of them. In Dr. N. G. Dastane v. Mrs. S. Dastane (1975 (2) SCC 326), the Court, inter alia, held that the Court has to deal not with the ideal husband and an ideal wife, but with the particular man and woman before it. The Court also, inter alia, held as follows:

"32. One other matter which needs to be clarified is that though under Section 10(1)(b), the apprehension of the petitioner that it will be harmful or injurious to live with the other party has to be reasonable, it is wrong, except in the context of such apprehension, to import the concept of a reasonable man as known to the law of negligence for judging of matrimonial relations. Spouses are undoubtedly supposed and expected to conduct their joint venture as best as they might but it is no function of a court inquiring into a charge of cruelty to philosophise on the modalities of married life. Someone may want to keep late hours to finish the day's work and someone may want to get up early for a morning round of golf.

The Court cannot apply to the habits or hobbies of these the test whether a reasonable man situated Mat.A..Nos. 263 & 265 of 2010 similarly will behave in a similar fashion. The question whether the misconduct complained of constitutes cruelty and the like for divorce purposes is determined primarily by its effect upon the particular person complaining of the acts. The question is not whether the conduct

would be cruel to a reasonable person or a person of average or normal sensibilities, but whether it would have that effect upon the aggrieved spouse. That which may be cruel to one person may be laughed off by another, and what may not be cruel to an individual under one set of circumstances may be extreme cruelty under another set of circumstances."

22. It was further held that simple trivialities which can truly be described as the reasonable wear and tear of married life have to be ignored, and that in many marriages, each party can if he so wills, discover many a cause for complaint, but such grievances arise mostly from temperamental disharmony which is not cruelty. In Naveen Kohli v. Neelu Kohli (2006 (4) SCC 558) the Apex Mat.A..Nos. 263 & 265 of 2010 Court reviewed the case law. The Court, inter alia, noted that cruelty was not a ground for claiming divorce under the Hindu Marriage Act prior to the amendment in 1976. It noted that the words "as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious to the petitioner to live with the other party" were omitted, and that it is not necessary to claim divorce that the cruel treatment is of such a nature as to cause apprehension of the nature earlier insisted upon. The Court referred to the decision of the Apex Court in A. Jayachandra v. Aneel Kaur (2005 (2) SCC 22) wherein the Court, inter alia, held as follows:

"11. The expression `cruelty' 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. The cruelty may be mental or physical, intentional or unintentional. If it is physical, the court will have no problem in determining it. It is a question of fact and Mat.A..Nos. 263 & 265 of 2010 degree. If it is mental, the problem presents difficulties. First, the enquiry must begin as to the nature of 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 love 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. However, there may be a case where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or 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 (See Shobha Rani v. Madhukar Reddi".

12. To constitute cruelty, the conduct complained of should be `grave and weighty' so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than `ordinary wear and tear of married life'. The conduct, taking into consideration the circumstances and Mat.A..Nos. 263 & 265 of 2010 background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the court that the relationship between the parties had deteriorated to such an extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of Section 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant Mat.A..Nos. 263 & 265 of 2010 disturbance of mental peace of the other party.

13. The court dealing with the petition for divorce on the ground of cruelty has to bear in mind that the problems before it are those of human beings and the psychological changes in a spouse's conduct have to be borne in mind before disposing of the petition for divorce. However, insignificant or trifling, such conduct may cause pain in the mind of another. But before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the court to weigh the gravity. It has to be seen whether the conduct was

such that no reasonable person would tolerate it. It has to be considered whether the complainant should be called upon to endure as a part of normal human life. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent."

23. In Samar Ghosh v. Jaya Ghosh (2007 (4) SCC 511), the Apex Court laid down the following illustrative cases of human behaviour in dealing with the cases of mental cruelty:

"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, Mat.A.. Nos. 263 & 265 of 2010 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 miserabale life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than Mat.A..Nos. 263 & 265 of 2010 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 longe, 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 Mat.A..Nos. 263 & 265 of 2010 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."

24. The Court also held that the concept of cruelty differs from person to person depending upon the "upbringing, level of sensitivity, educational, family, cultural background, financial position, social status, customs, traditions, religious beliefs, human Mat.A..Nos. 263 & 265 of 2010 values and the value system". The Court also took the view that the concept of mental cruelty cannot remain static and there can be no uniform standard. The Court also took the view that it should seriously make an endeavour to reconcile the parties; yet, if it is found that the break down is irreparable, then divorce should not be withheld. In Neelam Kumar v. Dayarani (AIR 2011 SC 193), the Court, inter alia, held as follows:

"9. The High Court then took up the other allegation that the respondent did not come to attend and take care of the appellant when he was undergoing medical treatment in a hospital for the injuries caused in an accident. The High Court found that this allegation was not part of the appellant's pleadings and the matter was introduced in course of evidence. The court observed that not being stated in the pleadings, the allegation could not be taken into consideration. Even otherwise, apart from the oral statement made before the trial court, there was no material to support the allegation. The appellant did not examine any doctor or produce the medical Mat.A..Nos. 263 & 265 of 2010 records in connection with his treatment. In any event, one single instance, in isolation, was hardly sufficient for the dissolution of marriage on the ground that the respondent treated the appellant with cruelty.

13. We are not impressed by this submission at all. There is nothing to indicate that the respondent has contributed in any way to the alleged breakdown of the marriage. If a party to a marriage, by his own conduct brings the relationship to a point of irretrievable breakdown, he/she cannot be allowed to seek divorce on the ground of breakdown of the marriage. That would simply mean giving someone the benefits of his/her own misdeeds. Moreover, in a later decision of this Court in Vishnu Dutt Sharma v. Manju Sharma (2009) 6 SCC 379: (AIR 2009 SC 2254: 2009 AIR SCW 2984), it has been held that irretrievable breakdown of marriage is not a ground for divorce as it is not contemplated under section 13 and granting divorce on this ground along would amount to adding a clause therein by a judicial verdict which would amount to legislation by Court. In the Mat.A..Nos. 263 & 265 of 2010 concluding paragraph of this judgment, the Court observed (para12):

"If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of the marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Courts." "

25. The learned counsel for the respondent/husband pointed out seven instances of cruelty. The first instance is the repeated slapping of the respondent/husband by his wife, which is confirmed by PW3. In the proof affidavit filed by PW1 the husband has sworn to the fact that on one Saturday in the year 2008 he took back his wife to his house at Kottayam and at that time she insisted to go back to her house and he refused and then suddenly she slapped on his face and on the next day also the wife slapped on his face when he refused to take her back to her house. When the respondent/wife was examined as RW1 she Mat.A.. Nos. 263 & 265 of 2010 denied the happening of such an incident. PW2, who is the father of PW1, does

not speak about any incident regarding the slapping of PW1 by RW1. PW3 is the uncle of PW1. PW3 deposed that he had no direct knowledge with regard to the slapping of PW1 by RW1. Therefore the allegation of PW1 that RW1 slapped him twice is not properly proved. Even if it is taken that the wife slapped the husband on his face, there were two incidents as such that cannot be treated as much cruelty coming under the purview Sec.10(i)(x) of Divorce Act.

26. The second incident pointed out by the learned counsel for the respondent/husband is the suicide attempt by the wife by threatening to jump out of the moving car, which by the timely act of the husband was averted. PW1 deposed that on 1.6.2008 the wife informed him that she was coming to see the child and then he went to the Railway Station in a car along with the child to pick her and when he tried to take her to his house she threatened that if she was taken to his house she would jump out of the car and then Mat.A..Nos. 263 & 265 of 2010 he went to a hotel at Kottayam by name 'Homestead' and Ext.A3 is the hotel bill showing that he stayed in the hotel along with his wife. When RW1 was cross examined, no question was asked about the incident in which she alleged to have threatened to jump out of the car. Therefore that allegation is not proved.

27. The third incident narrated by the learned counsel for the respondent/husband is that the repeated accusation of the husband by the wife as mental patient and further calling their son as a mentally retarded child. In cross examination RW1 deposed that she would say that PW1 is having mental illness due to her experience in life. When RW1 was cross examined, PW1 has no case that she called her child as mental patient. In the proof affidavit filed by RW1, it is stated that the petitioner is prone to irrational fears being infected by diseases and he constantly washes his hands fearing germs or bacteria. He refused to eat food from hotels or restaurants fearing that the same may be contaminated. On one occasion when the petitioner and the Mat.A..Nos. 263 & 265 of 2010 respondent had to stay in a hotel the petitioner refused to sleep on the bed fearing that the bed sheet may be contaminated. The respondent had to go outside to buy a set of new bed sheets for the petitioner and even then the petitioner refused to sleep stating that there were hidden cameras installed in the hotel room. The next day the petitioner insisted that the new bed sheet should be burned and destroyed. These facts sworn to by RW1 in the chief affidavit are not challenged by the petitioner in cross examination. Therefore even if RW1 stated that PW1 is having some mental disorder it cannot be said as baseless allegations and may not amount to cruelty.

28. The next ground alleged by the learned counsel for the respondent is that there is continued refusal of the wife to perform her conjugal obligations. PW1 deposed that even after a lapse of six years from the date of the marriage, the husband and the wife resided only for a period of six months and that the wife failed to perform the obligations as a wife. In the proof affidavit filed by Mat.A..Nos. 263 & 265 of 2010 RW1 it is stated that if the petitioner is ready and willing to redress his behavioural problems and personality disorder it may well be possible for the parties to resume their married life. Therefore even if RW1 failed to perform her conjugal obligations that cannot be treated as cruelty.

29. The learned counsel for the respondent pointed out that the wife was secretly using another mobile phone at odd hours even after repeated requests by the husband to disclose the number. In the proof affidavit filed by PW1 it is stated that RW1 wife gave the other mobile phone number at the time of counselling by the direction of the Counsellor and that Ext.A7 is that sim card. The petitioner has not adduced any evidence to show that the wife made any undesirable phone calls by using that mobile number.

30. The learned counsel for the respondent submits that the appellant/wife accepted job without informing and without the concurrence of the husband. When RW1 was cross examined, the Mat.A..Nos. 263 & 265 of 2010 petitioner has not put any question regarding acceptance of the job by her without informing and without concurrence of the husband. It has come out in evidence that RW1 accepted an employment in the E.S.I. hospital, Kadambanad when the relationship between the petitioner and the respondent was not cordial. Even the respondent was aware that the appellant was preparing for the entrance examination

for Post Graduate course at the time of marriage. Attempting to secure a job or getting a job, as such cannot amount to cruelty.

31. Another point raised by the learned counsel for the respondent is that the appellant neglected the husband while undergoing treatment for hepatitis. In the proof affidavit RW1 has stated that in October, 2004 herself along with Dr. Nice shifted to Y.W.C.A., hostel at Kottayam to attend Entrance Examination coaching and unfortunately the petitioner contracted hepatitis in September, 2004 and the petitioner refused to allow her and their child to stay with him at Kottayam as the petitioner feared that the Mat.A..Nos. 263 & 265 of 2010 minor child and herself would be affected with hepatitis and when she received information that petitioner was affected by hepatitis she visited the petitioner, but the petitioner discouraged her from visiting him as he feared that she and the child would be affected by hepatitis. It has also come out in evidence that several doctors died in the Medical College Hospital, Kottayam during that period. In the above circumstances there is ample justification for the wife in not visiting the husband regularly during that period. If the grounds narrated by the learned counsel for the respondent are accepted as true, most of the allegations can be treated as mere trivial and normal wear and tear of married life which happens in day today life, which would not be adequate to grant divorce on the ground of cruelty.

32. The learned counsel for the respondent submits that the wife has admitted desertion by her when she was cross examined as RW1. But the petitioner/husband has not claimed any divorce under Section 10(1)(1x) of the Divorce Act on the ground of Mat.A..Nos. 263 & 265 of 2010 desertion.

33. The learned counsel for the respondent/husband submitted that while passing the order in I.A.No. 1286 of 2010 in Mat. A.No. 263 of 2010 dt. 8.6.2010 there was an undertaking by the wife to part as friends if she is convinced that the husband wants to separate from her and that decision is not influenced by any illness or complications developed consequent to his ailments. The learned senior counsel for the wife would contend that the wife only was pointing out the fact that there were some psychological impediment for the husband to lead a normal married life and it was in this regard that she pointed out certain habits of the husband. They include changing of bed (and rather out of the ordinary hygienic habits of the husband). It is contended that it was not a deliberately false allegation made against the husband without any foundation and the only attempt was to point out a problem in having a normal married life. In answer to the contention of the husband that the conduct of the wife in agreeing Mat.A..Nos. 263 & 265 of 2010 before this Court that if after the consultation with the Psychiatrist, the Psychiatrist were to find that the husband did not have any problem, she would be agreeable for parting of the ways and, therefore, the wife is estopped in the light of the report of the Psychiatrist, as per which it could be seen that the husband was not harbouring under any illness consequent upon which he was disabled from taking a decision, it is contended that the understanding of the conduct and the order passed by the court is incorrect. It is contended that the order does not bear out any conduct on the part of the wife by which she would stand estopped. He would further contend that a decree of divorce cannot be premised upon any conduct of a party, as contended and it can be validly based only on pleading and proof of cruelty under Section 10(x) of the Indian Divorce Act.

34. Learned counsel for the petitioner sought to draw assistance from the decision of a Division Bench of the Calcutta High Court in Dwijendra Narain Roy v. Joges Chandra De and Mat.A..Nos. 263 & 265 of 2010 others (AIR 1924 Calcutta 600). Therein, the Bench, inter alia, held as follows:

"It is an elementary rule that a party litigant cannot be permitted to assume inconsistent positions in court, to play fast and loose, to blow hot and cold, to approbate and reprobate, to the detriment of his opponent."

35. It is necessary to notice the facts. Therein, the appellant/defendant had pleaded that though in the four leases he had affixed the signature, the documents were not genuine in as much as the clauses had been interpolated after execution and without his consent. The litigation was fought on the said basis. The

appellant sought to contend at a late stage that the interpolation had been made before execution. It was this plea which is met by the court in the manner referred to in the paragraph. We do not see how the appellant can derive any support from the said proposition and how the court can be invited Mat.A..Nos. 263 & 265 of 2010 to pronounce dissolution of marriage without the petitioner proving the requisite ground available under law.

36. Learned senior counsel for the appellant also relied on the decision in B.(M.A.L.) v. B.(N.E.) (1968) 1 W.L.R. 1109). Therein, the court was dealing with the following short facts:

37. There was a settlement under which special maintenance was payable to the wife and three children including the third child. The husband was adjudicated bankrupt. To get discharge from bankruptcy, the consent of the wife being necessary to withdraw her claim, the husband undertook not to oppose her application for leave to apply for maintenance. He obtained discharge and a maintenance order was made by consent. The husband then sought to deny the paternity of the third child. It was found by serological evidence that he was not the father. The husband sought to set aside the maintenance order on the ground that it was obtained by fraud. It was therein that the court took the view that the husband cannot, after having obtained waiver of Mat.A..Nos. 263 & 265 of 2010 valuable rights of the wife, resile from that arrangement which led to the maintenance order. We find ourselves totally unable to permit the appellant to draw any support from the principle laid down in the said decision and to hold that merely because the appellant, going by the order of this Court, has taken the stand that she may not be opposed to parting of ways, if there was no psychological problem as such, decree of divorce is to be granted. We should bear in mind the nature of the statute, the rights of the parties, the public policy which underlies the statute and hold that a decree of divorce cannot be pronounced on the basis of the conduct alleged against the wife.

38. We are equally unimpressed by the attempt made to draw support from the decision in Mumbai International Airport Private Limited v. Golden Chariot Airport And Another (2010 (10) SCC 422). That was a case where the Court was reiterating the principle of estoppel, and that a litigant cannot change and suit its stand to his convenience. In Smith v. Smith and Others (2001 (1) WLR Mat.A..Nos. 263 & 265 of 2010 1937) the Court referred to the principle of estoppel by convention as laid down in Republic of India v. India Steamship Co. Ltd. (1998 AC 878) as follows:

"It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law, if it would be unjust to allow him to go back on the assumption: K. Lokumal & Sons (London) Ltd. v. Lotte Shipping Co. Pte. Ltd. (1985) 2 Lloyd's Rep 28; Norwegian American Cruises A/S v. Paul Mundy Ltd. (1988)2 Lloyd's Rep 343; Treitel, The Law of Contract, 9th ed (1995), pp 112-113. It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention."

39. We would think that the principle of estoppel by Mat.A..Nos. 263 & 265 of 2010 convention cannot be invoked by the respondent. The context of the statute and the conduct attributed to the appellant render the said principle inapplicable.

40. Considering all the above aspects of the matter, we are of the view that the Family Court is not justified in passing a decree of divorce in O.P. No. 491 of 2009 on the ground of cruelty and that the judgment has to be set aside in allowing Mat.Appeal No. 263 of 2010.

41. In Mat. A. No. 265 of 2010 the learned counsel for the appellants submits that while dealing with the custody of the child, the Family Court had not considered about the welfare of the child. The learned counsel for the appellants submits that presently the child is with the first appellant/mother. The Family

Court has not given any reasons to disturb the present status quo and handing over the custody of the minor child to the respondent/father. The Mat.A..Nos. 263 & 265 of 2010 learned counsel for the appellants submitted that the observation of the Family Court that the mother expressed her willingness to give custody of the child to the father by e-mail message is incorrect and the said conclusion is drawn out of contract and that it is wrong to observe that the first appellant mother permitted the child to be handed over permanently to the respondent/husband and in fact she was expressing occurrence to the respondent to take custody of the child as a stop gap arrangement till she completes her studies.

42. Admittedly the 1st appellant mother is working in a far away place in Anchal leaving the male child having an age of 7 years with her mother in a rented accommodation in Thiruvananthapuram.

The father of the first appellant is now working at Pathanamthitta as an approved Valuer of the State Bank of India and State Bank of Travancore and therefore he is staying permanently at Pathanamthitta and his presence is not there in the rented accommodation at Thiruvnanthapuram. In O.P. No. Mat.A..Nos. 263 & 265 of 2010 492 of 2009 it is alleged by the petitioner/husband that he is working as a Physician at Carithas Hospital, Kottayam and his parents are healthy and they can look after the child well and the child can continue his studies at Marian Senior Secondary School, Kottayam, which is situated near to the petitioner's house. Considering all these aspects of the matter, we are of the view that the judgment passed by the learned Family Court Judge regarding the custody of the child is reasonable and we find no reason to interfere with the judgment.

43. Accordingly Mat. Appeal No. 265 of 2010 is dismissed and the judgment in O.P. (G & W) No. 492 of 2009 on the file of Family Court, Kottayam is confirmed with a modification that the custody of child is to be given to the father from 1.8.2011 instead of 30.4.2010. Mat.Appeal No. 263 of 2010 is allowed and the judgment in O.P. No. 491 of 2009 on the file of Family Court, Kottayam allowing divorce is set aside and that O.P. is dismissed Mat.A..Nos. 263 & 265 of 2010 without costs. Both sides are directed to suffer their respective costs in both the above appeals.

**(K.M. JOSEPH) Judge**

**(M.L. JOSEPH FRANCIS) Judge**

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# T.M. BASHIAM VERSUS M. VICTOR

**Madras High Court**

**Bench : Hon'ble Mr. Justice M. Anantanarayanan, Hon'ble Mr. Justice Ramakrishnan & Hon'ble Mr. Justice Natesan**

*T.M. Bashiam*
*Versus*
*M. Victor*

**AIR 1970 Mad 12**

**Decided on 17 February, 1969**

- **This is a reference by the learned District Judge of South Arcot at Cuddalore, under Sections 10 and 17 of the Indian Divorce Act (4 of 1869) - entire reference involves an issue of law with regard to jurisdiction.**
- **Under the provisions of the Act (4 of 1869), a decree for judicial separation cannot ripen into a decree for divorce, by mere lapse of time.**
- **It is only under this Act (4 of 1869) that the law remains where it was, when this enactment was born, so that parties governed by this law are under the grave disadvantage that, even if a husband deserts his wife for a considerable period, that will be no ground for divorce; in our view, it is a genuine hardship, and there is urgent need for re-examination of the provisions of Act 4 of 1869, as the Act governs a large body of persons in this country to see that its provisions are rendered humane and up-to-date. Hence, with respect, we entirely concur in the observations of Alagiriswami, J., in the decision referred to. But the Courts have to administer the law as it stands, and as the law is today, there can be no decree nisi in this case in favour of the wife.**

## JUDGMENT

**Hon'ble Mr. Justice M. Anantanarayanan C.J.**

1. This is a reference by the learned District Judge of South Arcot at Cuddalore, under Sections 10 and 17 of the Indian Divorce Act (4 of 1869), for making absolute the decree nisi granted by him dissolving the marriage between the petitioner and the respondent. As the entire reference involves an issue of law with regard to jurisdiction, and, further, an issue concerning which we are unable to see any room for doubt or difficulty, it is not necessary to canvass the merits, except to the strict extent required for the disposal of this reference.

2. It is admitted that in certain earlier proceedings between the parties, which are among the typed papers as O. P. No. 240 of 1962, a decree was granted in favour of the petitioner (the wife) for judicial separation from the respondent (the husband) under Section 22 of the Indian Divorce Act. The petitioner alleges that though four years have passed since that decree, there has been no resumption of matrimonial living between the parties. In brief she now desires that she should be granted a decree nisi for dissolution of the marriage, merely because of the lapse of an interval of four years after the decree for judicial separation under Section 22.

3. It is sufficient to point out that this is plainly opposed to the scheme and the provisions of the Indian Divorce Act (4 of 1869). Though one may doubt the wisdom of the legislative provisions of this Act, in the light of more progressive marriage laws that have since been enacted with regard to other communities, as far as the parties governed by this Act are concerned, the decree for judicial separation does not ripen into a decree for dissolution of the marriage, because of the lapse of any interval of time. On the contrary, a wife under this Act, can obtain a decree for dissolution of the marriage under Section 10 only on the grounds exhibited under that section. If she alleges adultery against the husband, it will either have to be adultery coupled with cruelty as defined in the relevant clause, or adultery coupled with desertion for two years or upwards.

4. The learned Judge (District Judge) was perfectly aware of the limited nature of the reliefs that could be granted, under the provisions of the Indian Divorce Act. But it appeared to him that, under Section 7 of that Act, it would be competent for him to invoke the clauses of Section 7(1) to (3) of the Matrimonial Causes Act, 1950, of the United Kingdom. Under those provisions, a party may be entitled to the relief of divorce, if, for three years after the decree for judicial separation, there had been no resumption of cohabitation between the wife and the husband. The learned Judge invoked those provisions, and granted a decree nisi, subject to our confirmation.

5. It is sufficient to be very brief, to demonstrate that the learned Judge has fallen into a palpable error, in the course that he pursued Section 7 of the Act 4 of 1869 makes it clear beyond doubt (1) that the section itself is 'subject to the provisions contained in this Act'; and (2) that what the section enjoins is that the High Courts and District Courts should 'act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief.' Apart from every other difficulty, there is the insuperable difficulty, that, under the provisions of the Act (4 of 1869), a decree for judicial separation cannot ripen into a decree for divorce, by mere lapse of time. That is opposed to the scheme and the provisions of the Act. For reasons best known to the Legislature, and into which we need not proceed here, the Legislature has limited the remedy of the wife to obtain divorce, to the situation and the causes set forth in the latter part of Section 10 of the Act. The fact that there was an earlier decree for judicial separation, and that the parties did not resume cohabitation of matrimonial living, is not a ground which this Act recognises as one entitling the wife to divorce.

   Upon the wording of the first contingent clause of Section 7 itself, that the principles of the section must be applied only subject to the provisions of the Act, the course adopted by the learned District Judge cannot be supported and must be set aside. Even apart from this, when the Legislature enacted that relief has to be given on principles and rules, as nearly as may be conformable to those on which English Courts give that relief in such cases, it is clear enough that this does not imply that a statutory remedy per se, unknown to this Act, can be thereby introduced into the Act, as a new right or obligation between the spouses. For instance, we have recently had occasion to scrutinise the English decisions upon several aspects of the law arising from the Indian Divorce Act, such as what kind of evidence would be reasonable proof of the act of adultery, what might reasonably amount to cruelty as defined under the law, and, under Section 14. what kind of conduct on the part of the husband, might amount to condonation of the offence of adultery by the wife. In all such matters, and in matters of the processual application of the provisions, certainly, cases in the English divorce courts can be referred to and applied under Section 7.

   It is noteworthy that, in G. S. Joseph V. Miss H. S. Edward, (FB) the one relevant decision on this aspect cited by learned counsel for the petitioner what was held was that Section 7 of the Indian Divorce Act had been preserved by the Adaptation of Laws Order of 1950, and hence that the English law and practice could be applied, and should be applied in regard to decrees for nullity. The matter related to the period that should ensue between the decree nisi and the decree absolute, and it was held that the English practice could be validly adopted in this respect. The decision is no authority for the view that some

statutory right, unknown to the personal law of the parties as embodied in this Act, could be introduced by virtue of Section 7; to do so would be contravening the provisions of Act 4 of 1869, and that would be opposed to Section 7 itself.

6. Apart from this, we may also point out that, as held by their Lordships in Shamarao v. Union Territory of Pondi-cherry, , after the Constitution came into force, the legislature cannot abdicate its functions by passing any Act to the effect that the future amendments to a foreign Act would continue to apply to the territory of that legislature. The matter related to the Pondi-cherry General Sales Tax Act (10 of 1965), which extended the Madras General Sales Tax Act (1 of 1959) not only as it stood on the date of enactment of the former measure, but inclusive of the subsequent modifications and amendments as well. Since, admittedly, the Matrimonial Causes Act has been subsequently amended, in several respects, it cannot be contended that those future amendments must also be accepted as applicable to India by virtue of Section 7. In our view, Section 7 does not incorporate the statutes, of some other country as part of the law of this land; it merely makes a provision for conforming to the practice and principles of the matrimonial Courts in England in the matter of Divorce or Dissolution of marriage subject to the provisions and the scheme of the Indian Divorce Act. The decree nisi granted by the learned District Judge is, therefore, lacking in jurisdiction and will necessarily have to be set aside.

7. In this context, learned counsel for the petitioner (the wife) has raised an argument that Section 17 itself mav be taken as violating Article 14 of the Constitution, because it provides for the reference to this Court to be heard by a Bench of three Judges of this Court, for confirmation of a decree nisi for dissolution of marriage granted by any District Court whereas, with regard to such cases arising under the original civil jurisdiction of this Court, this Court itself exercises that jurisdiction as the High Court, and the proceeding is a petition before a learned Single Judge of this Court on the Original Side. The argument appears to be wholly lacking invalidity. Firstly, it is not an unreasonable differentiation; nor one unrelated to a very clear principle of distinction, that the jurisdiction of a uperior tribunal attracts cases arising within its territory, while inferior tribunals have to deal with cases in their similar jurisdictions. If such a principle or scheme were to be held as offending Article 14, the entire hierarchy of Courts, and the different provisions for the institution and disposal of civil matters in these Courts will have to be abolished.

   Further, we may point out that under Section 8 of the same Act, the High Court has the power to remove any cause from the Court of any District Judge, to itself. If a particular petitioner requires a trial on the original side of this Court, that petitioner has a mode of approach to this Court for redress by invoking this provision, of course, in a suitable case. Again, even a decree for dissolution granted by a learned single Judge of this Court is admittedly a decree nisi, and may be sub-icct to a Letters Patent Appeal under Section 15 of the Letters Patent. We are unable to see any principle of discrimination whatever in Section 17 of the Act, and we may finally observe that, even if such an argument has to be accepted tor the sake of hypothesis, it would still involve an adverse result to the petitioner, because the reference itself will have to be quashed, as well as the decree nisi of the learned District Judge.

8. Before parting with the case, we may observe that the provisions of Act 4 of 1869 appear to be highly antiquated, and that they have not kept pace with the provisions of similar enactments relating to marriage in other communities, which are of a far more progressive character. This anomaly was noted by Alagiriswami J. in S. D. Selvaraj v. Mary, 1968-1 Mad LJ 289 at p. 294 and he contrasted this Act with the English Matrimonial Causes Act which amended the earlier laws in England, and "put the husband and wife on equal footing". The learned Judge also pointed out that the law under the Hindu Marriage Act is more progressive, as well as the Parsi Marriage Act, and that this enactment alone, applying, as it does to the Indian Christians, remains at the same primitive stage. In scrutinising the provisions of the English Matrimonial Causes Act, 1950, we find under Section 1 (1) (b), if one of the spouses has deserted the other without cause for a period of at least three years immediately preceding the presentation of the petition, that itself is a ground recognised by the law for divorce. As Alagiriswami, J. points out, the

Hindu Marriage Act has been equally progressive, and the Parsi Marriage Act was amended in 1936, to bring it in conformity with these progressive enactments.

It is only under this Act (4 of 1869) that the law remains where it was, when this enactment was born, so that parties governed by this law are under the grave disadvantage that, even if a husband deserts his wife for a considerable period, that will be no ground for divorce; in our view, it is a genuine hardship, and there is urgent need for re-examination of the provisions of Act 4 of 1869, as the Act governs a large body of persons in this country to see that its provisions are rendered humane and up-to-date. Hence, with respect, we entirely concur in the observations of Alagiriswami, J., in the decision referred to. But the Courts have to administer the law as it stands, and as the law is today, there can be no decree nisi in this case in favour of the wife.

9. The decree is accordingly set aside. There will be no order as to costs.

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# KALAICHEZHIYAN SRINIVASAN VERSUS NIRMALA

**Madras High Court**

**Bench : Hon'ble Mrs. Justice R. Banumathi and Hon'ble Mr. Justice B. Rajendran**

*Kalaichezhiyan Srinivasan*
*Versus*
*Nirmala*

**O.S.A.No.255 of 2011**

**Decided on 15 September, 2011**

- **Challenge in this appeal is order dated 21.6.2011 made in Application No.916 of 2011 in O.P.No.186 of 2010, whereby the learned single Judge declined to modify the earlier order dated 30.06.2010 in respect of visitation rights of appellant.**
- **The modification sought for by the appellant is to permit him to have the custody of the child "Nithyanand" with suitable visitation rights to the respondent. The appellant had alleged that he is travelling to India from Dubai every alternative week and incurring huge expenditure of about Rs.1 lakh per month and if he is granted the custody of the child, the said amount could be utilised atleast for the benefit of the minor child.**
- **We spoke to the child and the child stated that he is studying in II Standard, He conversed well both in English as well as in Tamil and he understood the questions put by us. The child expressed that he was very comfortable in Dubai and he would very much like to continue the studies in Cambridge International School in Dubai. The child also expressed that though he is okay with the grant parents, he very much longs to be with both mother and father in Dubai.**
- **The expression "welfare of a minor" is a term of a very wide connotation; it ought not to be measured in money only or by physical comfort alone. It has many facets, such as financial, educational, moral, ethical and due regard has to be had to the ties of love and affection and capacity of building up of a good career of the minor.**
- **The custody of the minor child "Nithyanand" shall be with the Respondent/mother, who is at Dubai and the Appellant/father shall have visitation rights. The Respondent shall hand over the passport of the minor child within one week from today to the Appellant to enable the Appellant to obtain Visa for the minor child.**

## JUDGMENT

(Judgment of the Court was delivered by **R.BANUMATHI,J.**) Challenge in this appeal is order dated 21.6.2011 made in Application No.916 of 2011 in O.P.No.186 of 2010, whereby the learned single Judge declined to modify the earlier order dated 30.06.2010 in respect of visitation rights of appellant.

2. Marriage of appellant and respondent was solemnized on 27.6.1997 as per Hindu rites and customs. After marriage, the couple moved to Dubai, where the appellant was working and respondent also got an employment as Software Engineer. Out of their wedlock, minor child "Nithyanand" was born on 10.03.2005. The appellant also started a restaurant in 2004 named "Balaji Bhavan" in Dubai and had a very good business. From out of their earnings, appellant and respondent purchased various immovable

properties in and around Chennai and in the State of Tamil Nadu. Respondent has a younger sister by name Chitra, who is stated to have been separated from her husband and living with her parents, expressed her interest to come to Dubai to make a living. The said Chitra left her only daughter at her parents house and went to Dubai to live with the appellant and respondent. The said Chitra was taking care of the restaurant. After Chitra went to Dubai, differences arose between the appellant and respondent and relationship between appellant and respondent strained. When the appellant expressed his intention to disinvest from the restaurant, the respondent and her sister lodged a police complaint in Dubai against the appellant alleging that the appellant is trying to grab the restaurant from the respondent's sister - Chitra. In these circumstances, on 23.11.2009, the respondent and her sister left for India with minor child and left the child under the custody of respondent's parents and thereafter respondent and her sister went to Dubai leaving the child in India under the custody of their parents. From then onwards, the couple were living separately in Dubai. After return of the respondent to Dubai, differences deepened. Regarding the immovable properties, there were number of litigations between the parties viz., Suit DO.S.No.140 of 2010 in Principal District Court, Chenglepet and O.S.No.584 of 2010 before the Alandur District Munsif's Court. The appellant had also filed criminal case against the respondent in Dubai for Cheque bounce case. In the said case, Dubai Court found the respondent guilty and she was imposed sentence of three months. Challenging it, the respondent has also preferred appeal. It was stated that while imposing the sentence, the passport of the respondent has been impounded and therefore she is not in a position to move out of Dubai.

3. Thereafter, the appellant filed a Petition for restitution of conjugal rights in Dubai Family Court and the Court recorded that reconciliation was not possible. Child Nityanand continued to be in Chennai with the maternal grand parents. In these circumstances, the appellant had filed O.P.No.186 of 2010 under Section 25 of the Guardians and Wards Act seeking custody of the minor child Nithyanand. In A.No.1246 of 2010, single Judge has passed the order on 30.06.2010 inter alia ordering:-

   (i) to let the minor child to talk to the appellant when ever he calls the child over phone;

   (ii) parents and the brother of the appellant were permitted to see the child on every Sunday at a common place, which was agreed as Ponniamman koil near the house of parents of respondent at Pallikarani;

   (iii) the parents and brother of the appellant or anyone claiming under them not to do anything which will disturb the minor child and the minor child should not be taken out of the temple during their visits.

4. Subsequently, in 2010, number of orders came to be passed on various dates. On 11.01.2011, the single Judge has passed the order permitting the appellant to take interim custody of the child from the office of the counsel for the respondent on every alternative Friday evening and return the child on the following Sunday after surrendering the passport.

5. During the continuance of the above arrangement, appellant has filed A.No.916 of 2011 seeking for modification of the original order dated 30.06.2010. The modification sought for by the appellant is to permit him to have the custody of the child "Nithyanand" with suitable visitation rights to the respondent. The appellant had alleged that he is travelling to India from Dubai every alternative week and incurring huge expenditure of about Rs.1 lakh per month and if he is granted the custody of the child, the said amount could be utilised atleast for the benefit of the minor child. The appellant has also averred that the child was studying in Cambridge International School in Dubai, which is of International standard and in India the child is put in Sharanalaya Public School, Viduthalai Nagar, Chennai, which is not of equal high standards. The appellant had also alleged that he had taken insurance policy for the education of his son with periodical endowment benefits for which he and his wife are paying the premium. The appellant had also alleged that custody of the child could be given to respondent/mother with visitation rights to

the appellant, which would enable him to save the trouble of flying down to India every alternative week and would also save huge sum of money.

6. By the impugned order dated 21.06.2011, learned single Judge declined to modify the order holding that if custody is given to the appellant, the child will be moved out of the jurisdiction of the Court. The learned judge further pointed out that the conviction, which the respondent is facing in Dubai in a cheque bounce case and that she is not in a position to move outside the jurisdiction of the Court in Dubai and therefore respondent may not be able to seek redressal before the Madras High Court, especially on account of the circumstances in which she is placed. The learned judge held that if the respondent is in a position to travel to India and seek assistance of the court at any point of time, then only permission can be granted to the appellant to move the child temporarily out of the jurisdiction of the Court.

7. Learned counsel for appellant Mr.Raghavachari has submitted that the learned Judge did not keep in view that the appellant is spending nearly Rs.1 lakh for his air travel alone to come to Chennai from Dubai once in a fortnight to see the child. He further submitted that the appellant has expressed his readiness that custody of the child could be given to mother, who is at Dubai, pending the main petition with fortnight visitation rights to the appellant in Dubai. It was further submitted that the learned Judge erred in holding that if the modification application is allowed and if the child is to be taken to Dubai, there is no way to compel the parties to bring back the child to India. The main submission of the appellant is that the appellant is spending huge amount of money and most of his earnings are being spent on air travel alone.

8. Drawing our attention to the various litigations between the parties and also the Cheque bounce case, the learned counsel for respondent has submitted that because of the conviction in Cheque bounce case, the respondent is not in a position to move out of Dubai and because of the circumstances in which she is placed, if child is moved outside the jurisdiction of the Court, the respondent may not be able to seek any redressal before this Court. It was further submitted that the interest of the child is being well taken care by her parents and therefore there is no justification for interfering with the impugned order.

9. When the matter was heard by us on 19.8.2011 in the morning session, being a Friday, the day of exercise of visitation rights, the appellant was also present in the Court. Learned counsel for the appellant insisted that we must talk to the child. Since it was the visitation week end, we directed the learned counsel for respondent to ask the grandparents of the child to bring the child to the Court at 3.30 p.m. Accordingly, the minor child "Nithyanand" was produced before us by the grandfather in the Chamber at 3.30 p.m and we asked the grandfather and the appellant as well as the counsel for both sides to remain outside. We spoke to the child and the child stated that he is studying in II Standard, He conversed well both in English as well as in Tamil and he understood the questions put by us. The child expressed that he was very comfortable in Dubai and he would very much like to continue the studies in Cambridge International School in Dubai. The child also expressed that though he is okay with the grant parents, he very much longs to be with both mother and father in Dubai. While talking to the child, we could realise that the child was missing the love and affection of both mother and father. After talking to the child, we asked the parties to come inside the Chamber. When the parties came inside, we asked the child whether he wants to go to the father, immediately the child rushed to the father, hugging and kissing him. Thereafter we directed the appellant to take the child for exercise of his visitation rights for that and also directed him to hand over the passport as directed by the learned single Judge. Till the time we completed the hearing, the child tightly stuck to the father.

10. Though we are called upon to decide the temporary arrangements to be made during the pendency of the main O.P, law is well settled and in deciding the question of custody of a minor, welfare of the minor is of paramount importance. The boy, who studied in Cambridge International School in Dubai, which is of International Standard, is put in a very moderate school in Chennai. The boy now lives with maternal grandfather and grandmother and living away from his parents. We have noticed that the child is really

missing the love and affection of both mother and father. While considering the paramount interest and welfare of the minor child, maintenance, education and the loving care that the child would receive are the factors to be kept in view. The child, having been brought up in Dubai and started his education in Cambridge International School and now because of the strained relationship of the parents now put in a very moderate school and in very disadvantageous position. In our considered view, love and affection of father and mother and the good education will ensure the self development of the child both in thought, actions and behaviour and his well being.

11. The expression "welfare of a minor" is a term of a very wide connotation; it ought not to be measured in money only or by physical comfort alone. It has many facets, such as financial, educational, moral, ethical and due regard has to be had to the ties of love and affection and capacity of building up of a good career of the minor. In the circumstances of the case, keeping in view the interest and welfare of the minor child, in our considered view, it would be appropriate that the child has to be sent back to Dubai. Even though the appellant had asked for interim custody of the child, both in the petition as well as in the grounds of appeal, the appellant had also stated that he has no objection if custody of the child is granted to the respondent/mother and that he could be given visitation rights in Dubai. We also feel sending back the child to Dubai would be in the welfare of the child as the child can have the love and affection of both mother and father. It would also ensure good education for the child and at the same time, it would save the appellant from the trouble of flying down to India once in a fortnight and would also save a huge sum of money, which can be usefully spent either for the child or other useful purposes.

12. As pointed out earlier, because of the differences between the parties, the appellant had filed a criminal case against the respondent in respect of bouncing of a cheque issued by her in favour of the appellant. In the said criminal case, the respondent was convicted and sentenced to three months imprisonment. Challenging the said conviction, the respondent has preferred appeal and her passport is said to be impounded. That apart, the appellant had also filed a Civil Suit before the Principal District Court, Chenglepet in O.S.No.140 of 2010 and O.No.584 of 2010 - suit for permanent injunction has also been filed before the District Munsif's Court, Alandur.

13. Having regard to the grounds raised in the Memorandum of Appeal and also the submissions made by the learned counsel for Appellant, solely keeping in view the interest and welfare of the minor child, it would be appropriate that the child is sent back to Dubai. The child, being of tender age, custody of the minor child is given to the mother, who is in Dubai by giving visitation rights to the Appellant. Pending disposal of the main O.P, the appellant shall have the visitation rights on 2nd and 4th week ends of every month (Friday + Saturday). The appellant shall have the custody of the child at 10.00 A.M on the Friday morning of the 2nd and 4th week ends and shall have the custody of the child till Saturday and hand over the child back to the respondent on Saturday evening before 5.00 P.M. The impugned order is modified and this appeal is partly allowed.

14. We have posted the matter today [16.09.2011] under the caption "for clarification and judgment". The Appellant is also present in Court. Regarding exercise of visitation rights and the place of taking the child at Dubai, we have heard Mr.V.Raghavachari, learned counsel appearing for the Appellant and Mr.V.Manohar, learned counsel appearing for the Respondent. We have also heard the appellant.

15. In the result, the order of the learned single Judge dated 21.6.2011 in Application No.916 of 2011 is modified and this appeal is partly allowed with the following directions:-

The custody of the minor child "Nithyanand" shall be with the Respondent/mother, who is at Dubai and the Appellant/father shall have visitation rights.

The Respondent shall hand over the passport of the minor child within one week from today to the Appellant to enable the Appellant to obtain Visa for the minor child.

Mr.Sriram, Advocate is appointed as Commissioner for handing over the custody of the minor child to the Respondent. His remuneration is fixed at Rs.25,000/- and the same shall be paid by the Appellant directly to the Advocate-commissioner. That apart, the appellant shall also bear the travel expenses to the Advocate Commissioner. The Advocate-Commissioner shall take the minor child-Nityanand to Dubai after obtaining necessary Visa and hand over the passport and the minor child to the Respondent-mother. The custody of the child in Dubai with the Respondent/mother is subject to the result of the main O.P.

Appellant shall exercise visitation rights on the 2nd and 4th week ends of every month. That is the Appellant shall take custody of the minor child at 10.00 A.M on the Friday morning of the 2nd and 4th week ends and shall have the custody of the minor child till 4.00 P.M on Saturday and hand over the minor child back to the Respondent-mother before 5.00 P.M. on Saturday evening. The handing over and taking over of the custody of the child shall take place at Zabeel Park, Dubai Karama.

Appellant shall take necessary steps to get admission for the minor child in the Cambridge International School at Dubai, where he earlier studied and shall bear all the expenses for the studies of the minor child. Respondent shall also hand over all the school records pertaining to the minor child to the Appellant enabling him to get admission.

Both parties shall strictly adhere to the directions issued by this Court. The Appellant also filed an affidavit to that effect.

Till the obtaining of Visa for the child to go to Dubai and the handing over of the custody of the child to the Respondent/mother by the Advocate Commissioner, the appellant shall continue the visitation rights in India as per the impugned orders.

The above interim arrangement is passed without prejudice to the contentions of both parties in the O.P. Both parties shall also co-operate for early disposal of the O.P.

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# JAYANTHI, D/O. JAYARAMAN VERSUS THE COMMISSIONER OF POLICE, COIMBATORE

**Madras High Court**

**Bench : Hon'ble Mr. Justice K. Mohan Ram and Hon'ble Mr. Justice G.M. Akbar Ali**

*Jayanthi, D/o. Jayaraman ..... Petitioner/Mother of the detenu*
*Versus*
*1. The Commissioner of Police, Coimbatore 2. The Assistant Commissioner of Police, Law andOrder, East Sub-Division, Coimbatore City 3. R.B Pugazh, S/o. R. Bhaskaran ..... Respondents*

**Habeas Corpus Petition No. 1696 of 2011**

**and**
**M.P No. 1 of 2012**

**Decided on May 9, 2012**

**In this case, it is not in dispute that the parties are Indian citizens and therefore the Laws of Australia are not applicable to them.**

**After staying together in India, the petitioner and the third respondent had moved over to Singapore and the detenu-P. Arjun was born on 14.06.2004 at Singapore. The petitioner, the third respondent and the Child-P. Arjun were living together at Singapore till the petitioner and her son-P. Arjun moved to Perth, Australia.**

**We are of the considered view that the custody of the detenu-P. Arjun with the third respondent is in violation of the order of the Magistrate's Court at Perth, Australia, and as such it is prima facie illegal. Taking that aspect into consideration along with the aforesaid facts and circumstances andthe welfare of the minor/detenu, the detenu, P. Arjun, is directed to be set at liberty and the custody of the detenu is handed over to the mother/the petitioner herein (Jayanthi, D/o. Jayaraman).**

**The third respondent is hereby directed to handover the passport of the detenu-P. Arjun to the petitioner immediately. The petitioner is permitted to take the child to Australia subject to the condition that the petitioner shall file an affidavit undertaking that she will abide by the orders that may be passed by the Family Court, Coimbatore.**

## ORDER

**Hon'ble Mr. Justice K. Mohan Ram, J.,**

The petitioner is the legally wedded wife of the third respondent. The petitioner is an Indian Citizen, yet she had been living in Singapore since age 4. The petitioner had been a resident of Singapore from 1983. The marriage between the petitioner and the third respondent took place at Sirkali, Tamil Nadu, on 24.6.2011 The third respondent is an engineering graduate. After the marriage, the third respondent moved to Singapore and stayed with the petitionerand he got an employment at Singapore. The detenu P. Arjun was born on 14.6.2004 at Singapore. According to the petitioner, she and the third respondent did not have a smooth matrimonial life as the third respondent was dissatisfied with his job at Singapore and hence, he obtained a skilled migrant visa to Australia in 2008. Initially, the petitioner moved to Perth, Australia with the detenu P. Arjun in March 2010

and the detenu began his schooling at Perth. The petitioner began working as a Medical Scientist in Clinipath Pathology. The third respondent joined them at Perth in July 2010.

2. According to the petitioner, as the third respondent could not find a job at Perth, he began to show his frustration on the petitioner and the child and this led to a lot of arguments with the third respondentand he abused the petitioner on several occasions. On 21.8.2010, the third respondent pulled the detenu P. Arjun out of school without the consent of the petitioner and he booked air tickets for him and the detenu P. Arjun to go to India. Despite her earnest requests and pleadings, the third respondent took the detenu P. Arjun to India on 22.8.2010 After much coaxing and pleading, the third respondent brought back the detenu P. Arjun on 20.9.2010

3. It is the further case of the petitioner that on 20.9.2010, the third respondent threatened to take P. Arjun to India and in such circumstances, the petitioner had to hide their passports. Infuriated on this, the third respondent verbally abused the petitionerand physically assaulted her in front of her son anddemanded to return the passports. Left with no other option, she called the police for help and the police gave a 24 hour Violence Restraining Order (VRO) to the third respondent. The next day, the Magistrate's Court at Perth granted VRO to the petitioner and her son, which was later dismissed as the third respondent was not violent. Thereafter, the third respondent initiated proceedings in the Court at Perth for shared parental responsibility. Based on the compromise arrived at between the petitioner and the third respondent, the Magistrate Court at Perth, Australia passed final orders on 7.7.2011 granting shared parenting responsibility of the detenu P. Arjun and granted permanent custody of the detenu P. Arjun allowing him to stay with the petitioner at Perth. The orders contained a detailed schedule for the detenu P. Arjun to spend time with the third respondent. As per the Order, either parent could take the child P. Arjun outside Australia for a period upto three weeks for the purpose of a holiday after givng the other parent 21 days written notice. The travelling parent also has to provide a written itineraryand proof of return tickets to the other parent within 14 days of the departure and also deposit a sum of Aus $ 5000/- into the Trust account of the solicitors ofthe non-travelling parent within 14 days of departure. The travelling parent must also provide a mobile telephone number to the other parent to facilitate reasonable telephone communication with the child P. Arjun during overseas travel.

4. On 12.9.2011, the third respondent sent an email attachign the itinerary of his plan to travel to India with her son from 1.10.2011 to 8.10.2011 on a holiday. As per Clause 19 of the final order, dated 7.7.2011, the passport of the child P. Arjun was directed to be returned to the petitioner. Hence, the third respondent sought her help in obtaining the passport from the Registry since it required the petitioner to be personally present along with the identity proof. Honouring andrespecting the consent order of the Magistrate Courtand believing that the request of the third respondent is bona fide, the petitioner extended her fullest cooperation to him and obtained and handed over the detenu P. Arjun's passport to the third respondent.

5. The third respondent took the detenu P. Arjun andflew to India on 1.10.2011 In India the third respondentand the detenu P. Arjun were staying at the house of the third respondent's sister Aghil and her husband Dr. Jayavardhana at Coimbatore. On 7.10.2011, the petitioner received an email from the third respondent stating that the detenu had viral fever and eye infection and hence, their return to Australia will be postponed. The thrid respondent also sent a medical report issued by his sister's husband Dr. Jayavardhana to that effect. On 8.10.2011, the petitioner spoke to the detenu P. Arjun to enquire about his health and at that time, the detenu sounded very nervous anddisoriented and did not speak normally. When the petitioner asked about the eye drops to treat the eye infection, the detenu was very confused as he did not suffer from any eye problem and was not treated for the same. Thereafter, the petitioner could not contact the detenu through his mobile number and the same continued to be switched off. The petitioner sent an email to the third respondent on 8.10.2011 asking for the return date, but there was no reply. On 19.10.2011, the petitioner's lawyer in Australia received a fax from the third respondent's

lawyer stating that the third respondent intended to remain in India with P. Arjun, the detenu. It was also informed that the third respondent has moved the Family Court at Coimabtore for divorce.

6. In such circumstances, on 21.10.2011, the petitioner sent an online complaint tothe Tamil Nadu Police at tnpolice@tn.gov.in seeking their assistance to recover her son from the third respondent. Since no action was taken by the Police authorities, the petitioner has filed the above H.C.P

7. It is the further case of the petitioner that when she approached the Magistrate Court at Perth, she was given to understand that while the actions of the third respondent were in breach of the Family Court order concerning children and may carry a penalty upto 12 months imprisonment, the authorities in Australia could not help her and advised her to initiate legal proceedings in India since P. Arjun is kept in unlawful custody at Coimbatore, India. In such circumstances, since the petitioner could not contact the third respondent and the detenu P. Arjun, the petitioner came to India on 4.11.2011 On 5.11.2011, the petitioner received a legal notice dated 4.11.2011 through email containing several false allegations and it is stated that the third respondent decided to stay in India along with the detenu P. Arjun, which is in violation of the consent order on shared parenting responsibility dated 7.7.2011 passed by the Magistrate Court at Perth, Australia. It is also stated that the third respondent had initiated divorce proceedings against the petitioner in H.M.O.P No. 1169 of 2011 on the file of the Family Court, Coimbatore.

8. It is the further case of the petitioner that the third respondent has violated the consent order by cutting off the telephone connection given to the child andthus prevented the petitioner from communicating with the child. The petitioner is concerned about the healthand safety of the detenu P. Arjun. The petitioner is afraid to travel to Coimbatore because of the hostile atmosphere there and the threats, which she has been receiving from the third respondent and his men. The petitioner has availed unpaid leave of absence from her present employment and has come down to India to secure the custody of her son.

9. According to the petitioner, the detenu P. Arjun is enrolled in Year Two at Mount Pleasant Primary School at Perth, Australia; he has been performing well at school and is active in extracurricula activities like swimming; his behavioural assessment report dated 21.10.2010 states that he is well settled in his attitudeand behaviour; his teacher also reported as early as in 2010 that he had began to apply himself to his workand accepts help that is given to guide his work; the detenu P. Arjun is very set in his surroundings at Perth, goes to school there and had his friends there. Therefore, it is just and proper to restore the child to the ambience that is conducive and comfortable for him. The child is of an impressionable age and the third respondent must not uproot him from his surroundings to take advantage of his own wrongs.

10. The third respondent has filed a counter affidavit inter alia contending as follows:-

The entire allegatiosn and averment made in the affidavit of the petitioner have been denied as false, except that are specifically admitted by him. The H.C.P is not maintainable in law or on facts since the detenu is in lawful custody. The orders passed by the Magistrate Court at Perth is not having any binding effect since India is not a signatory to the Hague convention. The third respondent at the time of marriage was working as Senior Engineer in L & T, ECC Mumbai and the petitioner had completed Diploma in Nursing andjoined as Staff Nurse in National University Hospital, Singapore. The third respondent is an Indian Citizen, the laws in India are applicable to the custody of P. Arjun. The detenu is aged about 7 years and is studying at Perks Matriculation Higher Secondary School, Coimbatore and is comfortable in India and is free from racist attack as has been undergone by him in Australian School. As the petitioner is working as Lab Technician, Clinipath Pathalogy, she has no time to spend with P. Arjun during her working days, whereas in India the detenu had his grand parents to support andinvest their life in upbringing the detenu. The Australian Courts do not have jurisdiction to entertain the custody petition of Indian Citizens as India is not signatory to Hague convention. The allegations of threatening are inventged only for the purpose of filing this H.C.P The petitioner did not make any attempt to visit Coimbatore to see the child. After the marriage, initially, the petitioner and the third respondent set up their matrimonial home at Trichy and due to repeated pestering of the petitioner, the third respondent resigned his job as Senior

Engineer, L & T ECC, Mumbaiand shifted to Singapore. During 2008, the third respondent applied for permanent residence for his family with Australian Government andaccommodated his family in the month of March 2010. From March 2010 till his return to India with P. Arjun he had financially supported her. The allegations of frustration, arguments and misunderstanding cropped up only on revelation of extra marital affairs of the petitioner with one Dr. Senthil Kumar. When the petitioner was enquired about the extra marital relationship, she fairly admitted and sought for divorceand asked the third respondent to leave Australia.

11. According to the third respondent, he and the petitioner discussed about the custody of P. Arjun andfinally they sought the consent of P. Arjun, who wanted to live with the third respondent, and therefore, he was removed from the school and booked the tickets to India and the petitioner came to the Airport for sending off the third respondent and the child on 22.8.2010

12. It is further contended that after coming from Australia, he wanted to file a divorce petition on the ground of adultery and cruelty, but the parents of the petitioner called him and begged to give her second chance to save the marriage. The petitioner has also called and warned the third respondent that she would committ suicide, if the third respondent did not return back to Australia. On humanitarian grounds, the third respondent went back to Australia on the night of 20.9.2010 There was heated arguments between the third respondent and the petitioner over the removing of his mattress from his bedroom and the petitioner replied that since the marriage has already been broken down, they are going to live separately but under one roof. Feeling cheated, the third respondent informed the petitioner that he will be back to India with his son. At that time, the petitioner is said to have taken the passports and hidden them. When the third respondent asked for the return of the passports, as she refused to return the same, there was a tussle in which, his hands struck her face. Immediately the petitioner called the Australian police and 24 hours restrained order was passed against the petitioner from entering his house and reaching his son. Thereafter, the petitioner moved Family Court, Australia and obtained parenting responsibility.

13. According to the third respondent, he was forced to submit to the jurisdiction of Australian Courts only in the interest of the welfare of the child. According to the third respondent, he got an email from the petitioner's paramour's co-sister, namely, Ms. Chandramani, which reveals the close contacts of the petitioner with Dr. Senthil Kumar, who had also sought divorce from his wife. On petition to the Family Court, Australia, the third respondent got shared parenting responsibility with the petitioner. During his interim custody, his son P. Arjun complained about racism in his school that his co-students used to discriminate him of being dark and they eliminate him during gamesand he was avoided for all their get together andsocial parties and therefore, he becomes shy due to racism. His son was never comfortable with the Australian Education system. Therefore, his son wanted a break and desired to be with his grand parents in India during his school vacation. Only, in such circumstances, he came to India on 1.10.2011 with the consent of the petitioner.

14. The third respondent and his son were supposed to fly back to Australia on 9.10.2011 but as the detenu P. Arjun was afffected with viral fever, their return had to be postponed. At that time, P. Arjun wanted to stay in India with his grandparents and since he was adamantand seeing his welfare and he faces racism in Australian School, the third respondent decided to stay in India. The third respondent resigned his job explaining his situation and cancelled the return tickets. He vacated the rental house and got back the advance money.

15. According to the third respondent, he took the decision to stay in India only on the welfare and well being of his son and now he put his son in a reputed Matriculation School at Coimbatore. The third respondent has got employment and earning lump sum to suppor his child and is living only for the welfare and well being of his son, whereas the petitioner is the part time lab technician and due to her luxury style of living will not be sufficient for upbringing his child. Therefore, he has filed HMOP. NO.

1169 of 2011 for divorce before the Family Court, Coimbatore, on the grounds of cruelty and adultery. Only as a counterblast, the above H.C.P has been filed.

16. According to the third respondent, the detenu is well placed in India and is psycholigically feel good and in such circumstances, if any order is passed against his wish, it would disturb his mental condition andtherefore, in the interest of child, the above H.C.P may be dismissed. Further, the third respondent is willing to give her divorce as she wanted and she should not disturb the third respondent and his son by filing such kind of petitions. On the aforesaid contentions, the third respondent sought for the dismissal of the above H.C.P

17. Heard both.

18. The learned counsel for the petitioner after narrating the factual aspects stated above submitted that the third respondent has violated Clause 13 of the consent order passed by the Magistrate Court, Perth, Australia, dated 7.7.2011 The learned counsel submitted that on 1.10.2011 the third respondent andthe detenu came to India and as per the undertaking given by the third respondent and as per the return tickets purchased by the third respondent for him andthe detenu, the third repsondent should have returned back to Australia with the detenu on 9.10.2011 But he had failed to return to Australia with the detenu andthus he had violated the orders of the Australian Court. But on 7.10.2011, the third respondent sent an e-mail communication to the petitioner stating that the detenu had viral fever and eye infection and hence, their return to Australia had been postponed. On 8.10.2011 the petitioner spoke to the detenu but thereafter, she was unable to contact the child as the mobile phone had been switched off. But on 19.10.2011, the third respondent through his lawyer had informed the petitioner's lawyer that the third respondent has intended to remain in India with the detenu and third respondent had also initiated divorce proceedings before the Family Court, Coimbatore.

19. The learned counsel submitted that the aforesaid facts make it clear that even at the time when the third respondent left Australia to India with the detenu he had made up his mind not to return back to Australiaand thus he had played fraud upon the petitioner as well as on the Australian Court by violating the Australian Court's order. The learned counsel submitted though it is stated in the counter affidavit that the third respondent is presently employed, but the details of the present employment, income etc. have not been furnished. The third respondent, according to the petitioner, is not employed and is not having any income of his own to take care of the detenu. The learned counsel submitted that whereas the petitioner is gainfully employed at Perth and she can take better care of the detenu than the third respondent and thechild is only aged about seven years and throughout the detenu had been with the petitioner and she had taken proper care of the detenu. The learned counsel submitted that there is absolutely no truth in the allegations made by the third respondent that the petitioner had illicit intimacy with one Dr. Senthil Kumarand the fact that the third respondent had returned back from India to Australia on an earlier occasion andhad joined with the petitioner itself will show that there was no truth in the allegation.

20. The learned counsel submitted that there is absolutely no truth in the allegation made in the counter affidavit filed by the third respondent that the detenu P. Arjun was racially discriminated at Australia, since he happens to be an Indian. The said allegation is only a pure imagination of the third respondent. The learned counsel submitted that his school reports andextracurricular activities of the detenu P. Arjun, which are enclosed in the typed set of papers makes it clear that Arjun was very much comfortable in his schooland he was good at studies as well as extracurricular activities.

21. The learned counsel submitted that a perusal of the student achievement report of the detenu P. Arjun furnished by the Mount Pleasant Primary School shows that his learning for achievement was satisfactory andhis achievement in extracurricular activities was also satisfactory. The learned counsel submitted that the said report shows that the detenu cooperated productively and built positive relationship with others. The said report also states that the detenu showed confidence in making positive changes anddecisions.

Therefore, according to the learned counsel, the contention that the detenu was racially discriminated at Australia is a total falsehood. If really, the detenu had been racially discriminated at Australia, he could not have faired satisfactorily at School both in his studies and extracurricular activities. It was the petitioner, who had put the child into school and he was also admitted to swimming course. The learned counsel submitted that the report of Blue Gum dated 2.10.210 shows that the detenu P. Arjun had made new friends. Therefore, the learned counsel submitted that taking into consideration of the tender age of the detenu and the fact that the petitioner is gainfully employed at Australia whereas the third respondent is currently unemployed and has to solely depend upon his parents for his livelihood and of the detenu and in the interest and welfare of the child, the custody of the child has to be handed over to the petitioner andpermit her to take the child to Australia. The third respondent has to work out his remedies before the Australian Court or in the proceedings said to have been initiated by him at the courts at Coimbatore. Unless and until, the third respondent obtains an order in his favour from a competent court either at Australia or in India, the third respondent is not entitled to have the custody of the detenu. When the third respondent is admittedly a violator of law and has no respect to rule of law he is not entitled to have thecustodyof the detenu.

22. In support of his contentions, the learned counsel based reliance on the following decisions:-

a. Dr. V. Ravi Chandran v. Union of India (W.P(Crl.) NO. 112 of 2007).

b. Ruchi Majoo v. Sanjeev Majoo (S.L.P(C) No. 9220 of 2010) (2011) 6 SCC 479.

23. Countering the said submissions, the learned counsel for the third respondent made the following submissions:-

Learned counsel submitted that when admittedly the petitioner, the third respondent and the detenu-P. Arjun are Indian citizens and Hindus, the Australian Laws are not applicable to them and therefore, the order passed by the Magistrate's Court at Perth, Australia, cannot be enforced in India; in the decisions cited by the learned counsel for the petitioner, the parties were not Indian citizens and therefore, the said decisions are not applicable to the facts of this case; the third respondent has filed HMOP No. 1169 of 2011 before the Family Court, Coimbatore, seeking divorce on the ground of adultery and cruelty and he has also filed GWOP No. 225 of 2012 before the same Courtand both the petitions are pending and therefore, the custody of the detenu including his interim custody can be decided only by the Family Court, Coimbatore, after elaborate enquiry.

24. Learned counsel for the third respondent further submitted that the child is happy here with the third respondent and grandparents; the grandparents of the detenu, namely, R. Baskaran and Smt. B. Prema, have filed an affidavit before this Court stating that the grand father is a retired Engineer in BHEL, Trichy and now engaged as Consultant in ABS Services, Trichy, as Service Engineer and the grandmother is a housewifeand both are willing to dedicate their life for upbringing of the child; they have also stated in the affidavit that the child is affectionate towards themand their bonding may not be snatched.

25. He further submitted that as laid down by the Apex Court in the decision reported in (2000) 3 SCC 14: 2000 SCC (Cri) 568 (Sarita Sharma v. Sushil Sharma) an elaborate enquiry can be directed to be conducted to decide the question to whom the custody of the childshould be granted by taking into consideration the welfare of the child. He further submitted that the mere violation of the order passed by the Magistrate's Court at Perth, Australia, by the third respondent itself will not entitle the petitioner to get the custody of thechild; the totality of the facts and circumstances of this case, the welfare of the child and the conduct of the petitioner and the third respondent should be taken into consideration. He further submitted that Document Nos. 5, 9 and 10, namely, Medical Bill, dated 31.07.2008, the Police Complaint, dated 27.09.2010 lodged by the petitioner's mother and the E-mail, dated 04.10.2010, sent by the co-sister of the paramour of the petitioner will clearly establish that the petitioner had illegal intimacy with one Dr. Senthil Kumar; in the light of such conduct of the petitioner, it is not desirable

to handover the custody of the child to the petitioner. He further submitted that the detenu has been admitted at Perks Matriculation Higher Secondary School, Coimbatore, and he has very well settled down in the new environment and therefore the rights of the child should not be disturbed.

26. We have considered the aforesaid submissions made by the learned counsel on either side andperused the materials available on record.

27. Before going into the merits of the contentions put forth by the learned counsel on either side, it will be better to understand the law laid down by the Apex Court in various decisions in respect of the duty of a Court exercising its Parens Patraie jurisdiction.

28. In the decision of the Apex Court rendered in the case of Ruchi Majoo v. Sanjev Majoo, in Civil Appeal No. 4435 of 2011, dated 13.05.2011, reported in (2011) 6 SCC 479, in paragraph 29, it is observed as follows:-

"29. Recognition of decrees and orders passed by foreign courts remains an eternal dilemma in as much as whenever called upon to do so, Courts in this country are bound to determine the validity of such decreesand orders keeping in view the provisions of Section 13 of the Code of Criminal Procedure 1908 as amended by the Amendment Act of 1999 and 2002. The duty of a Court exercising its Parens Patraie jurisdiction as in cases involving custody of minor children is all the more onerous. Welfare of the minor in such cases being the paramount consideration; the court has to approach the issue regarding the validity and enforcement of a foreign decree or order carefully. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of the minor is not enough for the courts in this country to shut out an independent consideration of the matter. Objectivity and not abject surrender is the mantra in such cases. That does not, however, mean that the order passed by a foreign court is not even a factor to be kept in view. But it is one thing to consider the foreign judgment to be conclusive andanother to treat it as a factor or consideration that would go into the making of a final decision. Judicial pronouncements on the subject are not on virgin ground. A long line of decisions of the court has settled the approach to be adopted in such matters. The plentitude of pronouncements also leaves cleavage in the opinions on certain aspects that need to be settled authoritatively in an appropriate case."

In the very same decision, after referring to several other decisions of the Apex Court, in paragraph 35, it is laid down as follows:-

"35….. A High Court may, therefore, invoke its extra ordinary jurisdiction to determine the validity of the detention, in cases that fall within its jurisdiction andmay also issue orders as to custody of the minor depending upon how the court views the rival claims, if any, to such custody. The Court may also direct repatriation of the minor child for the country from where he/she may have been removed by a parent or other person; as was directed by this Court in Ravi Chandran's & Shilpa Agarwal's cases (supra) or refuse to do so as was the position in Sarita Sharma's case (supra). What is important is that so long as the alleged detenue is within the jurisdiction of the High Court no question of its competence to pass appropriate orders arises. The writ court's jurisdiction to make appropriate orders regarding custody arises no sooner it is found that the alleged detenue is within its territorial jurisdiction."

In the very same decision, the Apex Court, after referring to the decision of the Apex Court reported in(1987) 1 SCC 42 (Elizabeth Dinshaw v. Arvand M. Dinshaw), has pointed out that in that case while dealing with a child removed by the father from USA contrary to the custody of the US Court directed that the child should be sent back to the USA to the mother not only because of the principle of comity but also because, on facts, - which were independently considered - it was in the intersts of the child to be sent back to the native State. In that case, the removal of the child by the father and the mother's application in India were within six months and therefore the Apex Court thought it fit to exercise its summary jurisdiction in the interest of the child. Further, in the said decision, the Apex Court, after taking note off the following facts, viz., that the child was not removed from America violating any

order of the American Court; the minor was living in India and pursuing his studies in a reputed school in Delhi for nearly three years; the father had contracted a second marriageand he did not appear to be keen for having actual custody of the minor, rejected the plea of the father to repatriate the child back to the USA, but gavevisitation rights to the father till the disposal of the Guardian OP filed by the mother. Further, it is pertinent to point out that the said decision was rendered in a case arising out of an Interlocutory Application passed by the Additional District Court at Delhi in a petition filed under Guardians and Wards Act granting interim custody of the minor to the mother.

29. In the decision reported in (2010) 1 Supreme Court Cases 174 (V. RAVICHANDRAN (DR.)(2) v. UNION OF INDIA) a Full Bench of the Apex Court, in paragraph 29and 30, has laid down as follows:-

"29. While dealing with a case of custody of a childremoved by a parent from one country to another in contravention to the orders of the court where the parties had set up their matrimonial home, the court in the country to which child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to child's welfare be investigated in a court in his own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of thechild as the paramount consideration and go into all relevant aspects of welfare of child including stabilityand security, loving and understanding care andguidance and full development of the child's character, personality and talents. While doing so, the order of a foreign court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case.

30. However, in a case where the court decides to exercise its jurisdiction summarily to return the childto his own country, keeping in view the jurisdiction of the Court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interest of the child. The indication given inMcKee v. McKee (1951 AC 352: (1951) 1 All ER 942 PC) that there may be cases in which it is proper for a court in one jurisdiction to make an order directing that achild be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interest of the child has been explained in L (minors), In (1974) 1 WLR 250: (1974) 1 All ER 913 (CA)and the said view has been approved by this Court inDhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112. Similar view taken by the Court of Appeal in H. (Infants), in (1966) 1 WLR 381 (Ch&CA):(1966) 1 All ER 886 (CA) has been approved by this Court in Elizabeth Dinshaw v.Arvand M. Dinshaw (1987) 1 SCC 42:1987 SCC (Cri) 13."

30. In the decision reported in (2000) 3 SCC 14 (referred to supra) relied upon by the learned counsel for the respondent, the Apex Court, has referred to the following passage in the decision reported in (1998) 1 SCC 112 (Dhanwanti Joshi v. Madhav Unde):-

"As of today, about 45 countries are parties to this Convention. India is not yet a signatory. Under the Convention, any child below 16 years who had been "wrongfully' removed or retained in another contracting State, could be returned back to the country from which the child had been removed, by application to a central authority.

"So far as non-Convention countries are concerned, or where the removal related to a period before adopting the Convention, the law is that the court In the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration as stated in McKee v. McKee (1951) AC 352: (1951) 1 All ER 942 (PC) unless the Court thinks it fit to exercise summary jurisdiction in the interests of thechild and its prompt return is for its welfare. as explained in (1974) 1 All ER 913 (CA). As recently as 1996-97, it has been held In P (A minor) (ChildAbduction: Non-Convention

Country), in (1996) 3 FCR 233 (CA), by Ward, LJ. [1996 Current Law Year Book, pp. 165-166] that in deciding whether to order the return of a child who has been abductad from his or her country of habitual residence - which was not a party to the Hague Convention, 1380, - the courts' overriding consideration must be the child's welfare. There is no need for the Judge to attempt to apply the provisitions of Article 13 of the Convention by ordering the child's return unless a grave risk of harm was established. See also A (A minor) (Abduction: Non-Convention Country) [Re, The times 3-7-97 by Ward. LJ. (CA) (quoted in Current Law, August 1997, p. 13]. This answers the contention relating to removal of the child from U.S.A"

31. After considering the aforesaid passage, the Apex Court, taking into consideration the facts andcircumstances of the case, has held that the decree passed by the American Court, though a relevant factor, cannot override the consideration of welfare of the minor child. Thus it is clear that so far as the non-convention countries are concerned, the law is that the Court in the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration unless the Court thinks it fit to exercise summary jurisdiction in the interests of thechild and its prompt return is for its welfare.

32. In the light of the aforesaid legal principles, the facts of the case on hand has to be considered.

33. In this case, it is not in dispute that the parties are Indian citizens and therefore the Laws of Australia are not applicable to them. Admittedly, the marriage between the petitioner and the third respondent have been soleminised as per Hindu Rites and Rituals on 24.06.2001 at Sirkali. There is no dispute that the petitioner, though an Indian Citizen, had been the resident of Singapore from 1983. After staying together in India, the petitioner and the third respondent had moved over to Singapore and the detenu-P. Arjun was born on 14.06.2004 at Singapore. The petitioner, the third respondent and the Child-P. Arjun were living together at Singapore till the petitioner and her son-P. Arjun moved to Perth, Australia, in March 2010. In Australia, P. Arjun, commenced his year one schooling at Perth and the petitioner started working as a Medical Scientist in Clinipath Pathology and the third respondent joined them at Perth in July 2010. On 01.10.2011, the third respondent along with his son, the detenu, left Perth, Australia, to India and thereafter the third respondent and the detenu had not returned back to Australia. Thus it is seen that the detenu-P. Arjun had been living from the date of his birth, namely, 14.06.2004 to March 2010 at Singapore and thereafter at Perth, Australia, till 01.10.2011 Only for the past seven months, the detenu is living in India and that too only because of the fact that he had been brought to India by the third respondent by taking advantage of the permission granted to him in the order passed by the Magistrate's Court at Perth, Australia. Even as per the said order, he can keep the child only for twenty-one days and in this case, the third respondent had undertaken to return back to Australia by 09.10.2011, but contrary to that, he had, in violation of the Australian Court's order, failed to return to Australia but had expressed his intention to settled down in India along with the detenu and has filed petitions seeking divorce from the petitioner and for Guardianship.

34. A perusal of the student achievement report of the detenu P. Arjun furnished by the Mount Pleasant Primary School shows that his learning for achievement was satisfactory and his achievement in extracurricular activities was also satisfactory. The said report shows that the detenu cooperated productively and built positive relationship with others. The said report also states that the detenu showed confidence in making positive changes and decisions. Therefore, the contention that the detenu was racially discriminated at Australia is a total falsehood. If really, the detenu had been racially discriminated at Australia, he could not have faired satisfactorily at School both in his studiesand extracurricular activities. It was the petitioner, who had put the child into school and he was also admitted to swimming course. The report of Blue Gum dated 2.10.210 shows that the detenu P. Arjun had made new friends.

35. Thus it is seen that the child-P. Arjun is well settled at Australia and he is accustomed to the environment at School as well as at home. It is a fact that the childwas althrough living with the petitioner/mother andthe child has been separated from the petitioner only from 01.10.2011 and that too by the act of the third respondent in removing the child from Australia.

36. Though in the counter affidavit the third respondent has stated as if he was forced to submit to the jurisdiction of the Australian Court, but it is seen from the order, dated 07.07.2011 passed by the Magistrate's Court at Perth, that it was the third respondent who had filed the application on 23.09.2010 before the Magistrate's Court and therefore the contention that the third respondent was forced to submit to the jurisdiction of the Australian Court cannot be coutenanced and the order, dated 07.07.2011, is a consent order. Only believing that the third respondent will abide by the conditions imposed by the said order, the petitioner had handed over the passport of thechild to enable the third respondent to take the childto India on a vacation, but the third respondent has betrayed her faith and has also violated the Court's order.

37. As stated above, the detenu-P. Arjun had well settled both at school and at home at Australia and that the allegation that the child was racially discriminated by the other students in the school is falsified by the aforesaid reports of the school. We are of the considered view that the said allegation of racial discrimination against the detenu has been invented for the purpose of this case. Admittedly the third respondent had resigned his job at Australia andthough in the counter affidavit he has stated that he got employment here and earning a lumpsum and he can support his child, it has not been stated with details the nature of employment, the company where he is employed, his monthly salary, etc., There is absolutely no evidence placed before this Court to prove where the third respondent is currently employed. Whereas it is admitted by the third respondent that the petitioner is employed at Perth as Medical Scientist in Clinipath Pathology. The petitioner has taken leave of absence on loss of pay only for the purpose of filing the above Habeas Corpus Petition and getting custody of thechild.

38. Pursuant to the interim orders passed by this Court the petitioner had been staying/visiting Coimbatoreand exercising her visitation rights as per the interim orders. Therefore, it cannot be heard to be contended by the third respondent that the petitioner has no interest in seeing the child. Admittedly the father of the third respondent has retired from service and is said to be employed in a private concern at Trichy. The third respondent, at present, is dependant upon his parents for his and his son's support. Though the parents of the third respondent have filed an affidavit undertaking to take proper care of the detenu-P. Arjun the care of the grandparents cannot be compared with the care of a mother.

39. It is contended by the learned counsel for the third respondent that since the petitioner is employed even during holidays the child will be lonely at Blue Gum Out-off School Care Centre. But it is admitted that even while the petitioner and the third respondent were living together at Australia, the child was put in Blue Gum Out-off School Care Centre. It is not uncommon or something extraordinary for parents both of whom are employed to put their child in a Day Care centre even in India. Therefore, the said contention has no merit.

40. It has to be pointed out that after return from her job, the petitioner/mother will take proper care of thechild but if the child is at India in the custody of the third respondent, the detenu who is only aged about seven, will be deprived of the motherly care of the petitioner. At a tender age, the care of the mother is of utmost importance. At least for the time being till the Guardianship issue is finally decided in the Guardianship Original Petition filed by the third respondent by the Family Court, Coimbatore, the custody of the child-P. Arjun should be with the mother/the petitioner herein.

41. The learned counsel for the third respondent contended that the petitioner was having illicit intimacy with one Dr. Senthil Kumar and the third respondent has filed a divorce petition before the Family Court, Coimbatore, seeking divorce on the ground of adulteryand mental cruelty and therefore, considering the conduct of the petitioner, the petitioner is not entitled to the custody of the child. But a perusal of the

petition filed in HMOP No. 1169 of 2011 shows that the petition has been filed under Section 13(1)(i-a) of the Hindu Marriage Act, 1955, i.e, the petition has been filed only on the ground of mental cruelty and not on the ground of adultery. But in the petition there are some averments to the effect as if the petitioner had told the third respondent that she had been having an affair with Dr. Senthil Kumar and she wanted to divorce the third respondent and live along with the said Senthil Kumar. Merely on the basis of the said averments in the Divorce Petition and the averments contained in the counter affidavit filed in the above Habeas Corpus Petition, which are yet to be proved, this Court cannot come to the conclusion that the petitioner's conduct is not good and this Court cannot on the basis of the aforesaid unsubstantiated allegations deny custody of the detenu to the petitioner.

42. For the aforesaid reasons, we are of the considered view that the custody of the detenu-P. Arjun with the third respondent is in violation of the order of the Magistrate's Court at Perth, Australia, and as such it is prima facie illegal. Taking that aspect into consideration along with the aforesaid facts and circumstances andthe welfare of the minor/detenu, the detenu, P. Arjun, is directed to be set at liberty and the custody of the detenu is handed over to the mother/the petitioner herein (Jayanthi, D/o. Jayaraman). The third respondent is hereby directed to handover the passport of the detenu-P. Arjun to the petitioner immediately. The petitioner is permitted to take the child to Australia subject to the condition that the petitioner shall file an affidavit undertaking that she will abide by the orders that may be passed by the Family Court, Coimbatore, in GWOP No. 225 of 2012 and the petitioner shall file the said undertaking affidavit today itself.

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# K.PONNARASI VERSUS P.ALAGU MUTHURAJ

**Madras High Court**

**Bench : Hon'ble Mr. Justice G.R. Swaminathan**

*K.Ponnarasi ... Appellant*
*Versus*
*P.Alagu Muthuraj ... Respondent*

**C.M.A.(MD)No.411 of 2015**

**and**
**C.M.P.(MD) No.4250 of 2016**

**Decided on 11 October, 2017**

- **The respondent herein therefore filed the said petition for declaring that he is the guardian of minor Karthikeyan and sought a direction for handing over the custody of the child to him. The Court below allowed the said petition. Aggrieved by the same, this appeal has been filed.**
- **The child has been with the grandmother all these years. If the child is forcibly removed from the grandmother and handed over to the custody of the respondent, it would certainly cause psychological injury and damage to the child. At the same time, it cannot be forgotten that the respondent is the father of the child, who is the natural guardian.**
- **The interest of the minor child is paramount. That is why a summary order removing the child from the custody of the grandmother and handing over the same to the respondent cannot be passed. Not only the interest of the child is supreme in such cases, but the Court must bear in mind that the child is also having its own rights. That will have to be respected.**
- **In the result, the order declaring the respondent as guardian for minor Karthikeyan is sustained. The order directing the appellant to hand over the custody of the minor Karthikeyan to the respondent herein is set aside. The respondent shall have visitation rights as set out in the body of this order.**

## JUDGMENT

The grandmother of the minor child in question has filed this civil miscellaneous appeal, challenging the order dated 08.07.2013 made in G.W.O.P.No.174 of 2011 on the file of the Principal District Court, Thoothukudi.

2. The respondent herein filed the said G.W.O.P. seeking custody of his minor child Karthikeyan. The appellant's daughter Indira Devi was given in marriage to the respondent on 22.02.2007. The minor child Karthikeyan was born on 18.01.2008. Indira Devi passed away on 29.03.2011. The child is presently in the custody of the appellant grandmother. The respondent herein therefore filed the said petition for declaring that he is the guardian of minor Karthikeyan and sought a direction for handing over the custody of the child to him. The Court below allowed the said petition. Aggrieved by the same, this appeal has been filed.

3. Heard the learned counsel for both parties.

4. It is seen that the respondent is a lorry driver. A lorry driver by virtue of his avocation will be away from home. Therefore, he cannot take personal care of the child. The trial Court has given a specific

finding that the marital life between the respondent and Indira Devi was not satisfactory. It is not evident from a reading of the impugned order that the wishes of the minor were ascertained by the Court. The appellant's daughter had left the matrimonial home. Even though the respondent had claimed in the petition that he is having cars and is having transportation business, he has not chosen to adduce any evidence to demonstrate his financial wherewithal.

5. The child has been with the grandmother all these years. If the child is forcibly removed from the grandmother and handed over to the custody of the respondent, it would certainly cause psychological injury and damage to the child. At the same time, it cannot be forgotten that the respondent is the father of the child, who is the natural guardian.

6. Therefore, I sustain the declaration given by the lower Court that the respondent is the guardian for the minor Karthikeyan. But, the direction to hand over the custody of the child to the respondent is set aside. It would be better to confer visitation rights in favour of the respondent. The respondent is at liberty to visit the child every Sunday. The appellant herein is duty bound to make appropriate arrangements to receive the respondent and ensure that the respondent is able to spend a few hours atleast with the child. If enabling a meeting between the respondent and the child in the house of the appellant would lead to any embarrassing situation, the respondent can meet the child in the temple premises or in park or in a common place in the town, where the child is residing. If a natural bonding develops between the respondent and the child in due course, it is always open to the respondent to file an appropriate application before this Court in these proceedings, even though this civil miscellaneous appeal stands disposed of.

7. The interest of the minor child is paramount. That is why a summary order removing the child from the custody of the grandmother and handing over the same to the respondent cannot be passed. Not only the interest of the child is supreme in such cases, but the Court must bear in mind that the child is also having its own rights. That will have to be respected.

8. In the result, the order declaring the respondent as guardian for minor Karthikeyan is sustained. The order directing the appellant to hand over the custody of the minor Karthikeyan to the respondent herein is set aside. The respondent shall have visitation rights as set out in the body of this order.

9. The civil miscellaneous appeal is partly allowed as indicated above. No costs. Consequently, connected miscellaneous petition is closed.

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# S.SARAVANAN VERSUS DEEPA

**Madras High Court**

**Bench : Hon'ble Mr. Justice R.S. Ramanathan**

*S.Saravanan .... Petitioner*
*Versus*
*Deepa ... Respondent*

**C.R.P. No. 413 of 2010**

**and**
**M.P.No.1 of 2010**

**Decided on 10 November, 2010**

- **In view of the divorce decree granted earlier in favour of the revision petitioner herein and that application was dismissed by the Principal Family Court Judge and aggrieved by the same this revision is filed.**
- **The point for consideration in this revision is:-**

  **Whether the respondent submitted to the jurisdiction of the Foreign Court by filing of an application to set aside the ex parte order or by filing various applications for spousal support and for other reliefs?**
- **Clause (a) of Section 13 states that a foreign judgment shall not be recognised if it has not been pronounced by a court of competent jurisdiction. We are of the view that this clause should be interpreted to mean that only that court will be a court of competent jurisdiction which the Act or the law under which the parties are married recognises as a court of competent jurisdiction to entertain the matrimonial dispute. Any other court should be held to be a court without jurisdiction unless both parties voluntarily and unconditionally subject themselves to the jurisdiction of that court. The expression "competent court" in Section 41 of the Indian Evidence Act has also to be construed likewise.**
- **In the absence of any evidence to show that the husband and wife entered in to a matrimonial agreement in United States not to institute any legal action for divorce in India, the dissolution of marriage granted by the Foreign Court is not valid and the application filed by the wife for restitution of conjugal rights in India is maintainable. Considering all these aspects, I am of the view that the learned Principal Family Court Judge has elaborately discussed all these aspects and dismissed the application, relying upon the Judgement of the Hon'ble Supreme Court rendered in (1991) 3 SCC 451 (Y.Narasimha Rao and others Vs. Y.Venkata Lakshmi and another) and held the petition filed by the wife of restitution of conjugal rights is maintainable and I do not find any reason to interfere with the order of the lower Court and the revision is dismissed.**

**ORDER**

The respondent in O.P.No.1417 of 2008 on the file of Principal Family Court, Chennai, is the revision petitioner.

2. The respondent herein filed O.P.No.1417 of 2008 before the Principal Family Court against the revision petitioner for restitution of conjugal rights and in that application, the revision petitioner filed I.A.No.2030 of 2009 to decide the maintainability of the O.P.No.1417 of 2008 as a preliminary issue, in

view of the divorce decree granted earlier in favour of the revision petitioner herein and that application was dismissed by the Principal Family Court Judge and aggrieved by the same this revision is filed.

3. The case of the revision petitioner is that the respondent was his wife and he filed application for dissolution of marriage in Case No.1-05-FL-125461 before the Superior Court of California to dissolve the marriage between him and the respondent herein and as there was no appearance for the respondent before the Superior Court of California despite service of summons that Court passed an order of dissolution of marriage on the ground of irreconcilable differences and therefore, the marriage between the petitioner and respondent was already dissolved by a Competent Court and hence the application filed by the respondent herein for restitution of conjugal rights is not maintainable and therefore that question must be taken as a preliminary issue.

4. The respondent herein, who was also the respondent in I.A.No.2030 of 2009 filed counter stating that the order passed by the Superior Court of California was an ex parte order and United States of America is not a reciprocating country to India and therefore, any Judgment passed by a foreign court cannot be construed as a valid Judgment as per Section 13 of the C.P.C. It is further stated that summons in that proceedings was not served on her. The learned Family Court Judge relying upon the Judgment in Hon'ble Supreme Court rendered in (1991) 3 SCC 451 (Y.Narasimha Rao and others Vs. Y.Venkata Lakshmi and another) held that the order passed by the Superior Court of California dissolving the marriage between the parties is without jurisdiction and unenforceable in India and is also not binding upon the respondent and dismissed the application. Aggrieved by the same, this Revision is filed by the petitioner husband.

5. Mr.R.Thiyagarajan, learned senior counsel appearing for the revision petitioner submitted that as per Section 13 of C.P.C. and as per the Judgment rendered in (1991) 3 SCC 451 (Y.Narasimha Rao and others Vs. Y.Venkata Lakshmi and another) a Foreign Judgment cannot be relied upon. Nevertheless, the learned senior counsel submitted that when the parties submitted to the jurisdiction of the Foreign Court then they are bound by the Judgment and in this case, the respondent herein went to America and participated in the proceedings and submitted to the jurisdiction of the Foreign Court by filing application to set aside the ex parte order of divorce, filed various applications for spousal support and for other reliefs and the petitioner's counsel at America also agreed for setting aside the ex parte decree of divorce but refused to grant spousal support and other reliefs prayed for the respondents and thereafter the respondent did not prosecute the case and those applications were dismissed and therefore, having regard to the fact that the respondent submitted to the jurisdiction of the Foreign Court, she is bound by the Judgment rendered by the Superior Court of California and hence the present petition filed by the respondent before the usual Family Court for restitution of conjugal right in O.P.No.1417 of 2008 is not maintainable.

6. On the other hand, Mr.V.Balu, learned counsel for the respondent submitted that the Foreign Court is not having jurisdiction to entertain the application as admittedly, the marriage took place at Chennai according to Hindu rites and the respondent was severely assaulted and she was forced to return to India and thereafter, the revision petitioner filed application for divorce before the Superior Court of the State of California and the ground on which dissolution of marriage was sought for namely irreconcilable differences is not a ground available in India for divorce and United States of America is not a reciprocating country for India and hence as per the Judgment rendered in (1991) 3 SCC 451 (Y.Narasimha Rao and others Vs. Y.Venkata Lakshmi and another), the Judgment rendered in case No.1-05-FL-125461 by the Superior Court of California is not valid in India and the said decree is unenforceable and is not binding on the respondent. The learned counsel for the respondent further submitted that the respondent has not submitted to the jurisdiction of the Foreign Court and she filed only application, to set aside the ex parte decree and she has not filed her statement contesting the said application filed by the revision petitioner herein and the filing of other applications such as application for spousal support cannot be considered as submitting to the jurisdiction of the Foreign Court.

7. The point for consideration in this revision is:-

   1. Whether the respondent submitted to the jurisdiction of the Foreign Court by filing of an application to set aside the ex parte order or by filing various applications for spousal support and for other reliefs?

8. Admittedly, both parties are Indians and the marriage between them took place in Chennai. Both parties are governed by Hindu Marriage Act. It is also not in dispute that under the Hindu Marriage Act, as it stood today irreconcilable differences is not a ground for divorce. In these circumstances, we will have to see whether the respondent submitted to the jurisdiction of the Foreign Court.

9. As agreed by both the counsels, the law has been settled by the Hon'ble Supreme Court Judgment rendered in (1991) 3 SCC 451 (Y.Narasimha Rao and others Vs. Y.Venkata Lakshmi and another). The Hon'ble Supreme Court while interpreting Section 13 of C.P.C. held as follows:-

   "Clause (a) of Section 13 states that a foreign judgment shall not be recognised if it has not been pronounced by a court of competent jurisdiction. We are of the view that this clause should be interpreted to mean that only that court will be a court of competent jurisdiction which the Act or the law under which the parties are married recognises as a court of competent jurisdiction to entertain the matrimonial dispute. Any other court should be held to be a court without jurisdiction unless both parties voluntarily and unconditionally subject themselves to the jurisdiction of that court. The expression "competent court" in Section 41 of the Indian Evidence Act has also to be construed likewise.

   Clause (b) of Section 13 states that if a foreign judgment has not been given on the merits of the case, the courts in this country will not recognise such judgment. This clause should be interpreted to mean (a) that the decision of the foreign court should be on a ground available under the law under which the parties are married, and (b) that the decision should be a result of the contest between the parties. The latter requirement is fulfilled only when the respondent is duly served and voluntarily and unconditionally submits himself/herself to the jurisdiction of the court and contests the claim, or agrees to the passing of the decree with or without appearance. A mere filing of the reply to the claim under protest and without submitting to the jurisdiction of the court, or an appearance in the court either in person or through a representative for objecting to the jurisdiction of the court, should not be considered as a decision on the merits of the case. In this respect the general rules of the acquiescence to the jurisdiction of the court which may be valid in other matters and areas should be ignored and deemed inappropriate.

   The second part of clause (c) of Section 13 states that where the judgment is founded on a refusal to recognise the law of this country in cases in which such law is applicable, the judgment will not be recognised by the courts in this country. The marriages which take place in this country can only be under either the customary or the statutory law in force in this country. Hence, the only law that can be applicable to the matrimonial disputes is the one under which the parties are married and no other law. When, therefore, a foreign judgment is founded on a jurisdiction which is in defiance of the law. Hence, it is not conclusive of the matters adjudicated therein and, therefore, unenforceable in this country. For the same reason, such a judgment will also be unenforceable under clause (f) of Section 13, since such a judgment would obviously be in breach of the matrimonial law in force in this country.

   Clause (d) of Section 13 which makes a foreign judgment unenforceable on the ground that the proceedings in which it is obtained are opposed to natural justice, states no more than an elementary principle on which any civilised system of justice rests. However, in matters concerning the family law such as the matrimonial disputes, this principle has to be extended to mean something more than mere compliance with the technical rules of procedure. If the rule of audi alteram partem has any meaning with reference to the proceedings in a foreign court, for the purposes of the rule it should not be deemed sufficient that the respondent has been duly served with the process of the court. It is necessary to ascertain whether the respondent was in a position to present or represent himself/herself and contest effectively the said

proceedings. This requirement should apply equally to the appellate proceedings if and when they are filed by either party.

If the foreign court has not ascertained and ensured such effective contest by requiring the petitioner to make all necessary provisions for the respondent to defend including the costs of travel, residence and litigation where necessary, it should be held that the proceedings are in breach of the principles of natural justice. It is for this reason that we find that the rules of Private International Law of some countries insist, even in commercial matters, that the action should be filed in the forum where the defendant is either domiciled or is habitually resident. It is only in special cases which is called special jurisdiction where the claim has some real link with other forum that a judgment of such forum is recognised. This jurisdictional principle is also recognised by the Judgments Convention of the European Community. If, therefore, the courts in this country also insist as a matter of rule that foreign matrimonial judgment will be recognised only if it is of the forum where the respondent is domiciled or habitually and permanently resides, the provisions of Clause (d) may be held to have been satisfied.

The provision of clause (e) of Section 13 of which requires that the courts in this country will not recognise a foreign judgment. It it has been obtained by fraud, is self-evident. However, in view of the decision of this Court in Smt.Satya Dvs DTeja Singh it must be understood that the fraud need not be only in relation to the merits of the matter but may also be in relation to jurisdictional facts.

From the aforesaid discussion the following rule can be deduced for recognising a foreign matrimonial judgment in this country. The jurisdiction assumed by the foreign court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married. The exceptions to this rule may be as follows:-

(i) where the matrimonial action is filed in the forum where the respondent is domiciled or habitually, and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married:

(ii) where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests the claim which is based on a ground available under the matrimonial law under which the parties are married:

(iii) where the respondent consents to the grant of the relied although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties."

Therefore, it is seen from the above Judgment that unless the respondent voluntarily and effectively submitted to the jurisdiction of the Foreign Court and contesting the claim which is based on the ground available and the matrimonial law under which the parties are married the Judgment of the Foreign Court cannot be relied upon. As stated supra, the ground on which the revision petitioner applied for dissolution of marriage was irreconcilable differences. As per Section 13 of the Hindu Marriage Act, irreconcilable differences is not one of the grounds for divorce. Further, the Court which granted the decree must be a competent Court that has been considered by the Hon'ble Supreme Court in the very same Judgment that only that Court will be a Court of competent jurisdiction which the Act or the Law under which the parties are married recognises as a Court of competent jurisdiction to entertain the matrimonial dispute. Admittedly, the parties got married in Chennai under the Hindu Marraige Act and therefore, the Foreign Court did not have jurisdiction to entertain the matrimonial dispute in respect of marriage that took place in India as per the Hindu Marriage Act. Therefore, unless the respondent submitted to the jurisdiction of the Foreign Court, the Judgment rendered the Foreign Court cannot be enforce in India against the respondent.

10. It is submitted Mr.R.Thiyagarajan, learned senior counsel that by filing application to set aside the ex parte decree of divorce and by filing various applications for various relief, the respondent submitted to the jurisdiction of the Foreign Court and therefore, as per the Judgment rendered in (1991) 3 SCC

451 (Y.Narasimha Rao and others Vs. Y.Venkata Lakshmi and another), the decree is binding on the respondent.

11. Mr.V.Balu, learned counsel for the respondent has submitted that by filing an application to set aside the ex parte decree, the respondent cannot be said to have submitted to the jurisdiction of the Foreign Court. Further, the application to set aside the ex parte decree without filing a written statement or counter cannot be construed as submitting to the jurisdiction of the Foreign Court for the reason that after setting aside the ex parte order, the respondent might have taken the plea that the Foreign Court has no jurisdiction to entertain such dispute and therefore, in the absence of filing any written statement, the mere filing of an application to set aside the ex parte decree will not amount to submitting to the jurisdiction of the Family Court. According to the learned counsel for the respondent that filing of an application to set aside the ex parte decree will not amount to submitting to the jurisdiction of the Court.

12. According to me, by way of analogy Section 34 of the Arbitration Act ,1940 can be relied upon to find out whether an application to set aside the ex parte decree will amount to submitting to the jurisdiction of the Court. As per Section 34 of the Arbitration Act, 1940 whether any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to that agreement or any person claiming under him, any party to such legal proceedings made at any time before filing written statement or taking any other steps in the judicial proceedings applied to the judicial authority before which proceedings are pending to stay the proceedings. While interpreting the phrase taking any other steps in the proceeding, the Hon'ble Supreme Court held in the Judgment reported in AIR 1982 SCC 1302 in the matter of Food Corporation of India and another Vs. M/s.Yadav Engineer and Contractor held as follows:-

"Giving the expression "taking any other steps in the proceedings" such wide connotation as making an application for any purpose in the suit such as vacating stay, discharge of the receiver or even modifying the interim orders would work hardship and would be inequitous to the party who is willing to abide by the arbitration agreement and yet be forced to suffer the inequity of ex parte orders. Therefore, the expression "taking any other steps in the proceedings" must be given a narrow meaning in that the step must be taken in the main proceeding of the suit and it must be such step as would clearly and unambiguously manifest the intention to waive the benefit of the arbitration agreement and to acquiesce in the proceedings. Each and every step taken in the proceedings cannot come in the way of the party seeking to enforce the arbitration agreement by obtaining stay of proceedings.

.....Therefore, unless the step alleged to have been taken by the party seeking to enforce arbitration agreement is such as would display an unequivocal intention to proceed with the suit and acquiesce in the method of resolution of dispute adopted by the other party, namely, filing of the suit and thereby indicate that it has abandoned its right under the arbitration agreement to get the dispute resolved by arbitration any other step would not disentitle the party from seeking relief under S.34. Contesting the application for interim injunction or for appointment of a receiver or for interim relief by itself without anything more would not constitute such step as would disentitle the party to an order under S.34."

13. Further in the Judgment rendered in AIR 1987 MP 164 (M/s.Sharda Talkies Vs. M/s.Dhadiwal Exhibitors) it has been held that application for setting aside the ex parte decree will not amount to taking other steps in the suit. In AIR 1952 Punjab 109 in the matter of M/s.Charan and Sons Vs. Harbajan Singh, the Punjab High Court held that application to set aside will not amount to taking a step in the proceedings. Therefore, by filing an application to set aside the ex parte decree it cannot be stated that the respondent has submitted to the jurisdiction of the Foreign Court. Further this Court, also held in the Judgment reported in 2005 (3) MLJ 1 in the matter of T.Sivaraman Vs. P.Renganayagi following the Supreme Court Judgment rendered in (1991) 3 SCC 451 (Y.Narasimha Rao and others Vs. Y.Venkata Lakshmi and another) that in the absence of any evidence to show that the husband and wife entered in to a matrimonial agreement in United States not to institute any legal action for divorce in India, the

dissolution of marriage granted by the Foreign Court is not valid and the application filed by the wife for restitution of conjugal rights in India is maintainable. Considering all these aspects, I am of the view that the learned Principal Family Court Judge has elaborately discussed all these aspects and dismissed the application, relying upon the Judgement of the Hon'ble Supreme Court rendered in (1991) 3 SCC 451 (Y.Narasimha Rao and others Vs. Y.Venkata Lakshmi and another) and held the petition filed by the wife of restitution of conjugal rights is maintainable and I do not find any reason to interfere with the order of the lower Court and the revision is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

**R.S.RAMANATHAN,J**

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LANDMARK JUDGMENTS ON

# ADOPTION

# ST. THERESA'S TENDER LOVING CARE HOME, & ORS. VERSUS P. JAMUNA, SECRETARY GRAMYA RESOURCE CENTER FOR WOMEN & ORS.

**Andhra Pradesh High Court**
**[Division Bench]**

**Bench : Hon'ble Mr. Justice Devinder Gupta, C.J and Hon'ble Mr. Justice A. Gopal Reddy**

*St. Theresa's Tender Loving Care Home, & Ors. … Petitioners;*
*Versus*
*P. Jamuna, Secretary Gramya Resource Center for Women & Ors. … Respondents.*

**C.R.P No. 1927 of 2002 & Batch**

**Decided on May 1, 2003**

- **Under the revised guidelines, the State Government is required to separately maintain a list of all agencies handling in-country and inter-country adoption of children and it is required to identify those institutions/agencies, which have children who are legally free from adoption. The State Government is required to recognise the Indian Adoption Agencies for in-country adoption as per the procedure laid down and is also required to forward applications of Indian Agencies seeking recognition for inter-country adoption to the Central Adoption Resource Agency after proper verification according to the criteria laid down in the guidelines. Before a guardianship certificate is issued by the Family Court, a letter of relinquishment, VCA clearance, no objection certificate from CARA and other relevant documents such as the home study of the proposed guardians, no objection certificate from the agency which has scrutinised the application of the proposed foreign guardians, as also the approval from the scrutinising agency in India who scrutinises the applications, namely Indian Council of Child Welfare are required. It is only thereafter the Court is required to decide whether guardianship should be granted or not. In case there are any objections in respect of any proposed guardianship application, the same can be raised by the appropriate authority before the Family Court. The authorities are such which have been noticed by the Supreme Court in its decision in Indian Council Social Welfare v. State of A.P (8) (1999) 6.**
- **The allegations of malpractices, if any, against any specific organisation or in any specific case will have to be investigated into only by the State Government in terms of the decision in Indian Council Social Welfare v. State of A.P for which purpose alone the implead petitioners are seeking impleadment. Implead petitioners are not having any direct lis with the petitioners. Necessarily a line has been drawn between those having direct interest or those having legal interest or commercial interest. What is necessary is that the person must be directly or legally interested in the action. Implead petitioners are neither directly nor legally interested in the subject matter of the Original Petitions pending before the Family Court. The Family Court did not properly consider these aspects. It took into consideration irrelevant factors, namely, the status of the implead petitioners that they are social workers and therefore it would be for the welfare of the children whether they are to be given in adoption, that the implead petitioners were added as parties to the petitions. Thus, the family Court proceeded to exercise its jurisdiction vested in it with material irregularity for**

**which reason the impugned order is liable to be interfered with. The two decisions relied upon by the learned counsel appearing for the implead petitioners were in support of the view that such an order would not be liable to be interfered with. There is no dispute with the proposition laid therein. In these cases, we have come to the conclusion that the Family Court has exercised its jurisdiction with material irregularity and even on the basis of the ratio of the said decisions; the order is liable to be interfered with by this Court in exercise of the supervisory jurisdiction.**

The Order of the Court was delivered by

**Hon'ble Mr. Justice Devinder Gupta, C.J:—**

These petitioners filed under Article 227 of the Constitution of India seeks to have the Common Order dated 11.4.2002 passed by the learned Judge, Family Court, Hyderabad in I.A Nos. 435 of 2002 and batch set aside whereby the Interlocutory Applications filed by the unofficial respondents herein under Order 1, Rule 10 of the Code of Civil Procedure to implead them as parties to the main Petitions, filed under Section 7 of Guardians and Wards Act, were allowed. Since common questions arose for consideration, all the petitions were heard together and are being disposed of by this Common Order.

2. St. Theresa's Tender Loving Care Home, Sanathnagar, Hyderabad-Petitioner No. 1 is a Society registered under the Andhra Pradesh (Telangana Area) Public Societies Registration Act. As a part of its social activities, it runs an Orphanage at Sanathnagar, Hyderabad. The Supreme Court in Lakshmi Kant Pandey v. Union of India (1) (1984) 2 SCC 244 : AIR 1984 SC 469, laid down the normative and procedural safeguards to be followed for in-country and inter-country adoptions of Indian children. On the basis of the guidelines issued by the Government of India pursuant to the said Judgment of Apex Court, 1st petitioner-Society (hereinafter referred to as "the Society") claims that it was granted a certificate recognising it as an agency for processing and filing of the applications before the competent Court for declaration of foreigners as guardian of Indian children under the Guardian and Wards Act, 1890. The case of the Society is that the validity of the certificate of recognition was extended till 5th October, 2001. On 13.8.2001 application for renewal of the said certificate was filed which was required to be forwarded by the Government of Andhra Pradesh within a period of two months. The Central Adoption Resource Agency (CARA) did not give any response to the application, therefore, under Clause 5.5 of CARA Guidelines, the recognition of the society will be deemed to have been extended for a further period of two years. It is alleged that the society processes applications of the Indian as well as foreign nationals for adoption of orphan children and it has been recognised to be an agency for processing of such applications by CARA. The Society represented by its Chief Co-ordinator and also as the holder of General Power of Attorney of adoptive parents of foreign nationals filed as many as twenty Original Petitions under the provisions of the Guardians and Wards Act, 1890 (for short "the Act") before the Judge, Family Court, Hyderabad for grant of certificates of guardianship. Government of Andhra Pradesh through its Principal Secretary, Department of Women Development and Child Welfare was also impleaded as one of the respondents in all the Original Petitions. While the said petitions were pending consideration before the Family Court, applications were filed by (1) Smt. P. Jamuna of Gramya Resource Center for women, (2) Mr. B. Bhukya, Assistant Professor of History, Osmania University and (3) Mr. Isidore Phillips, a social worker, under Order 1 Rule 10 of the Code of Civil Procedure, seeking their impleadment as party respondents in the petitions filed by the society. It may be noticed that while Mr. Isidore Philips sought to be impleaded as Respondent No. 3 in four Original Petitions viz., O.P Nos. 150, 634, 1930 and 647 of 2001, Smt. P. Jamuna and Mr. Bhukya sought their impleadment as respondents 3 and 4 in the other Original Petitions.

3. Mr. Bhukya claims that he is Lambada by caste and alleged that child traffickers, taking advantage of the precarious position of lambada tribal people, have been adopting dubious methods in purchasing lambada children for a pittance and selling them for foreign currency. He claims to be a co-author of a publication on Lambada Tribes commissioned by UNICEF alleged to be dealing with the child trafficking

and also claims to be the advisor to the Lambada Rights Struggle Committee. Smt. P. Jamuna, Secretary of Gramya Resource Centre for Women claims to be striving for protection of the rights of women and children and alleged to be playing prominent role in exposing the inhuman and illegal trafficking in children in the State of Andhra Pradesh in the name of inter-country adoption. Mr. Isidore Phillips claims himself to be a social activist engaged with Divya Disha Registered Society for empowering individuals and organisations in Holistic developments and campaigning the rights and protection of children including rehabilitation of youth and street children.

4. The implead petitioners alleged that they had nothing personal against the petitioners in the main petitions filed under the Act but they desired to come on record only in public interest and to assist the Court with a view to ensure that child trafficking racket in the name of inter-country adoption does not go on unhindered by the default of all the authorities empowered under CARA guidelines. They further alleged that CARA had been issuing No Objection Certificates for inter-country adoptions without applying its mind as to the suitability of the proposed parents for the child and without making all possible efforts to put the children in Indian Home as required by its guidelines. The adoptive parents have no specific reasons for adopting an Indian child and they were obviously encouraged to go for adoption only to claim certain tax benefits. Implead petitioners also alleged that the State of Andhra Pradesh and CARA are acting under pressure from embassies of western countries and also Union Ministry of State for Social Justice and Environment. CARA had been issuing No Objection Certificates dubiously for inter-country adoptions and denying permissions for inter-country adoptions. Therefore, they prayed that it would be just and necessary to permit them to come on record as respondents in the respective Original Petitions.

5. The State of Andhra Pradesh did not file any reply to the applications for impleadment whereas the revision petitioners vehemently opposed the same by filing reply questioning the maintainability of the applications and also the locus standi of the applicants to be impleaded as parties to the petitions. The society strongly denied that it had ever indulged in any illegal activity. It was denied that there was no authority for the society to contest the applications. The petitioners claimed that the applications for impleadment had been filed with mala fide intention to defame the society. It was alleged that Smt. Jamuna had asked the Chief Co-ordinator of the society to rescue twin babies of a lambada family. When information was received that the infant babies were sought to be killed by their parents due to their incapacity to brought up, the Chief Co-ordinator of the society took the infants and went to the dwelling place of the couple to take their signatures on relinquishment deeds. The mother-in-law of the lady demanded a golden necklace to her daughter-in-law as a consideration for the babies. The Chief Co-ordinator refused to accede to the request and left the children at their home. Later on the parents brought the children to the Orphanage and the twins were given in inter-country adoption. On coming to know of the progress of the children, Smt. Jamuna demanded auto rickshaw for the biological father of the children. When the Co-ordinator refused for it, she developed animosity, which is reflected, in her conduct in moving interlocutory applications seeking impleadment. It was also pointed out that CARA guidelines had been prepared in accordance with the decision of the Supreme Court in Lakshmi Kant Pandey's case (supra) and were being strictly followed. The State Government was taking due care in the matter. In case the implead petitioners desire that some changes are required in the CARA guidelines, instead of getting themselves impleaded in individual proceedings, the proper course for them would be to approach the appropriate authorities. It was urged that implead petitioners were neither necessary nor proper parties to the petitions and cannot be permitted to be impleaded particularly in a matter in which they claim to be having no interest at all.

6. Family Court considered the question whether the proposed persons could be permitted to come on record on the basis of their claim that they have no personal interest in the matter but they being proper parties may be permitted to come on record in the interest of justice and for effective adjudication of the matter in controversy.

7. The Family Court by the order impugned allowed the applications and in doing so was swayed with the sole consideration that implead petitioners were social workers and their intervention would not in any way affect the fair trial of the Original Petitions. Rather their presence would help in protecting the interest and welfare of the children. Judge, Family Court, further observed that any objection in regard to the proposed guardianship can usually be raised before the Family Court concerned only by persons having interest and since the applicants were social workers and welfare of the children was of the paramount consideration, it will be permissible for the Court to permit the applicants to be added as proper parties for complete adjudication of the rights involved.

8. We heard the learned counsel appearing for the parties and were taken through the entire material on record.

9. Learned counsel appearing for the petitioner-society vehemently contended that the Family Court had exercised its jurisdiction with material irregularity in ordering the applications when implead petitioners are neither necessary nor proper parties. He relied upon the decision of the Apex Court in Razia Begum v. Anwar Begum (2) AIR 1958 SC 886, and referred to the provisions of Sections 10 and 11 of the Act. He would submit that only that person who has interest in the child can be permitted to be added as a party to the petition but not a person who has no interest in the child. The implead petitioners themselves alleged before the Family Court that they were not having any personal interest in the children. Merely on their bald allegation that the Government of Andhra Pradesh or CARA might not be acting properly in discharge of their obligation in terms of the decision of the Supreme Court in Lakshmi Kant Pandey's case, it is argued that the implead petitioners who are otherwise have no interest in the matter could not have been directed to be impleaded as parties to the petitions.

10. Learned counsel for the implead petitioners tried to support the impugned order urging that there were numerous allegations against the agencies in such like matters and in some cases even criminal proceedings were initiated and were pending. Irregularities had also come to the fore in the matter of letter of relinquishments obtained from the parents of the children. Therefore, in order to safeguard the interest and welfare of the children of lambada community and to see whether the procedure, as contemplated by law has been properly followed by the concerned authorities, the implead petitioners were desirous of coming on record. It was further urged that once an order had been passed by the Family Court, in exercise of the jurisdiction conferred on it, the same is not liable to be inferred with in a petition filed under Article 227 of the Constitution which is only a supervisory jurisdiction. According to learned counsel even in exercise of the revisional jurisdiction under Section 115 of the Code of Civil Procedure, such an order would not be liable to be interfered with. He placed reliance upon the decisions of the Apex Court in Johri Singh v. Sukh Pal Singh (3) (1989) 4 SCC 403 : AIR 1989 SC 2073, and U.P Awas Evam Vikas Parishad v. Gyan Devi (4) (1995) 2 SCC 326.

11. The question of addition of parties is generally not one of initial jurisdiction of the Court but of judicial discretion, which has to be exercised in the light of all the facts and circumstances of the case. Such an order passed in allowing the application for addition of parties, no doubt will not be liable to be interfered with, even if there is jurisdictional error on the part of the Court granting such application unless it is shown that the Court has exercised the jurisdiction not vested in it by law or had failed to exercise jurisdiction so vested or had acted in the exercise of its jurisdiction illegally or with material irregularity. If in exercise of discretion, the Court takes into consideration irrelevant or extraneous matters or ignores relevant or germane circumstances, the exercise of power would be bad and can be interfered with in revision.

12. In Razia Begum's case (supra) it was held that in a suit relating to property, in order that a person may be added as a party, he should have direct interest as distinguished from a commercial interest, in the subject matter of the litigation. Where the subject-matter of litigation is a declaration as regards status or a legal character, the rule of present or direct interest may be relaxed in a suitable case where the Court

is of the opinion that by adding that party, it would be in a better position to effectually and completely adjudicate upon the controversy.

13. In Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay (5) (1992) 2 SCC 524, referring to Razia Begum's case, it was held that a clear distinction has been drawn between suits relating to property and those in which the subject matter of litigation is a declaration as regards status or legal character. In the former category the rule of present interest as distinguished from the commercial interest is required to be shown before a person may be added as a party. At para 14, the Supreme Court observed that:

The person to be joined must be one whose presence is necessary as a party. What makes a person a necessary party is not merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party. The line has been drawn on a wider construction of the rule between the direct interest or the legal interest and commercial interest. It is, therefore, necessary that the person must be directly or legally interested in the action in the answer, i.e, he can say that the litigation may lead to a result, which will affect him legally that is by curtailing his legal rights. It is difficult to say that the rule contemplates joining as a defendant a person whose only object is to prosecute his own cause of action. Similar provision was considered in Amon v. Raphael Tuck & Sons Ltd. (6) (1956) 1 ALL ER 273 : (1956) 1 QB 357, wherein after quoting the observations of Wynn-Parry, J. in Dollfus Mieg et Campagnie S.A v. Bank of England (7) (1950) 2 ALL ER 605, 611, that their true test lies not so much in an analysis of what are the constituents of the applicants' rights, but rather in what would be the result on the subject matter of the action if those rights could be established, Deviin, J. has stated:

"THE test is 'May the order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal rights'."

14. From the above decisions, it is clear that in order that a person is added as a party to the proceeding, it must be shown that the person is directly or legally interested in the action and that the relief sought in the proceeding will directly affect the intervener in the enjoyment of his legal rights, if he is not added as a party. However, the rule of present or direct interest may be relaxed in a suitable case where the Court is of the opinion that by adding the party it would be in a better position to effectually and completely adjudicate upon the controversy. Such a person is called a proper party, whose presence is necessary for complete and final adjudication of questions involved in the proceeding. Such person is distinguished from a necessary party. Thus a person may not be necessary party yet he may be a proper party.

15. Before we proceed to examine the case of the implead petitioners in the light of the aforementioned principles, we may briefly refer to the guidelines of CARA issued by the Government of India.

16. In Lakshmi Kant Pandey v. Union of India the Supreme Court has laid down the normative and procedural safeguards to be followed in the matter of inter-country and in-country adoptions. Pursuant to the Judgment, the Ministry of Welfare, Government of India has issued certain guidelines in 1989. These guidelines were subsequently revised in 1995 pursuant to the recommendations made by a Task Force constituted by the Government of India under the Chairmanship of Justice P.N Bhagwati, former Chief Justice of India. The object of the revised guidelines is to provide a sound basis for adoption within the framework of the norms and principles laid down by the Supreme Court of India in a series of orders passed in Lakshmi Kant Pandey's case. Under the revised guidelines, the Government of India in the Ministry of Welfare has set up a Central Adoption Resource Agency (CARA) to act a clearing house of information in regard to children available for in-country and inter-country adoption and to regulate, monitor and develop programmes for the rehabilitation of children through adoption.

17. Chapter 2.13 of the revised guidelines deal with the functions of CARA. The functions include receiving of applications along with requisite documents of foreigners desirous of taking Indian children in adoption through a recognised social or child welfare agency in the foreign country or through an organisation owned or operated by the Government in that country; to forward the applications to one of Indian social or child welfare agencies; to receive names and particulars of children available for adoption who are under the care of Indian social or child welfare agencies recognised by CARA and to maintain a register containing the names and other particulars of such children; to receive periodical data from the agencies about the children admitted and the children given in adoption, in-country as well as inter-country; to monitor and regulate the working of agencies; to receive data from competent courts about children whose guardianship has been awarded in favour of foreign adoptive parents; to obtain periodical progress reports of children from foreign adoptive parents as well as from recognised social or child welfare agencies in foreign countries and to take such follow up action as deemed necessary; to assist the courts to crosscheck or re-verify the information furnished to them by various sources including the placement agencies and scrutinising agencies or to provide an independent advice in matters relating to adoption of children etc. Chapter III deals with the role of the State Governments. Under the guidelines the State Government is to monitor the adoption programme within its jurisdiction and coordinate the activities of placement agencies, Voluntary Coordinate Agencies (VCAs) established in the state and Scrutinising Agencies. The guidelines also detail about the role to be played by the recognised Indian agencies (Chapter IV), recognition of Indian agencies for adoption (Chapter V), role of enlisted foreign agencies for adoption (Chapter VI), Voluntary Coordinating Agencies (VCAs) (Chapter VII), Constitution of scrutinising Agencies (Chapter VIII).

18. Under the revised guidelines, the State Government is required to separately maintain a list of all agencies handling in-country and inter-country adoption of children and it is required to identify those institutions/agencies, which have children who are legally free from adoption. The State Government is required to recognise the Indian Adoption Agencies for in-country adoption as per the procedure laid down and is also required to forward applications of Indian Agencies seeking recognition for inter-country adoption to the Central Adoption Resource Agency after proper verification according to the criteria laid down in the guidelines. Before a guardianship certificate is issued by the Family Court, a letter of relinquishment, VCA clearance, no objection certificate from CARA and other relevant documents such as the home study of the proposed guardians, no objection certificate from the agency which has scrutinised the application of the proposed foreign guardians, as also the approval from the scrutinising agency in India who scrutinises the applications, namely Indian Council of Child Welfare are required. It is only thereafter the Court is required to decide whether guardianship should be granted or not. In case there are any objections in respect of any proposed guardianship application, the same can be raised by the appropriate authority before the Family Court. The authorities are such which have been noticed by the Supreme Court in its decision in Indian Council Social Welfare v. State of A.P (8) (1999) 6 SCC 365.

19. From a close scrutiny of the CARA guidelines, it appears that a very stringent and adequate procedure has been laid down in the matter of in-country and inter-country adoptions of children to safeguard the interest and welfare of the children.

20. Before the Family Court, the Chief Co-ordinator of the society on behalf of the society and as GPA holder of the foreign adoptive parents of the children filed petitions under section 7 of the Act for declaration of the adoptive parents as guardians of the Indian children for the purpose of inter-country adoption. Section 11 of the Act lays down the procedure to be followed on admission of an application. Sub-section (1) of Section 11 provides that where the Court is satisfied that there is ground for proceeding with the application, it shall fix a day for the hearing of the application and cause notice of the application and of the date fixed for the hearing to be served in the manner directed in the Code of Civil Procedure, on persons mentioned in sub-clauses (i) to (iv) of Clause (a) of sub-section (1). Sub-clause (iv) of Clause (a) of Sub-Section (1) of Section 11 provides that the Court may cause notice of the application to be

served on any person to whom in the opinion of the Court, special notice of the application should be given. Persons mentioned in sub-clause (i) of Clause (a) of Section 11 though are not necessary parties to the petition but can be said to be proper parties to whom the Court may issue notice and even persons to whom special notice may be given by the Court, as contemplated in sub-clause (iv) should also be those who may be termed as proper parties and not to any third party, who in terms of the decision in Harichandmal's case may be a necessary witness or may be having relevant information, who would neither be a necessary nor a proper party.

21. Admittedly, the implead petitioners are not necessary parties. Therefore, the question would be whether they are proper parties or not. The implead petitioners claim that they are proper parties on the ground that their presence is necessary for complete and final adjudication of the questions involved. Question involved is the welfare of the minor children to be given in adoption for which purpose, as already indicated above, adequate guidelines have been issued by the Ministry of Welfare, Government of India known as Central Adoption Resource Agency Guidelines. Though implead petitioners may belong to social organisation and striving hard for the welfare and interest of the children, but they cannot be said to be having any locus standi to appear before the Family Court and oppose the applications for grant of certificate of guardianship. In case they are having any information with them, they may do so by bringing those relevant facts or information before the Indian Council of Child Welfare, Andhra Pradesh. The mere fact that they might be in possession of some evidence with them, which they might like to produce in Court will not even make them proper parties, in terms of what is stated in Hirachandmal's case supra. Possessing of relevant evidence on some of the questions involved alone is not sufficient to treat a person as a proper person to be impleaded as a party to the proceeding.

22. The object of the implead petitioners to come on record to safeguard the interest and welfare of the children to be given in adoption is laudable. But, in our considered opinion, there is no basis for their assumption or apprehension that the authorities would not adequately safeguard the interest of the children. When the Government of Andhra Pradesh in the Department of Women and Child Welfare is impleaded as party to the main petitions and there are guidelines to oversee the process of adoption as also the proceedings in the Court, it cannot be said that the interest of the children would not be properly safeguarded by the respective authorities who are bound to follow the guidelines, issued by the Government of India. We have earlier noticed that under the CARA guidelines, the State the State Government was under an obligation to monitor the adoption programme within its jurisdiction and coordinate the activities of placement agencies and VCAs and scrutinising agencies (Chapter III, Para 3.3). Further, even after the child is given in inter-country adoption, CARA is under an obligation to monitor the progress of the child by obtaining periodical progress reports of children from foreign adoptive parents as well as from foreign agencies. Therefore, it is not a case where the rule of present interest or direct interest can be relaxed as the CARA, the State Government and the authorities empowered under CARA would adequately safeguard the interest of the children.

23. One of the grounds urged by the implead petitioners is that CARA had been issuing NOCs dubiously for inter-country adoptions and denying permissions for in-country adoptions, and therefore, it would be just and necessary to permit them to come on record. Except making such vague statement, no materials are placed before the Court substantiating the same. Even otherwise also, we are of the view that such allegations cannot be gone into in these petitions. However, if in the opinion of the implead petitioners, the interest of the children has not been properly protected by the authorities concerned as required by law, it is always open to them to approach the appropriate forum, in accordance with law, for adequate directions to safeguard the interest and welfare of the children.

24. The allegations of malpractices, if any, against any specific organisation or in any specific case will have to be investigated into only by the State Government in terms of the decision in Indian Council Social Welfare v. State of A.P for which purpose alone the implead petitioners are seeking impleadment. Implead petitioners are not having any direct lis with the petitioners. Necessarily a line has been drawn between

those having direct interest or those having legal interest or commercial interest. What is necessary is that the person must be directly or legally interested in the action. Implead petitioners are neither directly nor legally interested in the subject matter of the Original Petitions pending before the Family Court. The Family Court did not properly consider these aspects. It took into consideration irrelevant factors, namely, the status of the implead petitioners that they are social workers and therefore it would be for the welfare of the children whether they are to be given in adoption, that the implead petitioners were added as parties to the petitions. Thus, the family Court proceeded to exercise its jurisdiction vested in it with material irregularity for which reason the impugned order is liable to be interfered with. The two decisions relied upon by the learned counsel appearing for the implead petitioners were in support of the view that such an order would not be liable to be interfered with. There is no dispute with the proposition laid therein. In these cases, we have come to the conclusion that the Family Court has exercised its jurisdiction with material irregularity and even on the basis of the ratio of the said decisions; the order is liable to be interfered with by this Court in exercise of the supervisory jurisdiction.

25. In result, the revision petitions must succeed. They are accordingly allowed. The impugned order of the learned Judge, Family Court, Hyderabad is set aside.

26. The Interlocutory Applications seeking impleadment are dismissed. Parties are directed to bear their respective costs.

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# ST. THERESA'S TENDER LOVING CARE HOME, HYDERABAD VERSUS CHAIRPERSON, BOARD OF CONTROL AND SUPERVISION OF HOMES, GOVT. OF A.P AND OTHERS

**Andhra Pradesh High Court**

**Bench : Hon'ble Mr. Justice V.V.S Rao**

*St. Theresa's Tender Loving Care Home, Hyderabad*
*Versus*
*Chairperson, Board of Control and Supervision of Homes, Govt. of A.P and others*

**WP No. 2444 of 2002**

**Decided on January 28, 2009**

- **Women's and Children's Institutions (Licensing) Act, 1956 (Central Act No. 105 of 1956) (hereafter called, the Institutions Act) is Legislation to give effect to the Directive Principles of State Policy contained in Article 39 of the Constitution of India. It is intended to protect women and children from exploitation and to regulate and licence orphanages and other institutions caring for women, and children under eighteen years of age. The Act has come into force in the State of Andhra Pradesh with effect from 20.2.1992 Section 3 thereof prohibits a person from establishing or maintaining any institution for the reception, care, protection and welfare of women and children, without obtaining a licence stated under the Act. Sections 4 to 8 deal with grant and revocation of licence. Section 9 is penalty clause. Any contravention of provisions of the Institutions Act or the Rules made thereunder is punishable with imprisonment which may extend upto three months or with fine or with both. Section 11 empowers State Government to make Rules. In exercise of their powers under Section 11(1), State of Andhra Pradesh promulgated Institution Rules vide G.O.Ms No. 18, dated 11.5.2001 Rules 3, 4, 7 to 15 contain the procedure for making application for issue of licence, for maintenance of institution, the constitution of District Advisory Committee, the grant of licence by the said Committee, refusal/revocation of licence, suspension and cancellation of licence etc. Rule 5 prescribes eligibility for establishment of institution. The criteria are (a) the institution shall be registered under Societies Registration Act, 1860; (b) shall furnish social status, activity and reputation of Members of Managing Committee; (c) shall provide suitable accommodation facilities and sanitary conditions; (d) accommodation shall have good lighting, ventilation etc; (e) shall furnish copies of bye-laws of the institution; (f) shall furnish copies of audited statements of accounts for the past three years; and (g) shall furnish financial sources for running the institution.**
- **Yet another instrument of Regulations is "Guidelines for Adoption from India 2006" made by CARA, which is an autonomous body under the Ministry of Women and Child Development, Government of India (hereafter called, Guidelines). These Guidelines provide a basis for in-country adoption within the framework of norms and principles laid down by Supreme Court in Lakshmi Kant Pande's case (supra). Distributed over ten Chapters and four Annexures, they elaborately provide for various authorities/agencies, their role, powers and functions as well as method and**

**manner of recommending placement agencies as well as adoption agencies. As per Section 3.1 in Chapter III, State Government has to licence/recognize of children's homes engaged in adoption programmes of destitute, abandoned or orphaned children under relevant Act/Statute which only mean Orphanages Act and Rules made thereunder and Institutions Act and Rules made thereunder. Chapter IV of the Guidelines contain procedure for inter-country adoption in tune with Guidelines laid down by Supreme Court. These are to the effect that no application by a foreigner for taking a child in adoption should be entertained by any adoption/placement agency unless such application is sponsored by a social or child welfare agency licensed by Government or Department of foreign Government.**

- **The procedure for inter-country adoption is in five steps. After completing the procedure as contemplated in steps 1 to 4, the placement agency has to apply for NOC to CARA. After receiving such NOC, the petition has to be filed before the competent Court for adoption/guardianship. The Court then has to pass an order for placement of the child with foreign prospective adoptive parent. After this formality is completed, the placement agency would apply for a passport of the child and will be handed over to foreign adoptive parent who shall have to transfer to India to accompany the child to his/her country. Chapter V deals with recognized Indian placement agencies. Only agencies/institutions engaged in child welfare programmes can apply for recognition to CARA to State Government. Section 5.5(3) contains criteria for recognition of such agencies, which shall be granted for a period of three years. Even such recognized agencies are required to give priority to in-country adoption, 'so that every child gets an opportunity to find a family within its own cultural milieu'. Every recognized placement agency is required to maintain records as per Section 5.16 The procedure for renewal of recognition is contained in Section 5.18 and reads as under:**

  **5.18 Renewal of Recognition of RIPA**

  **RIPA should apply for renewal of recognition, 6 months prior to the date of expiry of the previous recognition. The original application should be sent by the agency to the appropriate authority of the State Government and a copy of it should simultaneously be forwarded directly to CARA. The State Government will forward the original application to CARA along with its comments within a period of two months from the date of receipt of the complete application. If the State Government does not respond within three months from the date of receipt of application, CARA may conduct a joint inspection and consider the renewal of recognition. Recognition would normally be renewable for a period of three years subject to the following conditions:**

  **(a) Recommendation/views of the concerned State Government accompanied by the inspection report of the Agency.**

  **(b) Satisfactory performance in relation to in-country adoption will be an important factor to assess and consider further renewal of recognition of any RIPA. The agencies shall sufficiently exhibit their involvement in the area of in-country adoption. The Agencies will place 50% or more children in adoption to Indians in India.**

  **(c) Regular submission of Annual Report, quarterly reports of the Agencies and audited statement of accounts as prescribed, adoption charges per child, donations received, if any.**

  **(d) No instance of proved malpractice against the RIPA.**

  **(e) Whether the agency is still recognized by the appropriate authority of concerned State Government for running the children home and doing in-country adoption under relevant Rules.**

  **(f) List of children places in in-country and inter-country adoption, year-wise for the period of three years to support the date submitted.**

## ORDER

### Introduction

1. St. Theresa's Tender Loving Care Home (hereafter called, TLH) filed instant writ petition aggrieved by an order of Chairperson, Board of Control and Supervision of Homes, O/o The Director of Women Development and Child Welfare (first respondent herein) (hereafter called, the Director), whereby and whereunder application of TLH for issue of recognition certificate was rejected. Such a certificate is required under Andhra Pradesh Orphanages and Other Charitable Homes (Supervision and Control) Rules, 2001 (Orphanage Rules, for brevity) as well as Andhra Pradesh Women's and Children's Institutions (Licensing) Rules, 2001 (Institution Rules, for brevity) for acting as adoption agency under G.O Ms. No. 16, dated 18.4.2001 The recognition was rejected on the ground that TLH violated Rules of adoption and committed irregularities in procuring children and arranging adoption of them to foster parents. The challenge is based mainly on the ground that TLH being an organization of religious congregation statedly handled all adoptions in 'rule-abiding-manner' and impugned order was issued ignoring relevant facts and circumstances without applying mind.

*Background of the case*

2. The factual background is as follows. Society of Jesus Mary Joseph (SJMJ) is an international organization. It is involved in social welfare and community development activities. Out of three provinces, Hyderabad province is the biggest and it covers number of States. In Andhra Pradesh, they run schools for girls, and tribal children. They run hospitals. They also run shelter homes for street children. SJMJ is registered as St. Theresa Convent Society and is running hospital in the same name. It also runs orphanages. TLH is one such orphanage in existence for long time.

3. The Society obtained Certificate of Recognition (CoR) from Central Adoption Resource Agency (CARA, for brevity), third respondent herein, in 1997, for a period of three years. Thereafter the recognition/ licence extended from 6.10.2000 to 5.10.2001 By virtue of such recognition, TLH is authorized to take up in-country and inter-country adoptions. After obtaining CARA recognition statedly TLH was successful in finding placement to children and it was instrumental in bringing happiness to several childless couples in India and abroad. TLH receives children at its doorsteps brought by biological parents or unwed mothers intending to relinquish children due to poverty or due to social stigma. They leave children with a hope that children sired by them find a home. The petitioner makes preliminary enquiry. They counsel biological parents. They are informed that they have right to take back the children within two months from the date of leaving a child at TLH. They are also informed that the relinquished child would be adopted by Indian or foreign parents. After such counselling, TLH would obtain relinquishment deed executed in the presence of witnesses. Though this ideal procedure is adopted, trouble starts when at every step referred to hereinabove, truth takes back seat.

4. TLH is run by Nuns, who rigidly and strictly adhere to a life of celibacy, owe, prayer and service to humanity with altruism of highest order. TLH alleges that due to lack of exposure to external world, these Nuns have no opportunity of crosscheck identity of persons who bring children or to verify whether persons are real biological parents or not. They go by trust and belief. Petitioner asserts that children were delivered to TLH by genuine biological parents who want to relinquish an unwanted child. As admitted by petitioner, procedure for receiving child is not foolproof and there is no other procedure laid down by State Government or the Board of Control and Supervision of Homes (the Board, for brevity). TLH has handled more than 50% of cases in in-country adoptions by giving children to adoptive parents including Government employees, businessmen, lawyers, police officers etc. Simultaneously if the children are rejected for in-country adoption, petitioner processed those cases for inter-country adoption. As per its guidelines and also the judgment in Lakshmi Kant Pandey v. Union of India, (1984) 2 SCC 244, the petitioner is submitting quarterly/half-yearly progress reports with regard to the children who were given in adoption outside India.

5. In 1999, the involvement of unscrupulous elements in children trade came to light. The officials conducted raids on several institutions and rescued children, who were kept in State Home for children. Criminal Investigation Department (CID) conducted enquiry and gave a clean chit to petitioner. TLH, as requested by respondents 2 and 3 processed as many as twenty-five cases of rescued children for adoption to foreign nationals wherever it was proposed prior to the raids. Again in February/March 2001, there was another adoption scam. Officials of third respondent conducted joint inspection of several orphanages. The records of TLH were checked, adoptive parents were interrogated and no anomalies were pointed out. A preliminary report of joint inspection was drawn up alleging that some of the receipts by petitioner society are not reflected in the cashbook. The petitioner was asked to submit explanation. After considering explanation, third respondent was satisfied and no questions were raised, but at the instance of second respondent, allegations of misappropriation running into several lakhs of dollars were publicized. The petitioner then forwarded a copy of explanation/clarification given by petitioner to third respondent, to second respondent.

6. The second respondent issued two notices on 22.5.2001 and 26.5.2001 calling upon the petitioner to show-cause as to why cancellation of licence should not be recommended to third respondent. An explanation was submitted. Third respondent then sent a communication dated 13.6.2001 informing the petitioner that State Government recommended for cancellation of licence and petitioner was asked to show-cause as to why recognition should not be withdrawn for violating Section 4.16 of the Revised Guidelines. The petitioner sent reply. While action was pending before third respondent, petitioner applied for renewal of CoR with effect from 5.10.2001 The same was not processed, but third respondent gave permission to continue processing adoption of those children for whom third respondent issued 'No Objection Certificate' (NOC) during subsistence of licence. In the meanwhile, Government issued Memo No. 9629.P2/2000, dated 24.11.2001 rejecting recognition certificate to TLH under Orphanage Rules and also rejected licence for doing adoption under Institution Rules. The petitioner then filed WP No. 1884 of 2002 challenging the Government memo. While the same was pending, first respondent passed impugned order, dated 1.2.2002 informing the decision of Board to reject the request of petitioner for issue of CoR under Orphanage Rules and Institution Rules.

7. The Chairperson of first respondent filed counter-affidavit. The allegations and - averments in brief are as follows. Petitioner is not recognized as fit institution to keep abandoned children under Section 10(1) of Juvenile Justice Act, 2001. It is not known how the petitioner obtained recognition from CARA in 1997 and as the recognition expired on 5.10.2001, there is no valid licence. Petitioner is not recognized institution under Orphanage Act. The petitioner was found purchasing children from vulnerable Lambada community people through agents. In 1999, Superintendent of Police (SP), Nalgonda, found that during September/October 1998 till March 1999, seven female infants were sold to TLH by Tanda tribals within the limits of Chandrayanpet and Devarakonda Police Sub-Division by paying Rs. 5,000/- to Rs. 10,000/- per child. During investigation, it was found that petitioner is not maintaining proper records and fabricated false documents including relinquishment deeds in fictitious names. In another case, petitioner was buying an infant brought by Lambada man for Rs. 4,000/- at Imlibun Bus Station, Hyderabad, and she was arrested. While denying the allegations made by petitioner as to how the children are brought to doorsteps of TLH, it is alleged that petitioner violated various guidelines laid down in Lakshmi Kant Pandey's case (supra) and guidelines issued by third respondent. Petitioner failed to produce relinquishment deeds and even some deeds submitted by TLH were found to be fabricated false documents, for violating CARA Rules, Case No. 457 of 2001 of P.S, S.R Nagar, under Sections 420, 468, 471 and 341 was registered.

8. In March/April 2001, officials of respondents 1 and 3 inspected, among others, TLH, where children of same ethnic background were found. During enquiry, it was noticed that parents and unwed mothers do not come to petitioner to surrender child. Instead, agents procure children from different parts of the State, especially, Nalgonda District. During inspection, petitioner did not produce records and

refused to give information. They processed inter-country adoptions only for financial gains. Therefore, notices were issued to petitioner on 22.5.2001 and 26.5.2001, but petitioner did not give any reply. The allegation that petitioner regularly furnished quarterly information is denied; Director issued two letters on 22.5.2001 and 26.5.2001 informing the grounds on which certificate of recognition was refused and explanation was called for before passing impugned order.

*Points for consideration*

9. Learned Counsel for petitioner and learned Government Pleader for Department of Women Development and Child Welfare made submissions in tune with pleadings. Learned Counsel for petitioner also made submissions with reference to contents of the additional affidavit filed in the Court on 4.11.2008 A reference is made to them at appropriate place.

10. Whether impugned order suffers from impropriety or procedural irregularity is the first question to be addressed. This has become necessary because learned Counsel for petitioner vehemently submits that first respondent while passing impugned order did not consider the explanation submitted by petitioner and that the impugned order was passed without application of mind. The sequence of events preceding impugned order would reveal that there was inspection of TLH in 1999. Petitioner was given a clean chit. Again in February/March 2001, there was inspection. A preliminary Joint Inspection Report was submitted pointing certain irregularities like misappropriation. Based on these, Director issued two notices on 22.5.2001 and 26.5.2001 Petitioner submitted explanation on 28.5.2001 In that connection, CARA sent a communication, dated 13.6.2001 informing that the State Government recommended to cancel licence and the petitioner was asked to show-cause as to why recognition should not be withdrawn for violating Sections 4.16 of the Revised Guidelines. The petitioner sent a reply on 21.6.2001 While the matter was pending, petitioner applied to second respondent for renewal of CoR, which was rejected by memo of the second respondent, dated 24.11.2005 This was challenged in a writ petition. While the same is pending, the impugned letter was issued by first respondent informing the decision of the Board to reject the request of petitioner for issue of CoR under Orphanage Rules. The impugned letter nowhere refers to explanation submitted by petitioner to the Director or to CARA pursuant to their notice, dated 13.6.2001 A copy of the reply, dated 21.6.2001 is annexed to the writ petition. It is addressed to Joint Director of CARA. A letter, dated 28.5.2001 of Sister Teresa Marie addressed to the Director, Women Development, who is also a party to the writ petition, is by way of interim reply and at no point of time petitioner submitted any detailed explanation. During the relevant time as can be seen from the counter-affidavit; there was a hue and cry about the role of NGOs in illegal adoptions. Presumably, for this reason, the Director and CARA initiated action simultaneously probably without proper co-ordination, which resulted in one authority issuing a show-cause and another authority passing an order rejecting request for CoR and yet another authority informing the said decision of the Government In anxiety to abate illegal activities, the procedure contemplated appears to have been ignored. This becomes clear by a brief reference to two relevant enactments and Rules made thereunder.

*Relevant Statute Law*

11. Women's and Children's Institutions (Licensing) Act, 1956 (Central Act No. 105 of 1956) (hereafter called, the Institutions Act) is Legislation to give effect to the Directive Principles of State Policy contained in Article 39 of the Constitution of India. It is intended to protect women and children from exploitation and to regulate and licence orphanages and other institutions caring for women, and children under eighteen years of age. The Act has come into force in the State of Andhra Pradesh with effect from 20.2.1992 Section 3 thereof prohibits a person from establishing or maintaining any institution for the reception, care, protection and welfare of women and children, without obtaining a licence stated under the Act. Sections 4 to 8 deal with grant and revocation of licence. Section 9 is penalty clause. Any contravention of provisions of the Institutions Act or the Rules made thereunder is punishable with imprisonment which may extend upto three months or with fine or with both. Section 11 empowers State Government

to make Rules. In exercise of their powers under Section 11(1), State of Andhra Pradesh promulgated Institution Rules vide G.O.Ms No. 18, dated 11.5.2001 Rules 3, 4, 7 to 15 contain the procedure for making application for issue of licence, for maintenance of institution, the constitution of District Advisory Committee, the grant of licence by the said Committee, refusal/revocation of licence, suspension and cancellation of licence etc. Rule 5 prescribes eligibility for establishment of institution. The criteria are (a) the institution shall be registered under Societies Registration Act, 1860; (b) shall furnish social status, activity and reputation of Members of Managing Committee; (c) shall provide suitable accommodation facilities and sanitary conditions; (d) accommodation shall have good lighting, ventilation etc; (e) shall furnish copies of bye-laws of the institution; (f) shall furnish copies of audited statements of accounts for the past three years; and (g) shall furnish financial sources for running the institution.

12. Rule 6 of Institution Rules contains eligibility for carrying out adoptions under Hindu Adoptions and Maintenance Act, 1956 and Guardians and Wards Act, 1890. These conditions are that such agencies shall be registered under the Societies Registration Act, 1860 and shall give an undertaking as follows, (a) They shall adhere to any guidelines or rules laid down by the State Government or Central Government for in-country and inter-country adoption from time to time; (b) all registered agencies must function as per the Societies Registration Act and the Rules; (c) all the office bearers shall be Indian Nationals; (d) the Chief Executive of the Organisation shall be willing to sign a written undertaking to follow the guidelines laid down by the Supreme Court of India and those prescribed from time to time by the Government of India and the regulations, if any, made by CARA; (e) they shall maintain minimum standard for childcare in their Homes, as defined by the State/Central Government from time to time; (f) they shall have an appropriate Children Home for the protection and upkeep of children including infants; (g) they shall run on non-commercial and non-profit basis; (h) they shall be able to raise funds through donations or Government grants; (i) they shall have atleast one qualified social worker on its staff to carry out the adoption work; (j) the agency shall be an independent respected social child welfare agency; (k) they shall furnish copies of bye-laws of the institutions; and (1) they shall furnish copies of audit statement of accounts for the past three years.

13. In 1960, Parliament enacted Orphanages and other Charitable Homes (Supervision and Control) Act, 1960 (Central Act No. 10 of 1960) (hereafter called, the Orphanages Act) to provide supervision and control of Orphanage Homes, which, as per Section 2(d) means an orphanage, a home for neglected women or children, widows home or any place intended for reception/care/protection/welfare of women and children. A reading of 'Statement of Objects and Reasons' appended to the Bill introduced in the Parliament would show that Orphanages Act is intended not to disturb existing Orphanages or Charitable Homes but to regularize management through a Managing Committee to be elected as prescribed.

14. The Orphanages Act contains 31 Sections divided into five Chapters. Chapter I contains Sections 1 to 4. Section 1 contains short title, territory and commencement of provisions. Section 2 is dictionary clause and Section 3 is exclusionary clause. Section 4 gives overriding effect of provisions of the Act. Chapter II (Sections 5 to 12) provides for establishment of 'Board of Control and Supervision of Homes' by the State Government. The functions and powers of such Board are indicated in Sections 7 and 8. It shall be duty of the Board to supervise and control generally all matters relating to management of Homes in accordance with provisions of the Act. In discharging its duties, the Board shall be bound by directions issued by State Government. It shall have powers to give general or special directions to the Manager of recognized Homes which shall be complied with. The Board is also given powers of inspection and power to enter any Home for ascertaining whether the provisions of the Act, the Rules, Regulations or directions are being complied with. Chapter III contains procedure for Recognition of Homes. Section 13 prohibits maintenance of a Home unless CoR is obtained under the Act, which can be revoked by the Board after giving an opportunity to manager to show-cause as to why certificate should not be revoked. When an application is made for recognition, the Board may either refuse or grant such recognition but a certificate cannot be refused until an opportunity of being heard is given to the applicant.

15. Chapter IV contains regulatory provisions for management of recognized homes. It shall be the duty of the manager to comply with all the requirements of the Act, the Rules, the Regulations, directions and orders in respect of every women or child admitted into recognized Home. A person who fails to comply with Rules or contravene conditions of CoR is punishable with imprisonment as well file as provided by Section 24 of the Orphanages Act. Section 29 empowers the State Government to make Rules and Section 30 empowers the Board constituted under Section 5 to make Regulations. State Government promulgated Orphanages Rules vide G.O Ms. No. 16, dated 18.4.2001 Rules 11 to 14 deal with grant/ refusal and revocation of recognition.

16. When an application is made, for grant of Certificate of Recognition, as per Rule 11(2), the Board is required to consider various aspects. These are: (i) antecedents and social status of the office bearers of the Managing Committee; (ii) suitability for running an institution; (iii) accommodation facilities; (iv) provision of medical facilities etc., as per Rule 11(2)(vii) read with (viii), children relinquished by biological parents on family grounds of poverty, number of children. If any unwanted girl child is admitted, the licence and recognition of Home for Orphanage shall be cancelled or withdrawn. If a child is found abandoned or picked up as destitute or abandoned by unwed mother or children whose parents expired in accident, it is mandatory that such children are registered (by civil/hospital/police officials) in the registers maintained with Project Director, District Women and Child Agency of Department of Women Development and Child Welfare.

*CARA Guidelines*

17. Yet another instrument of Regulations is "Guidelines for Adoption from India 2006" made by CARA, which is an autonomous body under the Ministry of Women and Child Development, Government of India (hereafter called, Guidelines). These Guidelines provide a basis for in-country adoption within the framework of norms and principles laid down by Supreme Court in Lakshmi Kant Pande's case (supra). Distributed over ten Chapters and four Annexures, they elaborately provide for various authorities/ agencies, their role, powers and functions as well as method and manner of recommending placement agencies as well as adoption agencies. As per Section 3.1 in Chapter III, State Government has to licence/ recognize of children's homes engaged in adoption programmes of destitute, abandoned or orphaned children under relevant Act/Statute which only mean Orphanages Act and Rules made thereunder and Institutions Act and Rules made thereunder. Chapter IV of the Guidelines contain procedure for inter-country adoption in tune with Guidelines laid down by Supreme Court. These are to the effect that no application by a foreigner for taking a child in adoption should be entertained by any adoption/ placement agency unless such application is sponsored by a social or child welfare agency licensed by Government or Department of foreign Government.

18. The procedure for inter-country adoption is in five steps. After completing the procedure as contemplated in steps 1 to 4, the placement agency has to apply for NOC to CARA. After receiving such NOC, the petition has to be filed before the competent Court for adoption/guardianship. The Court then has to pass an order for placement of the child with foreign prospective adoptive parent. After this formality is completed, the placement agency would apply for a passport of the child and will be handed over to foreign adoptive parent who shall have to transfer to India to accompany the child to his/her country. Chapter V deals with recognized Indian placement agencies. Only agencies/institutions engaged in child welfare programmes can apply for recognition to CARA to State Government. Section 5.5(3) contains criteria for recognition of such agencies, which shall be granted for a period of three years. Even such recognized agencies are required to give priority to in-country adoption, 'so that every child gets an opportunity to find a family within its own cultural milieu'. Every recognized placement agency is required to maintain records as per Section 5.16 The procedure for renewal of recognition is contained in Section 5.18 and reads as under:

    5.18 Renewal of Recognition of RIPA

RIPA should apply for renewal of recognition, 6 months prior to the date of expiry of the previous recognition. The original application should be sent by the agency to the appropriate authority of the State Government and a copy of it should simultaneously be forwarded directly to CARA. The State Government will forward the original application to CARA along with its comments within a period of two months from the date of receipt of the complete application. If the State Government does not respond within three months from the date of receipt of application, CARA may conduct a joint inspection and consider the renewal of recognition. Recognition would normally be renewable for a period of three years subject to the following conditions:

(a) Recommendation/views of the concerned State Government accompanied by the inspection report of the Agency.

(b) Satisfactory performance in relation to in-country adoption will be an important factor to assess and consider further renewal of recognition of any RIPA. The agencies shall sufficiently exhibit their involvement in the area of in-country adoption. The Agencies will place 50% or more children in adoption to Indians in India.

(c) Regular submission of Annual Report, quarterly reports of the Agencies and audited statement of accounts as prescribed, adoption charges per child, donations received, if any.

(d) No instance of proved malpractice against the RIPA.

(e) Whether the agency is still recognized by the appropriate authority of concerned State Government for running the children home and doing in-country adoption under relevant Rules.

(f) List of children places in in-country and inter-country adoption, year-wise for the period of three years to support the date submitted.

19. As can be seen from Section 5.18, an application for renewal of recognition is to be made in six months prior to expiry, to appropriate authority of State Government who shall forward the same with recommendation. The renewal depends on recommendation of State Government and satisfactory performance in relation to in-country adoption. There should not be any instances of malpractices against such placement agency. As per Section 5.23, the placement agency shall have to adhere to ethical practices and work in best interest of children described in Hague Convention for inter-country adoption, 1993, failing which, action shall be taken against defaulting agency.

*Conspectus of Legal Position*

20. The conspectus of Orphanages Act and Rules, the Institutions Act and Rules as well as CARA Guidelines would show that every agency, which establishes an institution for reception, care, protection and welfare of women and children, and every institution which establishes a Home whether it is called Orphanage or otherwise, is required to obtain a licence under Institutions Rules and CoR under Orphanage Rules. Only such institutions, who satisfy eligibility criteria as contained in Rule 6 of Institution Rules can seek registration as per Section 2.4 read with Section 3.1 of CARA Guidelines as recognized Indian Agencies for Inter-country Adoption (RIPA). Even for being a placement agency, in respect of in-country adoptions, a licence and CoR is required. If any licensed/recognized institution is reported to have resorted to malpractices, the State Government ordinarily cannot recommend such case for recognition or renewal of recognition under CARA Guidelines.

*Petitioner's case*

21. Reverting to petitioner's case, in affidavit accompanying the writ petition, no details are forthcoming with regard to licence under Institutions Act and CoR under Orphanages Act. Be it noted that in Andhra Pradesh both these Acts came into force from 20.2.1992 (A.P Gazette, 71, dated 19.2.1992). The Rules under these Acts have been made in 2001. Curiously, even without obtaining necessary licence/CoR, petitioner appears to have established an institution/orphanage and also assumed the role of adoption

placement agency. Presumably, after the judgment of Supreme Court in Lakshmi Kant Pandey's case (supra) and issue of Guidelines by Central Government in obedience to the dicta of the Apex Court, the petitioner applied for CoR to CARA. Certificate No. 89/2000, dated 9.10.2000 was issued for a period of one year from 6.10.2000 to 5.10.2001 This Certificate is subject to Guidelines issued by CARA and is liable to be revoked at any time for violation of any conditions or directions issued by Government of India or on the grounds of irregular practices by petitioner. During its period of validity, "adoption scam broke out". Serious allegations of trade in children were made. Inspections were conducted and in one such inspection, the officials of first respondent found irregularities and elements of misappropriation.

22. Director initiated action in May, 2001, and issued show-cause notice, dated 22.5.2001, alleging that petitioner is not maintaining proper records, that admission register does not contain details of adoptive parents and natural parents, declarations of biological parents were fictitious, relinquishment by biological parents does not contain the dates and proper witnesses and that by making use of fictitious declarations, unscrupulous elements are taking advantage. Explanation was submitted by petitioner. In the meanwhile, CARA also issued a show-cause notice, dated 13.6.2001 proposing to de-recognise the petitioner. At that stage, petitioner applied for renewal of recognition. This was considered by Government. By their memo, dated 24.11.2001 the Government refused to recommend to CARA for renewal of recognition. After receiving these orders, Director as Chairperson of the Board issued impugned order. It is no doubt true that many of contentions raised by petitioner (some of which form part of writ allegations mentioned hereinabove) were not considered. This is certainly contravention of Section 15(2) of Orphanages Act, which provides that an order of refusal cannot be passed without giving an opportunity to applicant or agency.

*Illegality cannot be perpetuated*

23. For this reason, in the ordinary course, impugned order has to be declared as illegal. If declaration of illegality gives rise to another illegal action of permitting petitioner to be adoption placement agency, that would certainly amount to allowing it to do so without proper licence/certificate of recognition. By not adhering to procedure with regard to accepting abandoning children and by creating fictitious relinquishment documents and not registering biological parents correctly, petitioners certainly violated the Orphanage Rules and Institution Rules. In such an event, a declaration cannot be granted because it would amount to permitting petitioner to continue illegality. It is well settled that an order cannot be quashed or set aside if it revives an illegality or an illegal order. A reference may be made, to Gadde Venkateswara Rao v. Government of A.P, AIR 1966 SC 828 and State of Uttaranchal v. Ajit Singh Bhola, (2004) 6 SCC 800. If the impugned order is set aside on the ground that it contravenes some provision of law and also on the ground that petitioner was not given opportunity to meet the allegations in the show-cause notice, and a direction is issued to first respondent to grant recognition to the petitioner, it would enable unrecognized institution to handle in-country and inter-country which is quite contrary to two Parliamentary Enactments as well as binding CARA Guidelines. Therefore, submission of learned Counsel for petitioner cannot be accepted.

*Basis for impugned order*

24. The impugned order rests on the following grounds, (i) The Department of Women Development conducted Joint Inspection of petitioner on 26.4.2001 and found that TLH is maintaining false records and committed several financial irregularities; (ii) a representative of Mrs. Uma Pande, NRI, living in California, USA, gave a complaint about irregularity committed by TLH in sponsoring a baby girl for adoption, in that no proper relinquishment document was prepared and no F.F.R, was filed in Police Station as required for abandoned children besides fabricating false documents; (iii) Additional D.G.P, CBCID, reported that on verification of nineteen relinquishment documents, the biological parents could not be traced and addresses indicated in the documents are not correct, which is violation of CARA Guidelines; and (iv) in 1999, S.P, Nalgonda, informed that seven female infants were sold during October, 1998 to March, 1999 and all the seven infants were given adoption to TLH by taking Rs. 5,000/- to Rs. 10,000/- per child and that TLH is not maintaining proper records.

25. Learned Counsel for petitioner made an effort to raise various objections with regard to these four grounds. Learned Government Pleader has placed before this Court necessary material, which would show that mention of these incidents in the impugned order is supported by documents. This Court is not an appellate authority nor this Court can go into correctness of these allegations especially when highest police officials submitted their reports after conducting detailed field enquiry. Therefore, the question of veracity of these grounds is not within the scope of judicial review. Insofar as relevancy of these grounds is concerned, as per the provisions of Orphanages Act, Orphanage Rules, Institutions Act and Institutions Rules as well as CARA Guidelines, referred to herein, these are certainly malpractices and entail in cancellation of licence and/or cancellation or refusal (renewal) of Certificate of Recognition. Therefore, this Court does not find any reason to exercise its discretion in favour of petitioner and set aside the impugned order.

*Parens patriae jurisdiction*

26. The case on hand is not merely the question of legal injury allegedly suffered by petitioner or proper or improper exercise of jurisdiction and powers by the respondents. This case is concerned with something more than this. In the legal battle between Christian Missionary Institution and State/Central Government and/or its Agencies, the Court cannot forget the Indian citizens of tender age notwithstanding the fact that they are parentless children, orphans or abandoned children. This issue has arisen by reason of the averments in the additional affidavit filed by petitioner on 4.11.2008 For appreciation of the point, it is necessary to summarise the contents thereof. In 2000, there were floods in Hyderabad. Many children were admitted in TLH with severe health problems. The parents could not afford to get them treated. The Government Hospital allegedly refused to treat them. The petitioner got them admitted in Rainbow Hospital, Banjara Hills, Hyderabad, for treatment at a huge cost. As at present, petitioner-institution has twenty-six children (actual number of children is not available) for whom TLH obtained clearance of V.A.C.A and NOC from Central Government. The adoptive parents from different European countries, the U.S.A, came forward and agreed to adopt the children. The details of which are mentioned in Para 7 of the additional affidavit. The petitioner states that if these cases are not processed for inter-country adoption, there would be problems. There are no local couples willing to adopt children. Further, after agreeing to adopt the children many adoptive parents from different countries are regularly in touch with the children and developed a bond with them. Though necessary documents executed by these willing adoptive parents are not enclosed nor filed before this Court the names of parents (with their Nationality) willing to adopt each of the children are as follows.

| SI. No. | Name of the Child | Name of the Adoptive Parents |
|---|---|---|
| 1 | Ragini | Mr. Robert Crackel<br>Mrs. Andrea<br>Spain |
| 2 | Bloosom | Mr. Raabe Robert<br>Mrs. Galan Madero<br>Spain |
| 3 | Ratna | Mr. Pouzeri Umberto<br>Mrs. Moriello Sabima<br>Italy |
| 4 | Lavanya | Mr. Robert E. Justis<br>Mrs. Helen M. Justis<br>U.S.A |
| 5 | Himabindu | Mr. Keith Hasart<br>Mrs. Karla Hasart<br>U.S.A |

| | | |
|---|---|---|
| 6 | Jessy | Mr. Robert Cracket<br>Mrs. Andrea Cracket<br>U.S.A |
| 7 | Satish | Mr. Steven W. Gilbert<br>Mrs. Beverley R. Gilbert<br>U.S.A |
| 8 | Nanditha | Ms. Lynn Marquette<br>U.S.A |
| 9 | Aleena | Mr. Schoonhoven<br>Mrs. Kille Sijgie Johanna<br>Netherland |
| 10 | Bizili | Mr. Tunistra Steven<br>Mrs. Klijinstra Jolande<br>Netherland |
| 11 | Anusha | Mr. Laurence Bernhard<br>Mrs. Klijinstra Jolande<br>Netherland |
| 12 | Vismaya | Mr. Arous Thomas<br>Mrs. Julia Ann<br>U.S.A |
| 13 | Suguna | Mr. Jurt Holeweg<br>Mrs. Gabi Holeweg<br>Germany |
| 14 | Mythili | Mr. Ute Baumhoff<br>Mrs. Joachin Baumhoff<br>Germany |
| 15 | Vennela | Dr. Dennis Keith Boxby<br>Mrs. Sarah Dadmun<br>U.S.A |
| 16 | Santhoshi and Pradeep | Mr. Brice Lewis<br>Mrs. Zina Lewis<br>U.S.A |
| 17 | Avanthi | Mr. Allen Stipek<br>Mrs. Cynthia Stipek<br>U.S.A |
| 18 | Srikala and Sasikala | Mr. Alsterlund Todd<br>Mrs. Tracy Howton<br>U.S.A |
| 19 | Namratha | Ms. Rachel Cary<br>U.S.A |
| 20 | Poornima | Mr. Robert K. Sumpter<br>Mrs. Rene J. Smith<br>U.S.A |

| | | |
|---|---|---|
| 21 | Lizzy | Mr. Joel Mishler<br>Mrs. Kimberly Mishler<br>U.S.A |
| 22 | Healen | Mr. Mathew Risley<br>Mrs. Beverley R. Gilbert<br>U.S.A |
| 23 | Jacqueline | Mr. Mark. Brockmeyer<br>Mrs. Jennifer Brockmeyer<br>U.S.A |
| 24 | Manjusha | Mr. Kavin Hoffman<br>Mrs. Connie Hoffman<br>U.S.A |
| 25 | Sreedevi | Mr. William Paxson<br>Mrs. Cynthia Parson<br>U.S.A |
| 26 | Prema | Mr. Ramdy R. Scheijets<br>Mrs. Roseann Thersa<br>U.S.A |

27. In a situation such as this, where the local people are not willing to adopt these children, the Court cannot ignore the welfare of the children. No doubt, learned Government Pleader submits that the Department of Child Welfare has a list of local people who are willing to adopt these children and if the children are handed over to Government of Andhra Pradesh in Child Welfare Department, the Government will take care of them. When the children are already given in adoption to foreign parents who developed a bond with them by reason of regular visits to them, can the Court ignore and issue a direction to petitioner to handover the children to Government Department ignoring the welfare of these children. The answer must be in the negative.

28. Parens Patriae jurisdiction is the right and duty of sovereign to protect persons with disabilities who have no rightful protector. It refers to the power of the State of Guardianship over persons under disability. In cases involving custody of minor children, whether it be by divorce or suppression or death of natural parents, the Court as the institution sharing sovereign power of the State cannot ignore the welfare of the orphan children. In L. Chandran v. Venkatalakshmi, AIR 1981 AP 1, speaking for Division Bench Justice P.A Chowdary, explained the law of parens patriae jurisdiction of the Courts in the matter of custody of children, thus:

Particularly in the case of minors who cannot be expected to express their intelligent preferences the modern State assumes the ultimate responsibility for their welfare. This is the origin of parens patriae jurisdiction of the Courts sharing in the sovereign power of the State. In exercise of this jurisdiction, which is derived not by reason of any statute but as an inseparable attribute of judicial power of the State, the Court should always look to the welfare of the minor in all matters relating to its life. Every claim including the one which has been advanced in this case by the father for the custody of the minor child, must be subordinate to the power and duty of this jurisdiction to look after the welfare of the minor.

29. The child that too an orphan child is not a chattel to be tossed up between competing rights. A child being a person has constitutionally recognized human right to life and liberty under Article 21 of the Constitution of India. Therefore, there cannot be concept of unlimited power of the Government to exclusively deal with such unfortunate children. Constitutionally, it is within the power of the High Court to protect the life of every child (see Paras 11 and 12 in L. Chandran's case (supra)). While deciding case of this nature, the Court cannot forget the welfare of the child. This Court, however, hastens to add that these observations must not be construed as indicating that the welfare of the abandoned child would be better protected if given in adoption to a foreign parent in preference to a local parent. Indeed, in

Lakshmi Kant Pandey's case (supra), Supreme Court categorically laid down that inter-country adoption is permissible only when in-country adoption is not possible. Even under CARA Guidelines, 2006, while dealing with adoption of orphan child, the right of the orphan child to find a family as visualized in United Nation's Convention on Child Rights and Hague Convention on inter-country adoption must be kept in mind. The National Policy for the Welfare of Children also lays stress on the role played by voluntary organizations in the field of education, health and social welfare services for children. Therefore, the welfare of the 26 children who have been already adopted by foreign parents cannot be ignored. Chapter IV of CARA Guidelines contains detailed procedure for inter-country adoption, which can be resorted to only when local persons are not available to adopt abandoned/orphan child. Chapter V (Section 5.5) contains procedure for in-country adoption. Indian Placement Agencies like TLH are required to give priority for in-country adoption. The order of priority while considering adoption of Indian children is as follows: (i) Indian citizens living in India; (ii) Indian citizens living abroad; (iii) Both parents of Indian origin abroad (PIO); (iv) one parent of Indian origin abroad; and (v) Foreign Nationals.

30. As per the averments in the additional affidavit filed on 4.11.2008 (these are not denied by respondents by filing appropriate additional counter-affidavit), twenty-six (26) children already been cleared by Central Government for adoption and these cases have to be processed so that foreign parents who have already adopted these children can leave the country. These children were brought to TLH in 2000. In all probability, all these children are more than eight years of age. At this stage, it may be difficult for them to adjust with adoptive parents of Indian origin. Therefore, as far as possible the cases of these twenty-six (26) children must be allowed to be processed by TLH so that all these children would have better life. However, the officials of CARA and a designated officer from the Department of Child Welfare can be associated in processing cases of these twenty-six (26) children.

31. In the result, the writ petition is disposed of in the following manner:

(i) There is no merit in the writ petition insofar as it seeks to challenge the impugned letter of the Chairperson of the Board of Supervision and Control of Homes being Letter No. 3950/02/2001, dated 1.2.2001 The same is declared as legal and valid;

(ii) Notwithstanding the above, the petitioner should be permitted to explore the possibilities of giving these twenty-six children in adoption to local persons i.e, Indian citizens living in India. The processing of these cases shall be under the supervision of an Official of Central Adoption Resource Agency and an Official of Department of Child Welfare, Government of Andhra Pradesh;

(iii) In case, it is not possible to find local persons, i.e, Indian citizens living in India, as per the procedure in Chapter IV of Guidelines for Adoption from India, 2006, issued by Central Adoption Resource Agency, Ministry of Social Welfare and Empowerment, New Delhi, TLH should be allowed to process the cases of twenty-six (26) children mentioned in this Judgment supra, to enable these children to leave for the respective countries;

(iv) It shall also be open to petitioner to obtain necessary licence under Orphanages and other Charitable Homes (Supervision and Control) Act, 1960; Andhra Pradesh Orphanages and Other Charitable Homes (Supervision and Control) Rules, 2001; Women's and Children's Institutions (Licensing) Act, 1956 and Andhra Pradesh Women's and Children's Institutions (Licensing) Rules, 2001; as well as Registration, if any required under CARA Guidelines, in which event such application shall be considered in accordance with law; and

(v) There shall be no order as to costs.

❑❑❑

# MASTER DIVYANSH ARORA MINOR THROUGH HIS NEXT FRIEND RAJ KUMAR ARORA VERSUS UNION OF INDIA & ORS.

**Delhi High Court**

**Bench : Hon'ble Mr. Justice Sanjeev Sachdeva**

*Master Divyansh Arora Minor through his Next Friend Raj Kumar Arora ..... Petitioner|*
*Versus*
*Union of India & Ors. ..... Respondents*

**W.P (C) 6759/2016**

**Decided on November 14, 2017**

**Adoption — Procedure for adoption by NRI**

**No Objection Certificate (NOC) from Central AdoptionResource Authority (CARA)**

**Whether it is necessary in every case to follow CARA's elaborate procedure ?**

**Child's interests are of paramount consideration.**

**Therefore, adoption ought to be given effect at the earliest in child's interest so that he/she is united with his adoptive parents . Child had been adopted by elder brother of his biological father. Not only customary adoption ceremony had been performed, but, formal adoption deed had also been executed . Mutation of parents' names had also been done in petitioner's birth certificate and Aadhaar card.**

**Guardianship court in India and Higher Regional Civil Court in Germany too had accepted the adoption, but, the child could not be united with his adoptive parents in Germany for two and a half years, for want of NOC from CARA . CARA is insisting that prescribed procedure, including Home Study Report, must be undergone for obtaining NOC from it.**

**Held, it was a bona fide adoption and child must be united with his adoptive parents without further delay, therefore, CARA directed to issue NOC within two weeks, and Passport Office directed to issue passport within two weeks thereafter.**

Allowing writ petition, the High Court of Delhi,

*Held :*

Delay in adoption would mean that the minor has to live with uncertainty and insecurity. The adoptionceremonies in this case were performed on 26-1-2015,and the adoption deed was executed on 27-1-2015,and for over two and a half years, the minor child is living with uncertainty. He has not been integrated with his adoptive family in the new country of residence (Germany). The home study report would not be required for the present case, more so in view of the fact that the Higher Regional Civil Court in Germany, by its order dated 20-2-2017 has also recognized the present adoption. Moreover, in view of the judgment dated 28-5-2015 ofthe competent court on a guardianship petition, the petitioner-child is now lawfully adopted. The judgment has attained finality and even if the petitioner was to wish, the petitioner cannot reunite with his biological parents. The petitioner's birth certificate and his Aadhaar card has already been modified, and the names of his adoptive parents have already been substituted in place of his biological parents. It is not a case of adoption between strangers. It is a case of

adoption between family members. The adoptive parents being the real elder brother of the biological father and the elder brother's wife. The adoption, being in accordance with the HinduAdoption and Maintenance (HAMA) Act, 1956, is complete. All relations between the petitioner and his natural family are severed. If the petitioner is not permitted to unite with his adoptive family, the petitioner would be in a precarious position, where his relations with the biological parents have severed, and the relations with his adoptive family are not permitted to be joined. It would cause grave injustice to a child. Central AdoptionResource Authority (CARA) is directed to grant, within a period of two weeks, a No Objection Certificate (NOC) to petitioner's adoptive parents for taking the petitioner to Germany. The Ministry of External Affairs/Regional Passport Officer is also directed to issue a passport to the petitioner within a period of two weeks thereafter. (Paras 18 to 20)

The Judgment of the Court was delivered by

**Hon'ble Mr. Justice Sanjeev Sachdeva**

By this petition, the petitioner seeks a direction in the nature of mandamus thereby directing the respondents to issue directions to the respective Visa Issuing Authorities that Certificate from Central Adoption Resource Authority (CARA) is not mandatory in view of an order of a Court under Hindu Adoptions and Maintenance Act, 1956 (hereinafter referred to as 'the HAMA Act') from a Competent Court and further for a direction to respondent No. 3, i.e, Ministry of External Affairs to issue a passport to the petitioner.

2. The petitioner was born on 15.01.2004 The biological parents of the petitioner are Shri. Raj Kumar Arora and Smt. Neeru Arora. The petitioner was adopted by his paternal uncle and aunt, i.e, the elder brother of Shri. Raj Kumar Arora and his wife, namely, Shri. Dalip Kumar Arora and Smt. Vaishali Arora. Formalities and ceremonies for adoption were performed on 26.01.2015 A registered Adoption Deed was executed on 27.01.2015 The adoptive parents, who were married since 11.07.2008, did not have any child despite undergoing various medical procedures. Theadoption of the petitioner was ratified by the Courtof District & Sessions Judge (West), Tis Hazari Courts, Delhi, in a Guardianship Petition No. 01/2015 by judgment dated 28.05.2015

3. The adoptive parents of the petitioner are German citizens with Overseas Citizen of India (OCI) status and live in Hannover, Germany.

4. As per the petitioner, since the adoption was an inter-country adoption, the parents of the petitioner approached CARA, as directed by the German Consulate at Delhi. CARA refused to assist the petitioner's parents but required them to apply through proper channel foradoption on the premise that CARA was the Central Authority regulating inter-country adoptions, which were guided by the provisions of The Hague Convention, 1993 and accordingly, the parents would require a No Objection Certificate from CARA prior to applying for a visa and for such a Certificate they had to make an application for adoption with CARA. The parents of the petitioner allege to have approached CARA various times but there was no response or assistance from them.

5. It is contended that despite the fact that there is a valid adoption of the petitioner by the adoptive parents and there is a Deed of Adoption dated 27.01.2015 and a judgment of the Competent Court dated 28.05.2015 ratifying the adoption, CARA has required the parents of the petitioner to go through a cumbersome process by making an application foradoption to CARA.

6. It is contended that reliance placed by CARA on the guidelines of 2015, which were notified on 17.07.2015 under the Juvenile Justice Act, 2015, which in itself was effective on 01.01.2016, the said Act is not applicable to adoption of children made under the provisions of HAMA Act.

7. It is further contended that the guidelines of2015 are not applicable, first of all, because they were notified after the adoption in the present case on 27.01.2015 and would only cover an orphan,abandoned or surrendered child and does not covered inter-country direct adoptions. It is contended that the present case is not only of an inter-country direct adoption but an adoption within the family.

8. The respondents have contended that it is mandatory for the adoptive parents to obtain the agreement/ approval of the Central Authority concerned in Germany as well as the NOC (agreement)of CARA under Article 17 of The Hague Convention on Prevention of Children & Cooperation in respect ofInter-Country Adoption, 1993 (hereinafter referred to as Hague Adoption Convention).

9. It is denied that the parents of the petitioner, ever, approached CARA for any NOC. It is contended that the parents of the petitioner need to make an application for grant of an NOC along with, inter alia, (i) Home Study Report of the adoptive parents from the Central Authority of Hamburg in Germany with supporting documents, (ii) letter from the Central Authority in Germany containing necessary declaration under Articles 5 & 17 of the Hague AdoptionConvention, (iii) undertaking from the Central Authority in Germany for post-adoption follow-up.

10. It is contended that the respondents cannot ensure immigration clearance for the adopted child to the country of residence of adoptive parents since the passport and Visa Issuing Authority are not under the administrative jurisdiction of the respondents.

11. It is contended that the respondents do recognize the adoptions made under the HAMA Actand the Adoption Order issued by the Competent Authority, however, CARA is mandatory to issue NOC for inter-country adoption being the Central Authority ofIndia under the Hague Adoption Convention for which an application is required to be made along with the requisite documents.

12. During pendency of the present petition, the petitioner placed on record a judgment of the Higher Regional Civil Court at Germany dated 20.02.2017 recognizing the adoption of the petitioner and also recognizing the judgment of the Court of District & Sessions Judge (West), Tis Hazari Courts, dated 28.05.2015

13. Identical issue as arising in this petition also arose in Writ Petition (Civil) No. 5718/2015 titled PKH v.Central Adoption Resource Authority through the Secretary General. By Judgment dated 18.07.2016, a Coordinate Bench of this Court examined in detail the various International Conventions as well as the judgments of the Supreme Court in Lakshmi Kant Pandey v. Union of India, (1984) 2 SCC 244 andAnokha (Smt.) v. State of Rajasthan, (2004) 1 SCC 382, while analysing the Juvenile Justice Act, 2000, the Juvenile Justice (Care and Protection of Children) Rules, 2007 and Guidelines Governing Adoption ofChildren, 2015.

14. It may be expedient to extract the analysis andreasoning of the learned Judge in PKH v. CentralAdoption Resource Authority (supra) as the same would have direct applicability in the present case andapplies on all fours. The relevant extract is as follows:—

"**********

COURT'S REASONING

47. Having heard the learned counsel for parties, this Court is of the view that it is essential to trace the development of the law relating to child rightsand adoption nationally as well as globally.

GENEVA DECLARATION OF THE RIGHTS OF THE CHILD, 1924

48. The first major declaration on child rights was the "Geneva Declaration of the Rights of the Child" which was adopted on 26th September, 1924 by the League of Nations. This Declaration recognized that a child who cannot fend for himself/herself must be protected and rehabilitated inasmuch as it stated that "the orphan and the waif must be shelteredand succored". This initial Declaration indicated that it was the society's responsibility to ensure that the interest of a child who does not have a natural family, is safeguarded.

DECLARATION OF THE RIGHTS OF THE CHILD, 1959

49. On 20th November, 1959, the General Assembly of the United Nations, by Resolution 1386(XIV) adopted the 'Declaration of the Rights ofthe Child'. By this Declaration, the best interest ofthe child was sought to be protected. Importantly, in Principle 9, it was declared that a child should be protected from "neglect, cruelty and exploitation".

DECLARATION ON SOCIAL AND LEGAL PRINCIPLES RELATING TO THE PROTECTION ANDWELFARE OF CHILDREN, WITH SPECIAL REFERENCE TO FOSTER PLACEMENT ANDADOPTION NATIONALLY AND INTERNATIONALLY, 1986

50. On 03rd December, 1986, the General Assembly of the United Nations in its 95th Plenary Meeting adopted the 'Declaration on Social andLegal Principles relating to the Protection andWelfare of Children, with Special Reference to Foster Placement and Adoption Nationally andInternationally'. While Articles 13 to 24 dealt withadoption, Articles 17 to 24 dealt specifically with inter-country adoption. Article 13 stated that the objective of adoption was to ensure that a child who did not have a natural family is taken care of in a family setting. Article 17 stipulated that when the option of placing a child either in foster care oradoption in the child's home country was unavailable, then inter-country adoption should be resorted to with the singular objective of ensuring that a child can grow up in a family. Article 18 stated that national governments should endeavour to enact laws for regulating inter-country adoptions. Article 20 stated that a competent authority must be created in States in order to oversee inter-country adoptions. Article 22 stated that inter-country adoptions should only be made once the child is legally free for adoption and that all the necessary protocols have been satisfied in order to facilitate the adoption. Article 23 stated that the inter-country adoption should be considered as legally valid in the two countries which are involved.

CONVENTION ON THE RIGHTS OF THE CHILD, 1989

51. On 20th November, 1989, the General Assembly of the United Nations adopted the 'Convention on the Rights of the Child'. This Convention comprehensively dealt with the rightsand entitlements available to a child. Article 21 ofthe Convention referred to adoption. It stipulated that in matters of adoption, the best interest ofthe child is the most important factor. Article 21(a) stipulated that adoption of the child must be undertaken through competent authorities in order to preserve the sanctity of the adoption process. Article 21(b) dealt with inter-country adoption. It provided that inter-country adoption must be allowed when no one is willing to take care of the child and that in the child's home country, an adoptive family could not be found. Articles 21(c), 21(d) and 21(e) stipulated that sufficient safeguards must be in place in order to protect a child who is given in inter-country adoption. India acceded to this Convention on 11th December, 1992.

CONVENTION ON PROTECTION OF CHILDRENAND CO-OPERATION IN RESPECT OF INTER-COUNTRY ADOPTION, 1993 AT HAGUE

52. The most important international convention on inter-country adoption is the subsisting 'Convention on Protection of Children and Co-operation in respect of Inter-Country Adoption', which concluded on 29th May, 1993 at The Hague, Netherlands. Its Article 1 states that the purposeand aim of the Convention is to preserve the best interest of the child and to ensure recognition ofinter-country adoption between contracting states.

Articles 4 and 5 provide for the circumstances in which an adoption can be said to be within the scope of the Convention. Article 6(1) provides that in a Contracting State, a Central Authority must be created to perform the duties imposed by the Convention. Articles 14 to 21 relate to the manner in which inter-country adoption can be undertakenand the role of the Central Authority in that regard. Article 23 provides that when the competent authority of a state certifies that the adoption has taken place as per the Convention, the certification should be recognized in the other

Contracting States. India signed this Convention on 09th January, 2003 and ratified it on 06th June, 2003.

53. Interestingly, a reading of certain Articles in the Convention shows that the Convention recognizes the operation of different laws onadoption within a country. Article 6(2) provides, inter-alia, that where a State has more than one system of law which relate to adoptions, then the Contracting State can create several Central Authorities for the different systems of law. Article 28 provides that the Convention does not affect a law which stipulates that the adoption must occur in the home country of a child. Also, Article 37 provides that when a State has several systems oflaw which apply to different groups, the specific law is to be considered when a reference is made to the State's law.

54. It should be noted that according to the 'Conclusions and Recommendations' of the Special Commission of the practical operation of the Hague Convention of 29 May 1993 on protectionof Children and Co-operation in Respect ofInter-country Adoption, one of the recommendations made is that direct andindependent adoptions are incompatible with the Convention (see Para. 1(g) and Paras. 22, 23, 24). However, it should be noted that it is only a recommendation and not binding as the Convention is.

55. At this stage, it is also necessary to take into account domestic legislative and jurisprudential developments that took place with regard to inter-country direct adoptions.

IN 1984, SUPREME COURT DELIVERED A COMPREHENSIVE AND SEMINAL JUDGMENT IN THE CASE OF LAKSHMI KANT PANDEY (SUPRA)

56. In 1984, the Supreme Court in the case ofLakshmi Kant Pandey (supra) delivered a comprehensive and seminal judgment on the question of inter-country adoptions.

57. Acting on a letter petition filed by an individual complaining of questionable practices adopted by agencies which gave children in inter-country adoptions, the Supreme Court decided to comprehensively review the process by whichchildren were given in inter-country adoptions. The decision begins by noting that there were two legislative attempts at passing an Adoption Bill which did not fructify. The first was 'The Adoptionof Children Bill, 1972' which had been introduced in the Rajya Sabha but was not passed. The second effort was made in 1980, when the 'Adoption ofChildren Bill' was introduced in the Lok Sabha, but which remained pending.

58. Prior to the Lakshmi Kant Pandey (supra) judgment, in the absence of any law on adoption, foreign parents who desired to adopt an Indian child would make an application under the Guardiansand Wards Act, 1890 to be appointed as the guardian of the child after which the foreign parents would have the right to take the child outof the country. To regulate this process, the High Courts of Bombay, Gujarat and Delhi had even put in place certain procedural rules.

59. The Supreme Court noted that when the child is abandoned or when a parent wants to relinquish a child and give the child up for adoption, then an effort should be made to find prospective adoptive parents within India. If no one was willing to adopt such a child in India, then the child could be given to foreign parents since it would be wiser to give theabandoned, orphaned or surrendered child for inter-country adoption rather than condemning him/her to a life in an orphanage or an institution without any family support.

60. The Supreme Court also held that since the best interest of the child has to be protected scrupulously, safeguards must be put in place to ensure that inter-country adoptions are not resorted to by persons who would mistreat the child. Thus, the Supreme Court held that in order for foreign parents to adopt a child from India, the parents' application for adoption should be sponsored by a child welfare agency in the parent's home country which agency must prepare a Home Study

Reportof the parents. Further, a Child Study Report should also be prepared. The Supreme Court noted that a Central Adoption Resource Agency must be created to oversee the process of inter-country adoptionand ensure the sanctity of the adoption process is observed. With regard to the surrender of a child, natural parents who want to surrender their child to an agency or institution must receive proper assistance and be made aware of the consequences of their decision.

61. Significantly, the Supreme Court judgment was emphatic on the point that the procedural andsubstantive safeguards which it laid down were inapplicable to cases where the foreign parents directly adopt the child from the natural parents. The Supreme Court in Lakshmi Kant Pandey (supra) held as under:

"11. We may make it clear at the outset that we are not concerned here with cases ofadoption of children living with their biological parents, for in such class of cases, the biological parents would be the best persons to decide whether to give their child in adoption to foreign parents. It is only in those cases where the children sought to be taken in adoption are destitute or abandoned and are living in social or child welfare centres that it is necessary to consider what normative and procedural safeguards should be forged for protecting their interest and promoting their welfare."

62. The justification provided for this exception was that when the child is abandoned or destitute or when the child is living in a welfare centre then there is no one to protect his/her interests. By contrast, in the case of direct adoptions, the natural parents still live with the child and they are best suited to judge whether it would be in the best interests of the child to be given up for inter-country adoption. Therefore, the decision is categorical in holding that inter-country direct adoptions are outside the ambit of the decision.

THE ANALYSIS OF THE ACT, 2000, RULES, 2007AND GUIDELINES.

63. The Act, 2000 was enacted pursuant to India's obligations under the Convention on the Rights ofthe Child. In 2006, this Act was amended. Inter alia, Section 2(aa) was introduced to define adoption as "the process through which the adopted child is permanently separated from his biological parentsand become the legitimate child of his adoptive parents with all the rights, privileges andresponsibilities that are attached to the relationship." The provision relating to adoption,and sub-sections (2) to (4) of Section 41 were also substituted in 2006. The amended Section 41(2) provides that adoption is a means to rehabilitate a child who is an orphan or abandoned orsurrendered. Sections 41(3) to 41(5) provide the procedure that has to be adhered to for theadoption of such a child.

64. The Juvenile Justice (Care and Protection ofChildren) Rules, 2007, (for short 'Rules, 2007') prescribes the process for adopting a child in Rule 33.

65. Rule 33(1) provides that the purpose ofadoption is to ensure that a child is placed in a permanent substitute family when such a child is not fortunate to receive the care from his/her natural parents. Rule 33(2) provides that the guidelines issued by the Central Adoption Resource Agency shall govern all adoptions. Rule 33(3) pertains to the process to be followed for the adoption of anorphan or abandoned child.

66. Rule 33(4) pertains to the adoption of "surrendered children". A reading of this rule reveals that a child who is directly adopted from the natural parents cannot be considered as a "surrendered child". Rule 33(4)(a) provides that a "surrendered child" is the one who has been declared by the Committee i.e the Child Welfare Committee ('CWC') as "surrendered" in order to also declare the child legally free for adoption. Further, such "surrender" is contemplated only in certain compelling conditions, such as a child born out of a non-consensual relationship [Rule 33(4)(a)(i)]. Rule 33(4)(b) provides that the CWC must counsel the parents to see whether they would like to keep the child, and if they are unwilling to do so, the child may be kept in foster care (Section 42,

Rules 34, 35, 36) or sponsorship (Section 43, Rule 37) may be arranged for him/her. Rule 33(4)(c) read with Rule 33(4)(e) provides that a deed of surrender has to be executed by the parents before the CWC. Rule 33(4)(f) provides that after the time period for reconsidering the surrender of the child elapses [Rule 33(4)(d)], the surrendered child may be declared legally free for adoption.

67. Section 41 read with Rule 33 suggests that a "surrendered child" denotes a child who has been relinquished by the natural parents and that the parents seek to irreversibly terminate the parental-child relationship. Upon the termination of this relationship which has to be done under the supervision of the CWC, the child is "surrendered" to the care and custody of the CWC who is then responsible for the care of the child.

68. The abovementioned provisions make it amply clear that direct adoption cannot be considered as a process by which the child becomes a "surrendered child" because in the case of directadoption, the natural parent gives the child inadoption directly to the adoptive parents without surrendering the child to the CWC and/or any third entity or agency. In direct adoptions, unlike the caseof surrender, there is no termination of the parental-child relationship in favour of the CWC or any third agency which then decides whether or not to give the child in adoption.

69. Further, a reading of the Guidelines, 2015, issued by the Ministry of Women and Child Development on 17th July, 2015 under the Act, 2000 also makes it clear that a surrendered child is not a child given in direct adoption. These Guidelines were made pursuant to Section 41(3) of Act, 2000and replace the Guidelines, 2011. In para 2 of the Note to the Guidelines, it is stipulated that, "These Guidelines shall govern the adoption procedure oforphan, abandoned and surrendered childrenin the country from the date of notification andshall replace the Guidelines Governing theAdoption of Children, 2011".

70. Certain Rules of the Guidelines, 2015 are also important. Rule 2(2) defines an abandonedchild to mean an "unaccompanied and deserted child who is declared abandoned by the Child Welfare Committee after due inquiry". Rule 2(23) defines an orphan to mean a child who does not have parents or legal guardian, or whose parents or legal guardians are unwilling to take care of the child or are incapable of taking care of the child. Rule 2(33) defines a surrendered child to mean a "child, who in the opinion of the Child Welfare Committee, is relinquished on account of physical, emotional and social factors beyond the control ofthe parent or legal guardian". A reading of Rule 2(33) reveals that the definition of a surrenderedchild cannot apply to cases of direct adoptions because in inter-country direct adoptions there is no element of relinquishment to the CWC, or a third entity or an agency.

71. A holistic reading of the Act, 2000, the Rules, 2007 and the Guidelines, shows that asurrendered child means a child who is given to the CWC after which it is only the CWC who has a say with regard to the welfare of the child. After the surrender, the parents no longer have any role to play and it is the CWC which decides the best course of action for the child. Consequently, a reading of Act, 2000 read with the Rules, 2007 shows that neither the Act, 2000 nor the Rules made there-under cover inter-country direct adoptions.

THE SUPREME COURT'S INTERPRETATION OFTHE ACT, 2000

72. In Anokha (supra) the Supreme Court specifically examined the applicability of Guidelines on Adoption to inter-country direct adoptions andthe role of respondent-CARA. In that case, an Italian couple wished to adopt an Indian child andto that end filed an application under the Guardianand Wards Act, 1890 in the court of the District Judge at Alwar. The District Judge rejected the application, inter alia on the ground that the Central Government had issued Guidelines for the 'Adoption of Indian Children' which required an authorised agency in the adoptive parents' home country to sponsor an adoption application andissue a no-objection certificate. The District

Judge held that in its absence, the application of the Italian couple had to be rejected. This decision was affirmed in appeal and the High Court ruled that in addition to the adoption application being sponsored by an agency in the foreign country, CARA must also issue a no-objection certificate. It is in this context that the matter was carried forward to the Supreme Court in appeal.

73. The Supreme Court in Anokha (supra) following the decision of Lakshmi Kant Pandey(supra) held that inter-country direct adoptions are not amenable to the rigours of the procedural safeguards since the natural parents are best positioned to judge what is in the best interests ofthe child. Crucially, the Supreme Court reiterated the distinction which Lakshmi Kant Pandey (supra) drew between a surrendered child and the giving of a child in direct adoption by noting that the said judgment would apply to a child who issurrendered or relinquished to an institution and"not to cases where the child is living with his/her parent/parents and is agreed to be given inadoption to a particular couple who happen to be foreigners".

74. The Supreme Court held that nothing in the Indian jurisprudence on the subject suggests that the adoption guidelines such as the one before the Court could apply to inter-country direct adoptions. The Supreme Court further held that the need for CARA to furnish an NOC, the application foradoption needing to be sponsored by a recognised agency, and the adoption needing to be undertaken by a recognised Voluntary Coordinating Agency, only arises when "… there is the impersonalized attention of a placement authority…".

75. The Supreme Court reiterated the conclusion that the extant adoption guidelines are inapplicable to cases of inter-country direct adoptions. However, it stated that when the adoptive parents make an application under the Guardian and Wards Act to be appointed as the guardians of the child, the Court must be satisfied that the adoption is voluntary, that the consent of the natural parents to give up the child for adoption has not been obtained through questionable means, and that the adoptive parents must present evidence as to their overall suitability to adopt a child.

76. In conclusion, the Supreme Court held inAnokha case (supra) that since there was sufficient material on record which attested to the suitabilityof the adoptive parents to take care of the child, the Italian couple were appointed as the child's guardian.

77. From a reading of Anokha (supra), it is clear that the Supreme Court declared that the extant Guidelines on adoption as they existed at that time would be inapplicable to cases of inter-country direct adoptions and that CARA would have no jurisdiction over such adoptions. However, it held that it otherwise be established that the inter-country direct adoption has taken place in a bona fide manner and that the adoptive parents are suitable for taking care of the child.

DELHI HIGH COURT'S INTERPRETATION OF ACT, 2000

78. The question of whether inter-country direct adoptions are amenable to the jurisdiction of CARA has also been examined by this Court.

79. In Dr. Jaswinder Singh Bains v. CARA, W.P (C) 8755/2011 decided on 13th February, 2012, the Petitioners, had directly adopted a child from a couple and also executed a duly registeredadoption deed. The Civil Judge (Sr. Division), Patiala issued a declaratory decree to the effect that the Petitioner was the guardian of the child under Section 7 of the Guardians and Wards Act. Since the Petitioners resided in Canada, they wished to take the child with them, but the Family Services ofGreater Vancouver sought a NOC from CARA. Since CARA did not respond to the Petitioner's request for a NOC, the parents filed a writ petition against CARA.

80. Following Lakshmi Kant Pandey (supra) andAnokha (supra), the High Court ruled that when inter-country adoptions are made directly from natural parents, a NOC from CARA was not required, since the procedural rules were inapplicable to casesof direct voluntary adoptions.

81. In Swaranjit Kaur (supra) the Petitioners therein adopted a child, executed an adoption deedand obtained a declaratory judgment from the competent civil court. In the said case, a NOC had been issued by CARA and since the Petitioners wanted to take the child back to Alberta, Canada, the Alberta Government inquired from CARA India as to the authenticity of the NOC that had been issued. Meanwhile, the Canadian Immigration Department wrote to the Petitioner stating that CARA had informed the Immigration Department that the NOC in question had not been issued by them. The Petitioners filed a writ petition under Article 226 in the Delhi High Court after they failed to obtain a response from CARA on the issue of the NOC.

82. This Court held in the said judgment that this was a case of inter-country direct adoption by a relative and following the decision of Jaswinder Singh Bains (supra) respondent-CARA had no role whatsoever to play with respect to direct adoptions.

83. In view of aforesaid binding judgments ofthe Apex Court and this Court, the judgment ofthe Madras High Court in Mr. Tim Cecil and Mrs. Steffi Cecil (supra) offers no assistance to the respondent-CARA.

APPLICABILITY AND ANALYSIS OF ACT, 2015

84. This Court is in agreement with the submission of the learned Amicus Curiae that as the adoption deed in the present case had been executed before the Act, 2015 came into force, it would be governed by the Act, 2000 and not by the Act, 2015.

85. Since arguments were advanced with regard to the scope and interpretation of Act, 2015, this Court clarifies that though there is some ambiguity as to whether the Act, 2015, applies to inter-country direct adoptions, yet it is of the opinion that the scope of Section 60 of the Act, 2015, should be expanded to cover all forms of inter-country direct adoptions. This interpretation would advance the best interest of the child whose family wishes to give him/her in adoption and also ensure that the sanctity of the adoption process is respected andthe best interest of the child is scrupulously safeguarded. This Court may mention that in exercise of its writ jurisdiction, it has the power to expansively interpret a provision of a statute in order to achieve the objects and reasons which the law seeks to achieve and to reach injustice wherever it is found. [See Dwarka Nath v. ITO, (1965) SCR 536]

86. The respondent-CARA should ensure that the applications for approval/NOC are processed in a child friendly manner and that too, in a strict time frame. After all, incorporation of safeguards should not lead to harassment and delay.

87. This Court suggests that the respondent-CARA should consider the option of appointing a panel of Psychologists, Lawyers as well as NGOs in all the States so that the Child Study Report andHome Study Reports in the case of domestic adoptions, if applicable, in India are prepared scientifically in a time bound manner. The local police as well as Anti Trafficking Unit of the Ministryof Home Affairs should be asked to give their response to the Adoption application within a strict time frame. If response is not received from statutory/government authority within the time-frame prescribed, it should be presumed that said authority has no objection to the adoption."

15. After analysing the domestic laws and various international conventions and the Judgments of the Supreme Court, Learned judge reached the following conclusion:

"91. The survey of the domestic law andinternational conventions leads to the following conclusions:

a. As the adoption deed in the present case has been executed under HAMA, 1956, before the Act, 2015 came into force and the adoptiondeed has been held to be legal, valid andgenuine by the Additional Civil Judge (Senior Division), Zira in a civil suit filed by the adoptive parents against

the natural mother, the adoption in the present case is governed by the Act, 2000 and not by Act, 2015.

b. The Act, 2000 read with the Rules, 2007 andthe Guidelines, 2015 expressly lays down a procedure for adoption only in relation to a child who is an orphan or abandoned orsurrendered, and does not cover inter-country direct adoption.

c. The Act, 2000 read with the Rules, 2007 andthe Guidelines, 2015 provides that a child issurrendered when the parents wish to relinquish him/her to the CWC and a formal act takes place by which the child issurrendered by the natural parents to the CWC. Once the surrender is complete, the parents have no role in the future of the child and the CWC alone decides the best course for the child's future before the child is adopted.

d. A child given in direct adoption cannot be termed as a "surrendered child", since there is no relinquishment of the child, by the parents to the CWC.

e. The Supreme Court in Lakshmi Kant Pandey(supra) as well as Anokha (supra) and the High Court of Delhi in Dr. Jaswinder Singh Bains (supra) and Swaranjit Kaur (supra) have categorically and conclusively held that all inter-country direct adoptions are outside the scope of the rules set out for adoptions under the Act, 2000 and the Rules/Guidelines framed there-under.

f. In view of the aforesaid binding precedents, there is no scope for incorporation of the concept of parens patriae in inter-country direct adoption cases under the Act, 2000, specially when the adoption deed has been declared to be legal, valid, genuine andbinding by a competent court.

g. Rule 26 of the Guidelines, 2011 is a procedural provision and it does not advance the case of the respondent-CARA.

h. In view of CARA, Canada's approval foradoption and its favourable home study report as well as the decree of declaration passed by Additional Civil Judge (Senior Division), Zira, this Court is of the opinion that the requirements of Articles 5 and 17of The Hague Convention are satisfied in the present case.

i. Consequently, in cases of inter-country directadoption like the present case, NOC from respondent-CARA is not required under the Act, 2000 and the Guidelines, 2011.

j. The Regional Passport Officer/MEA cannot insist on issuance of an NOC by respondent-CARA before processing the petitioner's application for issuing a Passport to the adopted child."

16. At this juncture, it may also be expedient to refer to the judgment of the Court of the District & Sessions Judge (West) dated 28.05.2015, with regard to theadoption of the petitioner. The relevant portion reads as follows:—

"Petitioner No. 1-Dalip Kumar Arora appeared in the witness box as PW1 and he also deposed on behalf of his wife in view of the General Power ofAttorney Ex.PW-1/1, executed by his wife in his favour attested by Consulate General of India, Hamburg and carrying the seal & stamp of the Consulate as well as the signatures of Vice Councilof the Consulate General of India, Hamburg. PW-1 was executed in his presence and his wife signed at point E on each page. He further deposed that the present petition was also signed by her in his presence expressing her keenness to adopt Master Divyansh Arora.

PW-1 deposed that petitioners do not have their own child due to medical problems and Master Divyansh Arora born on 25.01.2004 has been adopted by them vide Adoption Deed dated 27.01.2015 Ex.RW-2/2. He further deposed that theadoption/godi ceremony was performed on 26.01.2015 in presence of their near and dear.

Further, it is deposed that after adoption of the child, his parentage in his birth certificate was changed. His initial birth certificate, showing the respondents as his parents is Ex.RW2/1 and his birth certificate, showing petitioners as his parents is Ex.PW1/2. His Aadhar Card with changed parentage is Ex.PW-1/4.

PW-1 further deposed that he is earning 25,000/- Euro annually and he is having good financial status and that he and his wife will treat Master Divyansh Arora born on 25.01.2004 as their own child and will give him best environment andeducation and will take care of all his needs.

Respondent No. 1 - Shri. Raj Kumar Arora andrespondent No. 2 - Smt. Neeru Arora have been examined as RW-1 & RW-2 respectively. They deposed that they are biological parents of Master Divyansh Arora born on 25.01.2004 The copy of the Adhaar Card of respondent No. 1 is Ex.RW-1/1. The copy of initial birth certificate of Master Divyansh Arora born on 25.01.2004 is Ex.RW-2/1.

It was further deposed by the respondents that they were blessed with three children i.e elder son Vishesh Arora born on 20.03.2002, younger son Master Divyansh Arora born on 25.01.2004 and a daughter Luvya Arora born on 07.10.2009

They further deposed that the petitioners are Bhaiya and Bhabhi of respondent No. 1 who were married in the year 2008 and did not have their own child due to medical problems. Accordingly, Master Divyansh Arora born on 25.01.2004 was adopted by them and formal Adoption Deed dated 27.01.2015 Ex.RW-2/2 was executed and a godi ceremony was performed at their residence on 26.01.2015 as per Hindu rituals and ceremoniesand consequent upon adoption by the petitioners, the birth certificate of the child was got issued andthe names of the respondents i.e the natural andbiological parents were substituted with the namesof the adopted parents, i.e the petitioners.

They stated that the reason for giving Master Divyansh Arora born on 25.01.2004 in adoption to the petitioners is that from his early childhood, the child is too much attached with them and he has been living with them whenever they stayed in India.

Both the respondents who are natural andbiological parents of Master Divyansh Arora stated that the child is being looked after by the petitioners as their own child.

Therefore, as per facts of the case, petitioner No. 1 is the real brother of respondent No. 1 andsince petitioners could not have their own child due to medical reasons, Master Divyansh Arora born on 25.01.2004, the second child of the respondents, was given in adoption to the petitioners videAdoption Deed dated 27.01.2015 Ex.RW-2/2.

Master Divyansh Arora has been examined by the Court in-camera in chamber, who in response to Court queries, expressed that he loves his Taya andTayi, who are now his parents, and they too love him and in response to another Court query that whether he will miss his siblings, he answered that he can talk to them on phone and he expressed his desire to settle with the petitioners in Germany for the sake of his education. Even in the Court, it is observed that the child was standing close to petitioner No. 1 in presence of the respondents.

In view of the testimony of the respondents, i.e the natural and biological parents of Master Divyansh Arora and the testimony of petitioner No. 1 and the examination of the child-in-camera in the chamber, the present petition is allowed andthe petitioners are permitted to adopt Master Divyansh Arora born on 25.01.2004, the second childof the respondents.

The requisite certificate be issued in favour ofShri. Dalip Kumar Arora and Smt. Vaishali Arora, the petitioners herein for adopting Master Divyansh Arora on their furnishing the necessary undertaking that they will take care of Master Divyansh Arora as their own child and that Master Divyansh Arora will succeed to all their properties and estate."

17. Further, it may be seen that the Higher Regional Civil Court at Germany by its order dated 20.02.2017 has also recognized the present adoption andhonoured the judgment of the Court of District & Sessions Judge (West), Tis Hazari Courts.

18. As noticed by the learned Single Judge in PKH v.Central Adoption Resource Authority (supra), delay inadoption would mean that the minor has to live with uncertainty and insecurity. The adoption ceremonies were performed on 26.01.2015 and the adoptiondeed was executed on 27.01.2015 and for over twoand a half years, the minor child is living with uncertainty and till date, has not been integrated with his adoptive family in the new country of residence. Though in the case of PKH v. Central AdoptionResource Authority (supra), there was also a home study report from Canada, however in view of the conclusion reached by the learned judge as noticed in para 91 of the said judgment (extracted hereinabove), it would not be required for the present case more so in view of the fact that the Higher Regional Civil Court at Germany by its order dated 20.02.2017 has also recognized the present adoption.

19. In view of the judgment dated 28.05.2015 ofthe Competent Court in a Guardianship Petition No. 01/2015, the petitioner is now lawfully adopted, the said judgment has attained finality and even if the petitioner was to wish, the petitioner cannot re-unite with his biological parents. The Petitioner's birth certificate and his Adhaar card has already been modified and the names of his adoptive parents have already been substituted therein in place of his biological parents. Further, it is not a case of adoptionbetween strangers. The present is a case of adoptionbetween family members. The adoptive parents being the real elder brother of the biological father and the elder brother's wife. The adoption, being in accordance with the HAMA Act, is complete. Accordingly, all relations between the petitioner and his natural family are severed. If the petitioner is not permitted to unite with his adoptive family, the petitioner would be in a very precarious position, where his relations with the biological parents have severed and the relations with his adoptive family are not permitted to be joined. It would cause grave injustice to a child.

20. In view of the above, the present petition is disposed of with a direction to the respondent - CARA to grant, within a period of two weeks, a No Objection Certificate (NOC) to the adoptive parents of the petitioner for taking the petitioner to Germany. The Ministry of External Affairs/Regional Passport Officer is also directed to issue a passport to the petitioner within a period of two weeks thereafter.

21. The petition is accordingly allowed in the above terms.

22. Dasti under signatures of Court Master.

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# THE TIBETAN CHILDRENS VILLAGE SCHOOL VERSUS KARMA LAMA & ANR.

**Delhi High Court**

**Bench : Hon'ble Mr. Justice Indermeet Kaur**

*The Tibetan Childrens Village School ..... Petitioner Mr. Jagdeep Kishore, Mr. Naresh, Mathur and Ms. Rekha Gupta, Advs.*
*Versus*
*Karma Lama & Anr. ..... Respondents*

**CM(M) 579/2015**

**and**
**C.M Nos. 11006/2015, 31084/2015, 31085/2015, 2550/2016 & 29897/2016**

**Decided on November 18, 2016**

- **Ss. 7 to 12 of the Guardians And Wards Act, 1890 — Family court — Jurisdiction**
- **Custody of minor Orphan child**
- **Inter-country adoption**
- **Respondents 1 and 2 are permanent residentsof U.S residing temporarily in Northern India — They Approached petitioner for sponsoring education of Tibetan male minor child . They filed guardianship petition under Guardians and Wards Act to seek custody of minor child . Respondent 4, adoptive mother of minor impleaded however her name deleted and could not contest petition. Ministry ofWomen and Child Development did not entertain them in first instance . They approached Central Tibetan Administration (in exile) . On fact of non-recognition by their respective Government left them with no option but to approach Family Court under S. 9(4) ofHindu Adoptions and Maintenance Act. Family Court is specifically clothed with jurisdiction to deal with matters of adoption as contained in S. 41 which includes an orphan child . Family Court appointed Respondent 1 as adoptive father of minor. It would not take case away from ambit of an 'inter-country adoption'. This would still qualify as an 'inter-countryadoption' and not an 'inter-country directadoption'.**

**Hon'ble Mr. Justice Indermeet Kaur**

The petitioner before this Court is Tibetan Children's Village School (TCV). It is functional from upper Dharamshala, Himachal Pradesh. This petition has been filed through its General Secretary.

2. This petition concerns the adoption rights of aminor child namely Master Tenzin Tsering (in short 'Tenzin'). The averments in the writ petition disclose thata lady namely Tashi Choedon brought with her atibetan male child namely Tenzin when he was 1- ½ years old to the TCV. She had brought him from Nepal. As per the information furnished to the TCV, the childwas born in Nepal on 03.03.2007 His natural and biological parents were not known. Tenzin was enrolled in the petitioner school on 13.08.2008

3. Respondents No. 1 & 2 are Karma Lama and Paola Pivi. They are permanent residents of United States. At the time of filing of this petition, they were residing temporarily in Northern India. Respondents No. 1 & 2 approached the petitioner for sponsoring the education of Master Tenzin. The petitioner accepted the sponsorship offer and received $480 for a periodof one year as sponsorship charges from respondents No. 1 & 2. This was in August, 2012. It was made clear to respondents No. 1 & 2 that they could meet the childperiodically and they could also take the child out forwinter vacations which fell between 25.12.2012 and 24.02.2013 The condition was that the child had to be brought back before the end of the winter vacation or earlier, if need be.

4. In the second week of January, 2013, Tashi Choedon came to the petitioner institute with arequest to take the child back to New Delhi for apossible relocation in France. The petitioner informed respondents No. 1 & 2 asking them to bring back Master Tenzin on 13.01.2013 Respondents No. 1 & 2 visited the school of the petitioner on 13.01.2013 They were un-accompanied with Master Tenzin. They agreed to bring back Master Tenzin to the petitioner school but thereafter they disappeared. They in fact lived at Dharamshala and shifted to New Delhi without informing their whereabouts to the petitioner.

5. On 17.01.2013, the petitioner learnt that respondents No. 1 & 2 had approached the National Commission for Protection of Child Rights (NCPCR) and had obtained an ex-parte order restraining thechild from being forcibly taken to France or any place outside India.

6. On 22.01.2013, respondents No. 1 & 2 filed aguardianship petition under Sections 7, 8, 9, 10 & 11 ofthe Guardians and Wards Act, 1890 (hereinafter referred to as the Act of 1890). They wished to obtain the custody of the minor child. This petition was filed before the Senior Civil Judge, Senior Division, Dharamshala. The High Court of Himachal Pradesh transferred the case to the Court of Senior Civil Judge, Shimla who on 11.12.2014 while exercising the powersof the District Judge appointed respondent No. 1 as the guardian of Master Tenzin. Tashi Choedon had been impleaded as respondent No. 4 being the adoptive mother of the minor but before she could be heard, her name was deleted and thus she did not have the opportunity of contesting the proceedings. The petitioner had however contested the petition.

7. The petitioner aggrieved by the order passed bythe Guardian Court (11.12.2014) preferred an appeal before the High Court of Himachal Pradesh at Shimla. This appeal was taken up for hearing after its admission on 07.05.2015 Respondents No. 1 & 2 were also served. The petitioner had in fact moved anapplication on 04.06.2015 before the High Court ofHimachal Pradesh seeking a direction from restraining respondents No. 1 & 2 from removing the child outside India. This appeal was however subsequently withdrawn on 21.08.2015 by the petitioner.

8. The petitioner, thereafter, learnt that respondents No. 1 & 2 had approached the Principal Judge, South-East, Family Court Saket and in proceedings under Section 9(4) of the Hindu Adoption and Maintenance Act (hereinafter referred to as the 'HAMA'), they obtained a decree dated 23.05.2015 whereby respondent No. 1 was appointed as guardian of minor Tenzin.

9. Submission being that this order was clearly without jurisdiction as the Family Court had assumedan illegal jurisdiction; he could not have passed any order under Section 9(4) of the HAMA appointing respondent No. 1 as the adopted father of the minor; respondents No. 1 & 2 were the only parties; the guidelines for determining adoption of foreignnationals had been ignored; the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as the 'JJ Act, 2000') as also the guidelines issued by the Ministry of Women and ChildDevelopment, 2011 (hereinafter referred to as the 'CARA') had been ignored; the Hague Convention on Protection of Children and Cooperation in respect ofInter-Country Adoption, 1993 (hereinafter referred to as the Hague Convention) was also taken into account.

10. This petition has been filed seeking to lay achallenge to the order passed by the Family Court dated 23.05.2015 The prayer is that respondents No. 1 & 2 should be restrained from removing Master Tenzin from the country.

11. In the course of these proceedings, anapplication had been filed by respondents No. 1 & 2 seeking permission of this Court to permit Master Tenzin to temporarily travel with them to the United States. This application was dismissed on 26.08.2015 The Bench of this Court was of the view that prima-facie the procedure prescribed for adoption as contained in Section 41 of the JJ Act, 2000 read with Section 33 of the Juvenile Justice (Care and Protection Rules, 2007) (hereinafter referred to as the JJ Rules) had been ignored; CARA guidelines had also not been adhered to; the same being prima-facie mandatory could not have been bypassed. While dismissing the application, the Court had also made an observation that the adoption of minor child Tenzin byrespondents No. 1 & 2 appears to be in the welfare ofthe minor child. However the aforenoted permission as sought for by respondents No. 1 & 2 was not granted to them.

12. On 22.09.2016, C.M No. 22106/2016 had been filed by the petitioner seeking impleadment of two persons i.e Central Tibetan Administration (in exile) (hereinafter referred to as the CTA) and CARA. This application was not opposed by the respondents. The aforenoted respondents i.e CTA and CARA were impleaded as parties.

13. Apart from the response of respondents No. 1 & 2, the response of the newly impleaded respondents i.e CTA and CARA is also on record.

14. On behalf of respondents No. 1 & 2 it is stated that the impugned order (23.05.2015) passed by the Family Court is a legal order; it suffers from no infirmity.

15. Section 7 of the Family Court Act, 1994 empowers the Family Court to pass such an order under Section 9(4). The present case does not fall within the CARA guidelines. Learned counsel for the respondents has placed reliance upon a judgment ofthe Apex Court reported as 2004 (1) SCC 382 Smt. Anokha v. State of Rajasthan as also another judgmentof a Bench of this Court in W.P (C) No. 5718/2015Parminder Kaur Hunda v. Central Adoption Resource Authority through its Secretary (PKH). Submission being that the case of the petitioner qualifies as a case ofan 'inter-country direct adoption'; the CARA Guidelines do not have to be followed. In the alternate, it is pointed out that after the Senior Civil Judge, Dharamshala had passed an order under the Act of1890 directing them to seek adoption under the CARA guidelines and the adoption law prevalent in the United States, the respondents had approached CARA but CARA by its communication dated 09.03.2015 had informed them that since the CTA is fully functional, it was appropriate for the respondents to seek their assistance. Submission being that CARA had refused to entertain the case of the respondents. The respondents had thereafter approached the CTA. The CTA is however neither recognized by the US authorities and nor the Italian Embassy; respondent No. 1 being a US citizen and respondent No. 2 being anItalian citizen; it would have been a futile path to have approached the CTA. The communications in this regard from the US Embassy and the Italian Embassy dated 16.06.2015 and 23.02.2015 have been relied upon. The Hague Convention was also not applicable. The only course available to the answering respondents was to approach the Family Court under Section 9(4) of the Family Court Act. The minor child having lived with his adoptive parents (respondents No. 1 & 2) for the last three years, the Hindu Adoption Law i.e the HAMA would be applicable. Submission being that the respondents are running from pillar to post to legalize the adoption of Master Tenzin who has been living with them since the last more than three years (at the time of filing response to the present petition); the order of the learned Family Court does not suffer from any infirmity.

16. The response of the newly impleaded respondents i.e CTA and CARA is also on record.

17. The affidavit of CARA filed through its Deputy Director states that respondents No. 1 & 2 had approached their Department with their application dated 17.05.2016 for a re-consideration of its decision regarding the NOC in their case; on the submission of the requisite documents on 25.07.2016,a NOC had been issued by CARA for the move ofthe adopted child to United States to habitually reside with his adopted parents i.e respondents No. 1 & 2. Relevant would it be to note that earlier CARA had not issued an NOC to respondents No. 1 & 2 but had thereafter reconsidered the case of respondents No. 1 & 2 and had issued an NOC to them on 26.07.2016

18. The response of CTA is also on record. The affidavit has been filed through the Secretary of the office of the Bureau of his Holiness the Dalai Lama, CTA having its office at Lajpat Nagar. In this affidavit, it is stated that the present controversy appears to be between the petitioner and respondents No. 1 & 2; neither of them at any point of time had approached the CTA seeking consent or permission for adoptionof Master Tenzin. The stand of CTA being that they are not necessary parties in these proceedings.

19. The counter affidavit of the other respondents is not relevant for the purposes of deciding this petition.

20. A rejoinder had been filed by the petitioner to the aforenoted stand of the respondents. The averments made in the writ petition have been reiterated and the defence sought to be set up by the respondents has been refuted.

21. On behalf of the petitioner, arguments have been addressed by learned counsel Mr. Jagdeep Kishore assisted by Mr. Mathur, Advocate. The foremost submission of the petitioner is that the impugned order suffers from an illegality for the reason that the Family Court was not vested with the jurisdiction to deal with the case of a child who was admittedly a Nepalese by birth. Section 7 of the Family Court Act, 1984 has been highlighted. Reliance has been placed upon a judgment of High Court ofBombay as also two judgments of the Bench of the Kerala High Court reported as Foreign AdoptionPetition No. 100/2009 (dated 19.12.2009) as also 1(1998) DMC 266 Vinod Krishnan v. Missionaries ofCharity delivered on 03.11.1997 as also a third judgment of the Kerala Bench reported as 2008 (1) CARLJ 647 Andrew Mendis v. State of Karla. Submission being that the jurisdiction to pass an order giving achild in adoption vests with the District Court or the High Court; a Family Court cannot deal with mattersof adoption. This position at law has been ignored. The order passed by the Family Court on 23.05.2015 under Section 9(4) of the HAMA being devoid ofjurisdiction was an order non-est. Respondent No. 1 & 2 had not complied with the directions of the Senior Civil Judge, Shimla and have by-passed the procedureof obtaining an NOC from CARA which was amandate upon them; the guidelines of the Hague Convention have been given a go-bye. Attention has been drawn to Articles 5 & 17 of the Hague Convention. Additional submission being that in the light of the judgment reported as 1984 (2) SCC 244Laxmi Kant Pandey v. Union of India efforts should have been made to first give the child to a local family in India; this process had not been followed. Respondent No. 1 & 2 had taken upon themselves to adopt Master Tenzin without there being any effort made to first offer the child to a local Indian family India and only when this situation is negatived can aforeign couple seek an adoption. Learned counselfor the petitioner submits that the JJ Rules, 2007 would be applicable as the Act of the year 2015 in the absence of the formal Rules having been formulated cannot be implemented; these Rules have been flouted. Attention has also been drawn to Rule 52 & Rule 53 ofthe 2015 of the CARA Guidelines; submission being that the CARA Guidelines of 2015 would be applicable; however CARA having reviewed its decision in grantingan NOC ex-post facto to respondent No. 1 & 2 on 26.07.2016 has gone back on its own conditions. The impugned order cannot be sustained.

22. These submissions have been countered. Learned counsel for respondent No. 1 & 2 in addition to his stand as adopted in his counter affidavit submits that there is a distinction which he would like to draw between the term 'inter-country adoption' and 'inter-country direct adoption'. His case would fall in the second category i.e an 'inter-country direct adoption'. Reliance has been placed upon a judgment passed bya Bench of this Court in PKH (supra). Submission being that this term was coined in this judgment.

The learned Single Judge had relied upon the judgment inSmt. Anokha (supra) to hold that where there is a caseof a direct adoption under the provisions of HAMA, the CARA guidelines do not have to be followed; submission being that in that case where the adoptionwas made by a Canadian couple from an Indianwidow the Court had held that there being no intermediary between the parties, the provisions ofeither the CARA guidelines or the Hague Convention having to be adhered to was not a mandate. Submission being that his case also stands on the same footing. Respondents No. 1 & 2 had admittedly been appointed as lawful guardians of Master Tenzin videan order of the Guardian Court on 11.12.2014 This order was never challenged; it had become final; since the child had a legal guardian he no longer remainedan orphan, abandoned or a surrendered child; CARA Guidelines would thus not apply. Section 9(4) of the HAMA adequately permits a guardian of any child to give in adoption with the previous permission of the Court to any person including the guardian himself; this has been done so in the instant case. The order suffers from no infirmity. Learned counsel for respondents No. 1 & 2 additionally submits that the submission ofthe petitioner that the child was in illegal custody ofrespondents No. 1 & 2 is clearly belied from their own documents and evidence on record. Submission being that even as per the case of the petitioner, Master Tenzin had been permitted by the petitioner to travel between December, 2014 up to January, 2015 with respondent No. 1 & 2; respondent No. 1 & 2 were admittedly sponsors of the child; a sponsor is never permitted to take the child out station unless the idea was to give the child in formal adoption to respondents No. 1 & 2 which was the undertaking and promise of the petitioner to respondents No. 1 & 2. Submission being that on 13.01.2013, on the requestof the petitioner, respondents No. 1 & 2 had appeared before the petitioner and had a long drawn out meeting with them. On 17.01.2013, respondents No. 1 & 2 had obtained an ex-parte order from the NCPCR whereby no coercive steps/police action was to be taken against them qua the custody of the child. On 04.02.2013, respondents No. 1 & 2 had approached the Civil Court and had obtained an interim custody order qua Master Tenzin in their favour up to 15.02.2013 which order continued up to 01.08.2013 when on 01.08.2013 the Civil Judge at Dharamshala had directed respondent No. 1 & 2 to handover the custody of thechild to the petitioner by 01.09.2013 This order was assailed before the High Court of Shimla. It was stayedby the High Court on 08.08.2013; submission being that on 04.09.2013, this petition was disposed of bythe High Court with a direction to the learned Civil Judge, Shimla to allow respondent No. 1 & 2 to retain the custody of Master Tenzin till the disposal of the petition pending before it. Submission on this count being that the stand of the petitioner that respondent No. 1 & 2 were having an illegal custody of the childis thus belied; they initially had permissive custody ofMaster Tenzin which thereafter got converted into alawful custody. Learned counsel for respondent No. 1 & 2 has placed strong reliance upon the judgment delivered by the Guardian Court at Dharamshala on 11.12.2014; submission being that this was after a long trial wherein 20 witnesses had been examined by the respective parties and 40 articles of evidence had been exhibited. The Court had come to the conclusion that the interest and welfare of the child demanded that the child should remain with respondent No. 1 & 2; this was after having a meeting with the child in the Chambers of the Judge. At the cost of repetition, learned counsel for respondent No. 1 & 2 argues that the order dated 11.12.2014 directing respondents No. 1 & 2 to comply with the CARA Guidelines and other inter-country laws could not be complied with for the reason that on his approaching the CARA, he was addressed a communication dated 09.03.2015 (byCARA) asking him to approach the CTA; the CTA is neither recognized by the US Embassy and nor by the Italian Embassy of whom respondent No. 1 & 2 are citizens. Respondent No. 1 & 2 thus had no other remedy but to approach the Family Court under Section 9(4) of the HAMA. Impugned order in the peculiar factsof this case does not suffer from any infirmity. Submission being reiterated that this argument is in the alternate; his first submission is that since this is a caseof an inter-country direct adoption, guidelines ofCARA did not have to be followed. Even otherwise, CARA has now given an NOC on 26.07.2016 Even presuming that on ex-post facto approval/no objection has been granted, the petitioner should have no quarrel on this issue as even as per the case of the petitioner thechild whose interest and welfare is the primary concern and the aim and

object of this Court while dealing with this petition it has to be noted that Master Tenzin is happy and comfortably placed in the handsof respondents No. 1 & 2. This fact is not disputed bythe petitioner and on repeated questions put by the Court on this score, they admit this position.

23. In rejoinder, learned counsel for the petitioner submits that respondent No. 1 & 2 have necessarily to follow the CARA Guidelines which have not been adhered to; CARA has ignored its own objects; the Hague Convention has also been given go-bye.

24. Arguments have been heard. Record has been perused.

25. The facts of the case evidence that Master Tenzin had been brought by Tashi Choedon to the TCV from Nepal; his parentage and the details of his biological parents were not known. Tashi Choedon had enrolled Master Tenzin in the TCV on 13.08.2008 He was just about 1- ½ years of age at that point of time.

26. The definition of "orphan" as contained in Section 2 (k) of the JJ Rules, 2009 reads herein as under:-

'Orphan' means a child who is without parents or willing and capable legal or natural guardian.'

27. The facts as noted supra qua Master Tenzin persuades this Court to hold that Master Tenzin at the time of his admission in the petitioner school fell within the definition of an 'orphan'.

28. This Court is of the view that the JJ Act, 2000 would be applicable. The Rules of 2007 which came into effect on 26.10.2007 would be the prevailing rules as the incident relates to the period 2008.

29. It is an admitted fact that respondents No. 1 & 2 (permanent residents of United States) had approached the petitioner for sponsoring the education of Master Tenzin. They had paid 480 $ fora period of one year. The petitioner had permitted respondents No. 1 & 2 to take Master Tenzin out during his winter vacations between 25.12.2012 to 24.02.2013 i.e for a period of almost two months. It is also anadmitted fact that pursuant to Tashi Choedon having approached the TCV in January, 2013, a request had been made by the petitioner school to respondents No. 1 & 2 to bring back Master Tenzin to the school. Respondents No. 1 & 2 had gone to the petitioner school on 13.01.2013 Master Tenzin was not with them. The request of the petitioner was that Master Tenzin be returned to the petitioner school as Tashi Choedon wanted to take him to France.

30. On 17.01.2013, an order was passed by the NCPCR. This was on a complaint made byrespondents No. 1 & 2 regarding the protection of the rights of Master Tenzin. In this complaint, it was brought to the notice of the NCPCR that Master Tenzin had been permitted by the petitioner to accompany respondents No. 1 & 2 for a two month holiday; he was admittedly under a sponsorship program of the TCV for which sponsorship charges had been paid byrespondents No. 1 & 2. The child had been issued anI-Card stating the name of his father as Karma Lama. The fact that this I-Card had been issued to Master Tenzin being an undisputed fact this Court is of the view that the submission of respondents No. 1 & 2 that the petitioner school had ultimately promised the custody of the child to them is a submission which cannot be ignored; the submission of the petitioner that it was only as an interim measure that respondents No. 1 & 2 had been granted permission to take the child with them being his sponsors and not entitled to any better right is belied by the fact that asponsor would not be permitted to take a minor childout for a two months vacation; he would also not have an I-card with the name of respondent No. 1 as his father; there was obviously something more in the mind of the petitioner school; the submission ofrespondents No. 1 & 2 on this score that this was witha view to give minor Tenzin for adoption to respondents No. 1 & 2 is thus not without any force.

31. This Court notes that on 17.01.2013, the NCPCR on the complaint of respondents No. 1 & 2 had restrained the police from taking any coercive action against respondents No. 1 & 2 for any act of alleged

kidnapping; it was noted that there was a written promise and consent from the petitioner school in favour of minor child for a period of two months between 25.12.2012 till 24.02.2013 which period had not yet expired.

32. On 04.02.2013 (i.e before the expiry of the period of the interim custody which had been granted to respondents No. 1 & 2 by the petitioner and which was up to 24.02.2013), an application had been filedby respondents No. 1 & 2 under Section 12 of the Actof 1890 before the Guardian Judge, Dharamshala. The petitioner school was arrayed as a party. Tashi Choedon was also arrayed as respondent No. 4. Master Tenzin was also present in Court on that date. Aninterim order was passed on the same date. The Court was of the view that respondents No. 1 & 2 had lawful custody of minor child Master Tenzin; this custody was validly granted to them by the petitioner school between 25.12.2012 up to 24.02.2013 An exparte interim order had been passed in favour ofrespondents No. 1 & 2 granting temporary custody ofminor child Master Tenzin to them.

33. This order was the subject matter of challenge before the Himachal Pradesh High Court in C.M (P) No. 4085/2013. On 04.09.2013, the High Court after hearing the respective parties i.e the petitioner and respondents No. 1 & 2 was of the view that the proceedings which were pending before the Civil Judge, Senior Division Kangara be transferred to the Civil Judge, Senior Division, Shimla; interim protection granted to respondents No. 1 & 2 would continue till the disposalof the petition before the Civil Judge, Senior Division. The High Court while disposing of this petition on 04.09.2013 had thought it fit to describe Master Tenzin as an 'abandoned orphan'. This was after noting the facts of the case.

34. Section 12 of the Act of 1890 empowers the Guardian Court to pass orders for the temporary custody and protection of the minor. The petition under Section 12 was disposed of by the Civil Judge, Senior Division, Shimla on 23.11.2014 The petitioner as also respondents No. 1 & 2 were duly represented. Facts were noted in detail. It was noted that Master Tenzin is a Tibetian Buddhist by religion. A receipt dated 20.08.2012 had been issued in the name ofrespondents No. 1 & 2 acknowledging the fact that they had paid 480 $ towards the sponsorship and supportfor a period of one year for Master Tenzin. It was admitted that the petitioner had permitted Master Tenzin to accompany respondents No. 1 & 2 for aperiod of two months during his winter vacation. The financial status of respondents No. 1 & 2 had been noted. It was noted that both the respondents had adequate moveable and immoveable assets and they were in a position to provide a secure and stable home to Master Tenzin. Their strong commitment to family values and in preserving the cultural and heritageof a parental home had also been noted.

35. All parties before the said Court had been served including Tashi Choedon (respondent No. 4). She chose not to appear. She was subsequently deleted from the array of parties vide order dated 15.02.2013 It was noted by the Court that Tashi Choedon had not been capable of taking care of her son; she thus could not be termed as a 'relative' of Master Tenzin; she had also never made any effort to get herself appointed as guardian of Master Tenzin. This order (of the deletionof her name) was never challenged; neither by the petitioner and nor by Tashi Choedon herself.

36. Twenty witnesses were examined before the Guardian Court. Forty documents had been exhibited. The statement of the petitioner was recorded. It was deposed that the child was an orphan and the whereabouts of his biological parents were not known. It was admitted that Master Tenzin had been sponsoredby respondents No. 1 & 2 and he was permitted to spend his winter vacations with them. The Judge had framed several issues in the matter and dealt with eachof them issue-wise. The question as to whether respondents No. 1 & 2 were liable to be appointed as guardians of Master Tenzin was framed as issue No. 1. The interest and welfare of the minor child was framed as issue No. 1 (a). The Court after examinationof the oral and documentary evidence was of the view that since Master Tenzin was a domicile of India and being a minor, the provisions of Guardians and Wards Act would be applicable. The observations of the Apex Court in Laxmi Kant Pandey (Supra) noting a no distinction between a 'foreign national' and an'Indian national' on the concept of guardianship was highlighted. The status of

the petitioner school gathered from the evidence which included the fact thata teacher of the petitioner school had been arrestedfor committing rape on a female child was also noted; it was also noted that admission of Master Tenzin had not been reported by the school authorities to any local police or to the Child Welfare Committee (CWC).

37. While disposing of the petition on 11.12.2014, the learned Guardian Court appointed respondents No. 1 & 2 as guardians of Master Tenzin and his custody which was already with them was to continue. However, Master Tenzin was not permitted to be taken outside India unless and until he was adopted in accordance with law; a direction was given by the Court thatadoption should be as per the CARA Guidelines and the inter-country adoption law prevailing in the USA.

38. This order dated 11.12.2014 was the subject matter of challenge before the High Court ofHimachal Pradesh. The appeal was admitted and taken up for hearing on 07.05.2015 Notice was issued to respondents No. 1 & 2 for 18.06.2015 The apprehension of the petitioner that respondents No. 1 & 2 would take the child out of country led them to file an application before the High Court of which anadvance copy of the same was given to the learned counsel for the respondents. Counsel for the respondents appeared before the High Court on 04.06.2015 They produced a copy of an order passed by the learned Family Judge, Family Court, Saket dated 23.05.2015 under Section 9(4) of the HAMA appointing respondent No. 1 as the adoptive father of Master Tenzin.

39. The vehement contention of the learned counsel for the petitioner that respondents No. 1 & 2 fully well knowing about the factum of pendency ofthe appeal before the Himachal Pradesh High Court (against the order dated 23.11.2014) had yet in aclandestine manner obtained an ex-parte order under Section 9(4) from the Family Court, Saket is belied. The order of the Family Court passed on 23.05.2015 was passed prior in time to the petitioner having made anapplication before the Himachal Pradesh High Court seeking a restraint on the respondents from taking Master Tenzin out of the country. It is also not the caseof the petitioner that notice of the pending appeal had been served upon respondents No. 1 & 2 prior to 23.05.2015 This is clear from the averments made in the writ petition and the ambiguity, if any, is washed away in the list of dates which has been appended by the petitioner in his petition. These averments and list ofdates clearly show that on 23.05.2015 when the Family Court, Saket had passed an order appointing respondent No. 1 as the guardian of Master Tenzin, the respondents had no notice of any appeal pending before the Himachal Pradesh High Court.

40. Be that as it may, this Court as an additional fact notes that this appeal was voluntarily withdrawnby the petitioner on 21.08.2015 This was a chosen actof the petitioner. They had consciously withdrawn the appeal. Thus the order of the Guardian Court dated 23.11.2014 had become a final order. This final order appointing respondents No. 1 & 2 as guardians ofMaster Tenzin having attained its finality, it was by law established that respondents No. 1 & 2 are undisputed guardians of Master Tenzin.

41. Sections 9(4) & (5) of the HAMA are relevant. They read as under:-

"9 Persons capable of giving in adoption. —

(1) xxxxxx.

(2) xxxxxx.

(3) xxxxxx.

(4) Where both the father and mother are dead or have completely and finally renounced the world or have abandoned the child or have been declared by a court of competent jurisdiction to be of unsound mind or where the parentage of the child is not known, the guardian of the child may give the child inadoption with the previous permission ofthe court to any person including the guardian himself.]

(5) Before granting permission to a guardian under sub-section (4), the court shall be satisfied that the adoption will be for the welfare of the child, due consideration being for this purpose given to the wishesof the child having regard to the age and understanding of the child and that the applicant for permission has not received or agreed to receive and that no person has made or given or agreed to make or give to the applicant any payment or reward in consideration of the adoption except such as the court may sanction. Explanation.—For the purposes of this section—

(i) the expressions "father" and "mother" do not include an adoptive father and anadoptive mother;6 [***] 7 [(ia) "guardian" means a person having the care of the person or a child or ofboth his person and property and includes—

(a) a guardian appointed by the will ofthe child's father or mother; and

(b) a guardian appointed or declared bya court; and]

42. The definition of a 'guardian' as contained in the Explanation to Section 1 (ia)(b) includes a guardian appointed or so declared by a Court.

43. This provision (Section 9(4)) clearly stipulates that where the parentage of a child is not known, the guardian of the child may give the child in adoptionto any person including the guardian himself. The rider is that this has to be with the permission of the Court.

44. It was on the premise of this statutory provision that respondents No. 1 & 2 had moved the Family Court at Saket. They were admittedly guardians of Master Tenzin. This had been held by a Competent Court ofCivil Judge, Senior Division, Dharamshala on 23.11.2014 This order, at the cost of repetition, had attained afinality. The guardian with the permission of the Court under Section 9(4) of the HAMA may give the child inadoption.

45. Sub-Section 5 casts an obligation on the Court to ensure that the adoption should be for the welfareof the child and the wishes of the child having regard to the age and understanding of the child have to be considered.

46. Respondents No. 1 & 2 were thus fully permitted to file this application under Section 9(4) of the HAMA. The order passed by the Family Court was well within its jurisdiction. The registered adoption deed dated 15.04.2015 in favour of respondents No. 1 & 2 is alsoa part of the record. This adoption deed had been produced before the Court pursuant to the order ofthe Family Court dated 30.04.2015 who had directed the parties to produce the registered adoption deed from the concerned Registrar relating to Master Tenzin on or before 05.05.2015 It was thereafter i.e after the perusalof the deed of adoption and the statement of the parties that the order dated 23.05.2015 had been passed by the Family Court.

47. The submission of the petitioner that the Family Court did not have the jurisdiction to deal with the aspect of adoption in terms of Section 7 of the Family Court Act, 1984 is a submission which is misunderstood.

**FAMILY COURT ACT, 1984**

48. Relevant would it be to extract Section 7:-

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

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

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

49. Explanation (g) to Section 7 of the Family Court Act reads herein as under:-

"7. Jurisdiction.-

(1) Subject to the other provisions of this Act, aFamily Court shall- -

(1) (a) xxxxxx

(b) xxxxxx.

Explanation.-The suits and proceedings referred to in this sub-section are suits and proceedings ofthe following nature, namely:-

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

50. A Family Court thus has the same jurisdiction which is exercisable by any District Court or any subordinate Civil Court. Sub-clause (g) appended to the Explanation provides that a suit or proceedings in relation to guardianship of a person or custody of aminor will be the subject matter of jurisdiction before the Family Court.

51. Section 8 excludes jurisdiction of all other Courts except the Family Court in a suit of the nature as described in sub-clause (g) of the Explanation appended to Section 7. It stipulates that where aFamily Court has been established, no District Court or any other subordinate Court in relation to that or will have or exercise jurisdiction in respect of any suit or proceedings of the nature referred to in the Explanation of Section 7.

**HAMA, 1956**

52. Section 2 (a) of the HAMA applies to any person who is a Buddhist, Jaina or Sikh by religion. Master Tenzin was a Buddhist by religion. The HAMA would be applicable to the rights of Master Tenzin. Chapter II of the HAMA which deals with adoptionstipulates that no adoption shall be made after the commencement of this act (21.12.1956) except in accordance with the provisions of this Chapter. Sections 9(4) and (5) have already been referred to supra. Section 9(4) provides that where the parentageof the child is not known (as is so in the instant case),a guardian of the child may give the child inadoption to any person including the guardian himself. The definition of 'guardian' as highlighted in the Explanation (ia)(b) appended to Section 9 of the HAMA has also been referred to supra. This definition includesa guardian appointed by a Court. Respondents No. 1 & 2 had admittedly been appointed as guardians by aCourt of competent jurisdiction i.e Court of Senior Civil Judge, Dharamshala on 23.11.2014 That order is afinal order.

**JJ ACT, 2000**

53. The JJ Act, 2000 was promulgated on 30.12.2000 Section 41 contained in Chapter IV describes the rehabilitation and social integration process. Section 41(2) applies to a child who is an orphan. Sub-clause (3) makes a reference to the CARA Guidelines as notified by the Central Government; sub-clause (4) stipulates that the child has to be free for adoptionbefore the child can be offered for adoption. Sub-section 4 recognizes the institutions or voluntary organizations for placement of orphan, abandoned and surrendered children for adoption in accordance with its Guidelines. Sub-clause (5) states that no childshall be offered for adoption unless he is made freefor adoption. Section 68 gives powers to the State Government (by a Notification in the official gazette) to make Rules to carry out the purposes of the Act.

**JJ RULES, 2007**

54. These Juvenile Justice (Care and Protection ofChildren) Rules, 2007 came into effect on 26.10.2007 These Rules have been notified under the powers conferred to the State Government under Section 68 ofthe JJ Act, 2000. These Rules have a statutory force.

55. The best interest of the child as described in Section 2 (c) means a decision taken to ensure that the physical, emotional, intellectual and moral developmentof the juvenile or the child is taken care off. Rule 33 contained in Chapter V lays down the procedure foradoption. The primary object being to provide achild who cannot be cared off by his biological parents with a permanent substitute family. The CARA Guidelines notified by the Central Government are to apply for all persons falling under Section 41(3). This includes an orphan child as has been described in Section 41(2).

56. Rule 33(5) reads as under:-

"For the purpose of Section 41 of the Act, 'Court' implies a Civil Court, which has jurisdiction in matters of adoption and guardianship and may include the court of the District Judge, Family Court and City Civil Court."

57. This sub-rule defines a Court to include a Civil Court which has jurisdiction in matters of adoption in guardianship and may include the Court of District Court, Family Court and the City Civil Court.

58. A holistic, wholesome and harmonious readingof the aforenoted provisions of law particularly Sections 7 & 8 of the Family Court Act, Sections 9(4) & (5) of the HAMA and Sections 41(2)(3) of the JJ Act, 2000 coupled with Rule 33(5) of the JJ Rules, 2007 clearly reflects the intent of the Legislations; it evidences that the Family Court has the same jurisdiction which is exercisable by any District Court or any other sub-ordinate Civil Court. A Family Court is thus specifically clothed with the jurisdiction to deal with matters of adoption as contained in Section 41 which includes an orphan child. It persuades this Court to hold that the Family Court was well within its domain to exercise jurisdiction in matters ofadoption; its jurisdiction was in no manner ousted bythe subsequent enactment of JJ Act, 2000.

59. This Court is fortified in this view by ajudgment of a Division Bench of Madhya Pradesh on this score reported as First Appeal No. 55/2013 Tarun Kadam v. State of Madhya Pradesh delivered on 17.09.2014

60. The judgment of the Bombay Bench in ForeignAdoption Case (supra) and of the Kerala Bench inAndrew Mendis (supra) had relied upon its earlier dicta given in Vinod Krishnana; the judgment of Vinod Krishnan had not considered the scope of Rule 33(5)of the JJ Rules, 2007 obviously for the reason that it was passed prior in time to the promulgation of the said Rules. The judgment of Andrew Mendis in fact presupposed that Rule 33(5) confers by necessary implication a jurisdiction on the Family Court to deal with matters of adoption but nevertheless had gone on to examine the provisions of the General Clauses Act to draw a conclusion to the contrary.

61. This Court with respect does not adhere to the view of the Kerala Bench in Andrew Mendis or of the Bombay Bench.

62. This Court again notes that the Guardian Court, Senior Division, Shimla while disposing of the petition on 23.11.2014 had directed the respondents to get theadoption of Master Tenzin to be effected in terms ofthe CARA Guidelines as also the inter-country adoptionlaws of United States of America.

63. CARA (subsequently impleaded as a party) has filed an affidavit as also an additional affidavit. It was stated that the application filed by respondents No. 1 & 2 seeking a NOC was examined in July, 2016; this was examined in the light of the Guidelines governingAdoption of Children Rules, 2015; this was pursuant to the order dated 23.05.2015 issued by the Principal Judge, Saket. The 2015 Adoption Guidelines would apply in terms of para 53(3) of the said Regulations which apply to pending adoptions; the instantadoption allowed by the Family Court on 23.05.2015 came under the category of the pending adoptions; it was for this reason that 2015 Adoption Guidelines would apply. CARA has issued a NOC in exercise of its jurisdiction as conferred upon it under para 17(1) ofthe said Regulations and 17 (c) of the Hague Convention. This NOC has been issued only after the dossier was placed before the No. Committee and duly approved by the Committee. It has also been brought to the notice of this Court that this NOC had been granted after a home study had been conducted byCARA on 25.07.2016, a no

objection certificate (dated 26.07.2016) has been issued in favour of respondents No. 1 & 2. This home study conducted by CARA was to verify the antecedents of the adoptive parents. This home study was conducted on 14.07.2016 Two social workers had met respondents No. 1 & 2 along with Master Tenzin at their residence. It was reported that the emotional, financial and physical status ofrespondents No. 1 & 2 was stable and they were well prepared for adoption of Master Tenzin who had bythen integrated into the family (being lived with themfor over four years). Respondents No. 1 & 2 appeared to be suitable parents; it was accordingly recommended this couple (respondents No. 1 & 2) was right foradopting Master Tenzin as per all required criteria.

64. It is relevant to note that this home study has made a detailed and a comprehensive analysis ofthe prospective adoptive parents and the conclusion had been arrived at only thereafter. This format byitself runs into 8-9 pages. It was noted that Master Tenzin was living with the family for more than four years and he has a good bonding with his parents. The needs and desires of the child appeared to be fulfilled; the parents were concerned about the education and other developmental issues of thechild; being an educated family, their focus was on providing the child with a healthy upbringing; the awareness of Master Tenzin and his comfort with the family as also his further dream of going to Alaska, USA were also noted. It had accordingly wholeheartedly recommended that respondent No. 1 & 2 be given aclearance and a no-objection from CARA. This home study report was signed by the Programme Officer as also the Programme Manager of the Department ofWomen and Child Development.

65. Pursuant to this home study report dated 25.07.2016, a 'no objection certificate' had been issuedby CARA on 26.07.2016 This document is a part ofthe record. It is not assailable.

66. The vehement contention of the learned counsel for the petitioner that CARA by giving a 'no objection' at this stage (which is admittedly an ex-post facto approval) has gone behind its own objects. This submission has neither been expanded and nor has it been taken any further than the aforenoted sentence. How CARA has gone back on its objects has not been explained.

67. The CARA Guidelines, 2015 notified on 17.07.2015 in Rule 53 states that the earlier Guidelines governing Adoption of Children Rules, 2011 are repealed; all pending adoptions shall be processed as per these Guidelines. Admittedly the application of the respondents seeking an NOC from CARA was made in July, 2016 on which date the notified Guidelines foradoption were of the year 2015. Thus the 2015 Cara Guidelines would be applicable to an NOC to be granted by CARA which has been granted on 26.07.2016 This is also the stand of the petitioner.

68. Reliance by the learned counsel for the respondents on Section 60 of the JJ Act, 2015 is alsoan argument which has force. It is pointed out that under Section 60 of the JJ Act, 2015 (prevailing at the time when CARA granted its NOC on 26.07.2016) postulates that an ex-post facto approval can be granted; Section 60(1) in fact states that a relative who intends to adopt a child shall obtain an order from the Court and he may then apply for an NOC from the authority in the manner as provided in the AdoptionRegulations framed by the Authority. This Section thus clearly contemplates an ex-post facto approval. ABench of this Court in PKH (supra) while examining the provisions of Section 60 had noted that the scope ofthis provision should be expanded in order to advance the best interest of the child. It had also instructed CARA to ensure that all applications for approval/NOC should be processed in a child friendly manner and within a fixed time frame.

69. In this context, it would be relevant to note the conduct of respondents No. 1 & 2. It is noted that afteran order had been obtained by respondents No. 1 & 2 from the Guardian Court on 23.11.2014 asking them to comply with a direction to follow the CARA Guidelines as also the inter-country adoption laws, respondents No. 1 & 2 made all out efforts to comply with this direction. They approached the CARA. CARA by its communication dated 09.03.2015 noted herein as under:-

"In this regard, the inter-Ministerial Meeting held on 02/02/2011 was of the view that since Tibetans have a Government in Exile, which is fully functional, it may be appropriate for it to decide whether they want to give their children inadoption. It was also viewed that in case immigration clearance is required for Tibetan citizens leaving India for adoption purpose, MHA would offer necessary facilitation."

70. Respondents No. 1 & 2 had no other option but to approach the CTA. CTA is admittedly neither recognised by the US authorities (of whom respondent No. 1 is a citizen) and neither by the Italian Government (of whom respondent No. 2 is acitizen). The communication from the Italian Embassy (dated 23.02.2015) and the U.S Embassy (dated 16.06.2015) clearly informs the respondents that the CTA is not an identifiable body qua the US and Italian authorities.

71. It would obviously thus have been a futile attempt for respondents No. 1 & 2 to have approached the CTA.

72. On 23.05.2015, an application under Section 9(4) of the HAMA was preferred by respondents No. 1 & 2 before the Family Court, Saket on which the impugned order had been passed.

73. It was not as if respondents No. 1 & 2 were sleeping over their rights or not making any effort to legalize the adoption of Master Tenzin. They had made all out efforts to do the needful. They were in fact running from pillar to post. CARA did not entertain them in the first instance. This is clear from its communication dated 09.03.2015 Respondents No. 1 & 2 then chose to approach the CTA but the non-recognition of the CTA by their respective Governments left them with no option but to approach the Family Court under Section 9(4) of the HAMA. At the cost of repetition, the Family Court was clothed with jurisdiction to deal with such an application. Respondents No. 1 & 2 had been appointed as guardianof Master Tenzin by an unassailable order dated 23.11.2014; Section 9(4) of the HAMA enabled the Family Court to appoint respondent No. 1 as the adoptive father of Master Tenzin. This was well within the parameters of law.

74. This Court also notes the stand of CARA who has now on 26.07.2016 granted a 'no objection certificate' in favour of respondents No. 1 & 2. The Hague Convention and particularly Articles 5 & 17 ofthe Hague Convention also stand satisfied.

75. The stand of the CTA has already been noted in its counter affidavit. Their uncontroverted stand is that they have no role to play in these proceedings which are inter-se proceedings largely between the petitioner and respondents No. 1 & 2.

76. This Court is also of the view that this is not a case of 'inter-country direct adoption'. This was the alternate argument propounded by the learned counsel for respondents No. 1 & 2. This is not a case where the natural/biological parents of Master Tenzin were transferring their child to the adopted parents which in the view of this Court would alone qualify as an 'inter-country direct adoption'; that would be a case where there is no intermediary party.

77. The connected argument in this context has also been noted. It had been propounded that the petitioner/ TCV is admittedly not registered; this fact is undisputed; it has also come on record that the admission of Master Tenzin in the petitioner school was not reported to any Child Welfare Committee; this had emanated in the evidence recorded before the Guardian Court at Dharamshala, Shimla; it would thus be a case of a private adoption and not on inter-country adoption.

78. The view of this Court is that such a non-registration/non-reporting is amenable to a penalty both under the JJ Act, 2000 and the subsequent Act of 2015. It would not take the case of Master Tenzin away from the ambit of an 'inter-country adoption'. This would still qualify as an 'inter-country adoption' and not an 'inter-country direct adoption'. Master Tenzin being an orphan and having been placed in the petitioner institution. The CARA Guidelines had to be adhered to.

79. The celebrated judgment of Laxmi Kant Pandeyhad in fact recommended a regulatory body i.e Central Adoption Resource Agency (CARA) to be set up which has since been playing a pivotal role in matters of

inter and in-country adoption. This has been reiterated by the Supreme Court in W.P (C) No. 470/2005 in Shabnam Hashmi v. Union of India delivered on 19.02.2014 This judgment while considering the provisions of the JJ Act, 2000 had noted that this is an enabling legislation giving the prospective parents an option for adoption of an eligible child by following the procedure prescribed by the Act, Rules and CARA Guidelines as notified under the Act.

80. In the peculiar facts and circumstances of this case, this Court is of the firm view that the impugned order in no manner suffers from any infirmity. Respondent No. 1 is the legally adopted parent of Master Tenzin.

81. Petition is without any merit. Dismissed.

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# CHILD WELFARE COMMITTEE VERSUS GOVT. OF NCT OF DELHI AND OTHER

**Delhi High Court**

*Child Welfare Committee*
*Versus*
*Govt. of NCT of Delhi and Other*

**ILR (2009) II Delhi 508**

**Decided on 3 September, 2008**

**Juvenile Justice (Care and Protection of Children) Act 2000—Section 40, 41—Hindu Adoption and Maintenance Act, 1956—Section 9(5), 17—'S', a minor while employed as domestic help was raped by the driver employed in same house—'S' became pregnant and got employed with another couple—Delivered one son who was taken away by employer husband and wife, who in connivance with one Santosh gave that child to one Veena on payment of Rs. 23,000/- Letter written by Chairman, Child Welfare Committee (CWC) to High Court which treated as Public Interest Litigation—Section 40 and 41 lays down detailed procedure for adoption of child—Any payment received for taking neglected child in adoption was violative of Section 9 (5) and 17 of the Hindu Adoption and Maintenance Act, 1956—Directions issued for handling over custody of child to CWC who was already taking care of mother, who herself was a minor and a neglected child in need of care and protection, and to provide vocational training to mother to make her financially capable and also to provide care to infant.**

## JUDGMENT

**Hon'ble Dr. S. Muralidhar**

1. The genesis of this petition is a letter dated 12th September 2007 addressed to a learned Judge of this Court by Dr. Bharti Sharma, Chairperson, Child Welfare Committee (CWC), Nirmal Chhaya Complex, Jail Road, New Delhi. That letter was treated as a public interest litigation. In the said letter Dr. Sharma referred to the case concerning the illegal adoption of a male infant born on 13th August 2007 to a girl who was a rape victim as well as a minor. The case was first brought to light by the reporter of a television channel, CNN IBN. The minor girl was a domestic worker with a placement agency by the name of Adivasi Sewa Samiti, Shakurpur. According to the minor girl, the placement agency sold her infant to a couple. Taking a cue from S.228A IPC, and with a view to protecting the identity of the girl, she will be referred to hereafter in this judgment as S.

2. On 2nd September 2007 when the above facts were brought to the notice of the CWC by an NGO, PALNA, the CWC took cognizance of the case and instructed the SHO of Police Station Saraswati Vihar to admit the minor mother as well as her infant, both answering the definition of children in need of care and protection under the Juvenile Justice (Care and Protection of Children) Act, 2000 [JJ Act], to the Childrens Home for Girls, Nirmal Chhaya under the care and protection of the CWC.

3. The police questioned `S at Shakurpur and recorded her statement in which she disclosed that she had been raped. She stated that she was a resident of Village Khujuriya Police Station Goyal Kira Distt : Pashmi Singhbhum Jharkhand. A regular FIR No. 925/2007 was registered and `S was medically examined. During the course of investigation one Preeti wife of Vinod was arrested. According to Preeti, S had come to them when she was already pregnant. Though S was not married she decided to retain the

child with her whereas Preeti and her husband wanted to sell the child. They contacted one Santosh for this purpose. After a male infant was born to S they handed him over to Santosh and informed S that her child had been born dead. Santosh in turn sold the infant to one Veena for Rs. 23,000/- and the money was shared between Santosh, Preeti and Vinod. S disclosed to the police that when she protested, Preeti, Vinod and Santosh confined her in their premises.

4. Thereafter the police recorded the statement of Veena who stated that she had four daughters and no son. Her mother had come into contact with Santosh. After some negotiations, Santosh sold the child to Veena for Rs. 23,000/-.

5. On 2nd September 2007, the 20-day old infant was produced before the concerned Duty Metropolitan Magistrate (MM) before whom an application was filed by Veenas husband for custody of the infant. By an order dated 3 rd September 2007, the learned MM ordered that the infant be kept in the custody of Veena. Thereafter the infant was produced before the MM on 5 th and 12th September 2007 during which the custody of the infant continued with Veena and her husband Ram Lal by the orders of the learned MM. Custody of the infant was finally handed over to Veena on 14th September 2007. It is stated that although the representatives of the CWC as well as the NGO (`PALNA) participated in the proceedings, the custody of the infant was not given to them.

6. In her letter to this Court, Dr. Bharti Sharma pointed out that the learned MM transferred the case of S to the CWC on 10th September 2007. The CWC ordered another NGO, `HAQ: Centre for Child Rights, to provide legal aid to S. In her letter dated 12th September, 2007 to this Court by Dr. Sharma pointed out that the adoption provisions under the JJ Act as well as the Central Adoption Resource Agency (CARA) Guidelines were "totally flouted" and that "what has transpired in this case is not just against the law (minor girl being sent to Womens home, baby being handed back to the persons who have `bought it illegally), but also not in the best interest of the children". Accordingly, Dr. Sharma urged this Court to take immediate cognizance and initiate necessary action.

7. On 6th September 2007, the statement of the `S was recorded under Section 164 CrPC by the learned MM. On 13th October 2007, Vinod was arrested. During the further questioning, S" disclosed that she had been raped by one Manmohan who was the driver working with Vijay and Sulekha with whom she was placed as a domestic worker. Manmohan was arrested. The DNA finger printing test proved that Manmohan and S were the biological parents of the infant.

8. The letter sent by Dr. Bharti Sharma to this Court was registered as Writ Petition (Civil) No. 6830 of 2007. After notice was directed to issue to the respondents on 19th September 2007, a detailed order was passed by this Court on 21st November. Since it is a fairly comprehensive order containing several directions, it is reproduced in full hereunder:

    1. Our attention is drawn to Section 41 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as, the Act). The said provision deals with the manner and mode of the process of rehabilitation and adoption of the children who are orphan and abandoned.

    2. The child herein was allegedly given on adoption by Ms.Preeti and Mr.Vinod through one, Ms.Santosh by selling the new born baby for a consideration of Rs.23,000/-. A case being FIR No.925/2007 is registered at police station Saraswati Vihar, under Sections 342/376/506/363/367/34 IPC. The police must investigate the aforesaid offence and bring the said investigation to a logical end. The action taken report shall be filed by the police in respect of the stage of the investigation positively before the next date.

    3. So far as the alleged adoption is concerned, we feel that such adoption should be in terms of and after following the procedure under Sections 40 and 41 of the Act. The said procedure has not been followed in the present case. The alleged adoption cannot be accepted as the same is not in accordance with the Act. In this connection, we may refer to the provisions of Section 29 onwards

of the Act. The said provisions give wide power to the Child Welfare Committee which has been entrusted with the responsibility and duty for providing care, protection, treatment, development and rehabilitation of the children. So far as Delhi is concerned, a Committee has already been constituted, which is functional as of today.

4. The Chairperson of Child Welfare Committee, Dr. Bharti Sharma is present in the Court. She is also represented through her counsel who states that there was a direction of the Child Welfare Committee for production of the mother and the child before them so as to enable the Committee to give effect to the provisions and requirements of the Act. In this connection, we may refer to Section 2(d) of the Juvenile Justice Act 2000 as amended in 2006 which defines "child in need of care and protection" as under:-

"Section 2(d) "child in need of care and protection" means a child."

(i) who is found without any home or settled place or abode and without any ostensible means of subsistence, [(i-a) who is found begging, or who is either a street child or a working child,]

(ii) who resides with a person (whether a guardian of the child or not) and such person"

(a) has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out, or

(b) has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person,

(iii) who is mentally or physically challenged or ill children or children suffering from terminal diseases or incurable diseases having no one to support or look after,

(iv) who has a parent or guardian and such parent or guardian is unfit or incapacitated to exercise control over the child,

(v) who does not have parent and no one is willing to take care of or whose parents have abandoned [or surrendered] him or who is missing and run away child and whose parents cannot be found after reasonable inquiry,

(vi) who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts,

(vii) who is found vulnerable and is likely to be inducted into drug abuse or trafficking,

(viii) who is being or is likely to be abused for unconscionable gains,

(ix) who is victim of any armed conflict, civil commotion or natural calamity;

5. The child in question would definitely come within the ambit of the "child in need of care and protection" and if that be so, then the Child Welfare Committee, which is a statutory authority, will have jurisdiction and power to pass such orders as deemed fit and proper for giving effect to the provisions of Act, which is a welfare legislation. One may also refer to the Judgement of the Supreme Court in Pratap Singh versus State of Jharkhand, reported in (2005) 3 SCC 551 wherein the Court while dealing with the question of the purpose and object of the Juvenile Justice Act, 1986 and the Act, noted as under:

"10. Thus, the whole object of the Act is to provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles. It is a beneficial legislation aimed at making available the benefit of the Act to the neglected or delinquent juveniles. It is settled law that the interpretation of the statute of beneficial legislation must be to advance the

cause of legislation for the benefit of whom it is made and not to frustrate the intendment of the legislation."

6. The direction and order passed by the Metropolitan Magistrate, Rohini Courts, unfortunately ignores and fails to take into consideration the provisions and object of the Act. The Factual averments made in the application filed by the Child Welfare Committee and the Police required deeper consideration and analysis keeping in mind the provisions of the Act. The role of the Child Welfare Committee with respect to the process of adoption is very clear from the plain reading of Section 41 of the Act, which reads as under:

"41. Adoption:- (1) The primary responsibility for providing care and protection to children shall be that of his family.

[(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.

(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 adoption by a court after satisfying itself regarding the investigations having been carried out, as are required for giving such children in adoption.

(4) The State Government shall recognise one or more of its institutions or voluntary organisations in each district as specialised 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 notified under sub-section (3) :

Provided that the childrens homes and the institutions run by the State Government or a voluntary organisation 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 the adoption agency in that district for placement of such children in adoption in accordance with the guidelines notified under sub- section (3).] (5) No child shall be offered for adoption

(a) until two members of the Committee declare the child legally free for placement in the case of abandoned children,

(b) till the two months period for reconsideration by the parent is over in the case of surrendered children, and

(c) without his consent in the case of a child who can understand and express his consent.

[(6) The court may allow a child to be given in adoption: (a) to a person irrespective of marital status; or

(b) to parents to adopt a child of same sex irrespective of the number of living biological sons or daughters; or

(c) to childless couples.]"

7. This is very unfortunate that a Metropolitan Magistrate who is vested with certain responsibilities has passed such an order.

8. The child is present in Court and we direct that the custody of the child be immediately handed over to the Child Welfare Committee who shall take care and provide for the child concerned, until we pass further orders in this regard.

9. The natural mother and the child are to live together under the supervision of the Child Welfare Committee.

10. The custody and possession of the child has been handed over to Dr. Bharti Sharma, Chairperson, Child Welfare Committee today in the Court.

11. The Child Welfare Committee shall also carry out enquiry in terms of the provisions of the Act and shall submit a report to this Court before the next date. The natural mother shall also be present in the Court on the next date.

12. This order shall be given effect to immediately and copy of this order be sent to the concerned Metropolitan Magistrate, wherever she is posted. Copy of this order will also be sent to the Chief Metropolitan Magistrate for being circulated. Renotify on 12th December, 2007."

9. What is important is that from 21st November 2007 onwards the custody of the infant was given to the CWC under whose protection S already was. In the further order dated 12th December 2007, this Court noted that the infant was in the custody of S. The Court allowed time to S to take a decision as regards the custody or adoption of the infant.

10. On 5th March 2008, the following order came to be passed by the Court:

"Pursuant to our order, the Child Welfare Committee, who was given custody of the mother and the child, is looking after the welfare of both the mother and the child at the present moment. Counsel appearing for the Child Welfare Committee, however, states before us that the mother wants to give the child in adoption. Our attention is also drawn to Section 41 of the Juvenile Justice (Care and Protection of Children) Act, 2000. There is already one applicant for custody of the child contending, inter alia, that they are interested in taking the boy in adoption in the family as there is no male child in the family. There is some complaint against the said applicant also.

Be that as it may, without going into the merits of the claims and counter claims in respect of custody of the child, we direct the Juvenile Justice Board No.1 to examine the matter as to who could be given the adoption/custody of the child and to whom the mother is desirous of giving the child in adoption, keeping in mind the welfare of the child. All the parties, who are interested in the issue, may appear before the Juvenile Justice Board No.1 on 27th March, 2008, when a further date in the matter will be given by the Board for making necessary inquiries. However, before giving custody of the child, a report shall be submitted to this Court by the concerned Board so that this Court can look into the issue of the welfare of the child and the Juvenile Justice Board would abide by the orders of this Court. It shall also be open to the Juvenile Justice Board to examine all persons, including the natural mother of the child.

Renotify on 30th April, 2008.

Copy of the order be sent to the Juvenile Justice Board No.1."

11. Pursuant to the above order, a detailed report has been submitted to this Court by the Juvenile Justice Board-I Delhi (JJB), presided over by Ms. Illa Rawat, Principal Magistrate. Enclosed with the report are the statements of persons examined by the JJB, the proceedings of the CWC and other relevant documents. The JJB has examined the statements made before it and the relevant records and concluded that `S in all probability did not freely consent to her child being given away in adoption. The JJB has observed has under:

"Though "S" made a statement before Ld. MM, Rohini Court on 02.09.2007, 03.09.2007, 05.09.2007 and 12.09.2007 and in her statement U/s 164 Cr.P.C. before concerned Court that she wanted to give her child to Veena, "S" has explained the circumstances in which she had so consented when she was examined by this Board on 07.05.2008. In this context she has explained that she was unable to lactate as she was not having milk to feed the infant and came to know that the place she was staying housed other small children for whom there was provision for milk. It is possible that the helpless minor girl, who was not aware of her rights or the fact that she and her child were entitled to be provided shelter, food and

clothing by the state run institutions, which would enable her to keep her child with her, probably out of helplessness and exasperation exercised the only option that she thought was available to her i.e.: to allow her child to remain with Veena and Ram Lal in a hope that there he at least would get shelter and food."

12. Further the JJB concluded that the payment made by Veena in the sum of Rs.23,000/- for taking the neglected child in adoption was violative of Section 9(5) and Section 17 of the Hindu Adoption & Maintenance Act, 1956 which prohibits any person from receiving any payment in consideration of adoption of any person or making or giving or agreeing to make or to give to any person, any payment or reward that is prohibited by that provision. The JJB also noted that the act of giving away of the infant in adoption was in the teeth of the guidelines laid down by the Supreme Court in Laxmi Kant Pandey v. Union of India (1984) 2 SCC 244 and in particular its observations in para 17 which read as under:

"We were told that there are instances where large amounts are demanded by so-called social or child welfare agencies or individuals in consideration of giving a child in adoption and often this is done under the label of maintenance charges and medical expenses supposed to have been incurred for the child. This is a pernicious practice which is really nothing short of trafficking in children and it is absolutely necessary to put an end to it by introducing adequate safeguards."

13. Referring to the provisions of Section 41 of the JJ Act and Rule 33(4) of the Juvenile Justice (Care and Protection of Children) Rules 2007 [JJ Rules], the JJB pointed out that even if this were to be considered to be a case of a surrendered child, "without the concerned parent/parents having been counseled and/or being informed of possibility of retaining the child, the surrender cannot be taken to be voluntary nor does it go with the legislative spirit." In addition, reference has been made to guideline 1.1.3(iv)(f) which reads as under:

"In case of a child born out of wedlock, the mother herself and none else can surrender the child. If she is a minor, the signature of an accompanying relative will be obtained on the surrender document."

14. The CWC got `S examined by Dr. Achal Bhagat, Director, Saarthak who was also a Senior Consultant Psychiatrist and Psychotherapist at the Apollo Hospital and Ms. Bharti Tiwari, Assistant Director, Saarthak and Consultant, Clinical Psychologist. The said report has been enclosed with the status report filed before this Court by the CWC on 12th December 2007. In the said report, it has been observed as under:

" S is in a dilemma about her future. She wants to bring up the child. She also feels that for the present the best place for her is with her family. She is not sure how her other siblings will behave with her and the child. She said that she loves the baby and now wants to bring up the child and not give him for adoption....."

"If S were to remain in Delhi, it is important that the court or the child welfare committee give directions for her to be trained to be able to economically and psycho-socially independent. It is recommended that she be placed in an environment which is safe, non- judgmental and helps to bring up her child. If such an environment is not possible and she has to be sent home, given the reluctance of her father to support the child, other care arrangements, including adoption should be considered for Ss child."

15. After taking note of the above report, the JJB has concluded as under:

" S fully understands her responsibility towards her child and is ready to take necessary steps to ensure that her child is brought up in an atmosphere of love and affection."

16. We appreciate the effort taken by the JJB and accept its report. It is a comprehensive report containing certain useful suggestions. Inter alia it has been suggested that in the background of the provisions contained in Article 15(3) read with Articles 24 and 39(e) and (f) of the Constitution, as explained by the Supreme Court, it is obligatory for the State to provide for the infant so that he can be brought up in a congenial manner without being deprived of the love, care and affection of his natural mother who wishes to retain him.

17. This Court in its proceedings dated 29th May 2008 noticed that S was at present in the Nirmal Chhaya Complex (Childrens Home for Girls) and that according to the Chairperson of the CWC she may be given further vocational training. The girls parents have apparently expressed their unwillingness to support girl and therefore the option of her returning, with her child to Jharkhand, is ruled out. This Court desired that the CWC should ascertain the wishes of S, as to what she would want to do so that she could support herself. It also directed the Government of National Capital Territory of Delhi (GNCTD) to consider providing employment to the girl. The Court was informed that S is no longer a minor and can be suitably employed.

18. At the hearing on 16th July 2008, this Court was informed by Ms. Mukta Gupta, the learned Senior Standing Counsel appearing for the GNCTD that the GNCTD is willing to give employment to S as House Aunty in a state run institution for care for which a fixed honorarium is paid. Although the minimum qualification for the said post is 8th Class pass, the GNCTD is prepared to consider relaxing that requirement in the special facts and circumstances of the case. The Court also ascertained the wishes of S. She was willing to take up an employment with a state run institution.

19. In view of the statement made by the GNCTD and the willingness expressed by `S, we direct that the GNCTD will employ S as House Aunty and arrange for her stay in the institution to which she will be attached along with her child by relaxing the educational qualification. This should be done within a period of four weeks from today. We further direct that all possible assistance will be extended to S by the GNCTD to enable her to pursue her education and for being trained in any vocational skills of her choice. The GNCTD will also ensure that her infant child is provided free education till he completes the age of fourteen and even thereafter if he chooses to continue. We would request the CWC to continue to monitor the progress and welfare of both the girl and the infant. It would be open to the girl and her child, as well as the CWC to approach this Court for any directions they may require in connection with this case.

20. This case brings to light the poignant plight of several child domestic workers who are taken in by placement agencies, and in turn are placed in many households in this city. These young children come from far away places in the country and, as in this case, belong largely to the disadvantaged sections of the society. The employment of such children for work is driven essentially by poverty which compels poor parents to part with their children for money. Despite the notification under the Child Labour (Prohibition & Regulation) Act, 1986 [`CLPRA] issued by the Central Government prohibiting employment of children in domestic households it is not uncommon to find in our immediate environs little girls employed as carers of babies and toddlers. They work for long hours on arduous tasks unsuited to their tender age. All this is, no doubt, illegal but it would be too simplistic to consider this to be a merely legal issue. It needs no reiteration that the JJ Act has itself been made in terms of Article 15 (3), Article 39(e) and (f), Articles 45 and 47 as well as the International Convention on the Rights of the Child (CRC) which has been ratified by India. The preamble to the JJ At makes express reference to these provisions as well as to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules), the United Nations Rules for the Protection of Juvenile Deprived of their Liberty (1990). The need to strictly enforce all these provisions is even more urgent and it would hardly suffice to be sanguine that the mere enactment of the Act would itself bring about the transformation in the lives of destitute children. Apart from awareness of legal provisions, the State would have to be constantly reminded of its obligations under the Constitution to create circumstances conducive to the healthy development and care of children in their homes. The GNCTD and the Delhi Police will also pay attention to the need for sensitizing concerned Station Housing Officers (SHOs) in cases arising under the JJ Act so that the applications made by the prosecution before the JJB or MM, are not mechanically drawn up as was perhaps done in this matter.

21. What is stark about this case is that the young mother when she gave birth to her child was herself a child in need of care and protection in terms of the JJ Act. While this case has served to highlight the

urgent need for the State put in place corrective measures and ensure that such instances are prevented, there are probably many more such children whose stories are unable to be narrated in the media and before the courts and other authorities. The vulnerability of girl children employed as child carers and maids in domestic settings and the need to ensure their safety from exploitation and violence can never be overemphasized. This Court would urge the GNCTD to create greater awareness of the provisions of the JJ Act and the CLPRA both through the print and electronic media and in particular in schools and residential colonies, through the resident welfare associations. The monitoring of the functioning of placement agencies would have to be undertaken on a far more rigorous scale to ensure that minors are not allowed to be employed and placed in domestic households. We would suggest to the GNCTD to seek the involvement of the Child Rights Commission at the Central and State levels in formulating scheme and programmes in the area.

22. While commending the efforts of the CWC as well as the JJB, this Court would also like to remind the learned MMs exercising powers under the JJ Act to be far more vigilant and cautious before making orders placing young children in the custody of unrelated adults without examining the ramifications of such orders. In particular this Court would like to reiterate the directions already issued in its detailed order dated 21 st November, 2007, which has been reproduced in full hereinabove. In addition, this Court would like to draw attention to the mandatory nature of Rule 77(3) of the JJ rules which requires that "In case of a child in need of care and protection and produced as a victim of a crime before a Magistrate not empowered under the Act, such Magistrate shall transfer the matter concerning care and protection, rehabilitation and restoration of the child to the appropriate Committee." Therefore, the presentation or transfer of the case by the Magistrate to the CWC or the JJB at the earliest possible stage is of utmost importance. The judicial officer should immediately transfer the case without going into details of claims and counter claims, to the JJB and/or the CWC which are specialized bodies constituted under a special Act meant for care and protection, rehabilitation and restoration of the child in need of care and protection.

23. Before parting with the case, this Court would like to make an observation as regards providing legal services and legal aid to children under the JJ Act and CLPRA. Despite each child being mandatorily entitled to free legal aid under Section 12 of the Legal Services Authorities Act, 1987 and there being a specific provision in the form of Rule 14 of the JJ Rules very often the CWC and JJB are having to resort to the services of NGOs. While the efforts made by the NGOs in this case, i.e., both `PALNA & `HAQ are indeed commendable and deserve unreserved appreciation, it is essential that both the District Legal Services Committees as well as the Delhi State Legal Services Authority, on a priority basis, constitute a special panel of advocates with the requisite degree of sensitivity to such cases to handle on a daily basis in the proceedings in the JJB as well as CWC. They should be available round the clock on call and a complete list of names with their telephone and mobile numbers should be made available to these authorities for that purpose. This court would add that the payment for rendering such services should be commensurate with the expertise and standing of such advocates so that their continued assistance at all times is available to the JJB and the CWC. The panel should be constantly reviewed after getting a feedback.

24. The Court would also like to place its appreciation of the assistance rendered to this Court by Ms. Aparna Bhat, the learned Advocate appearing for the CWC and Ms. Mukta Gupta, the learned Senior Standing Counsel for the GNCTD. The television channel CNN IBN also deserves appreciation for bringing the case to light and triggering the judicial exercise.

25. The writ petition and application stand disposed of with the above directions. Copies of this order be sent within a week to the CWC, the JJB-I, Delhi, the Secretary, Department of Social Welfare, GNCTD, and the Secretaries of both the District Legal Services Committee, Room No. 1, Patiala House Courts, New Delhi and the Delhi State Legal Services Authority.

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# SOCIETY OF SISTERS OF CHARITY, ST. GEROSA CONVENT VERSUS NIL*

**Karnataka High Court**

**Bench : Hon'ble Mr. Justice N. Venkatachala and Hon'ble Mr. Justice N.D.V Bhat**

*Society of Sisters of Charity, St. Gerosa Convent*
*Versus*
*Nil**

**M.F.A No. 14 of 1990**

**Decided on June 6, 1990**

**GUARDIAN & WARDS ACT, 1890 (Central Act No. 8 of 1890) — Sections 7, 10, 17 & 26 — Adoption to foreign parents — Where siblings mature & taking proper decision as to future, if prefers foreign parents with all knowledge, harsh & dangerous to force them to continue in Orphanage, regard being had to vicissitudes exposed in this Country — Preference not to be ignored — Normative & procedural safeguards for giving in adoption to foreigner: inapplicable to surrender prior to decision in (1984) 2 SCC 244 : AIR 1984 SC 469 — Court to first satisfy itself sponsoring institution dependable based on past services rendered regarding child welfare — If institution reputed, Court not to make conjectures — District Judge not to transfer such matters to subordinate Court for disposal shrinking responsibility.**

**Held :**

**(i) The reason that the siblings should not be given in adoption to foreign parents as there is a possibility of their coining up in life in India itself because of their intelligence and the progress they are making in their studies, looks rather amusing. When children of mature age are offered for adoption by foreign parents, the latter would never agree for adopting the former if they are not intelligent, healthy and good in their studies, in that it is difficult to expect of such children to cope up with the problem of their assimilation in the family of foreign adoptive parents arising on account of cultural, racial or linguistic differences…The siblings - the girls, in their age, who are to be regarded as mature enough to take a proper decision when have preferred to become the adoptive children of foreign parents and find their home with them having come to know all about them, which, in every respect, is found to be good, it would be harsh and rather dangerous to impose upon them a wish of the Court that they should continue to reside in the Orphanage itself in the hope that they may shine in this Country itself ignoring the realities prevailing in the Country as to the vicissitudes, to which such girls could be exposed. The fact that the Country as to the vicissitudes, to which such girls could be exposed. The fact that the siblings are intelligent, good in studies, good looking and healthy should not be weighed in ignoring their preference to be adopted by foreign parents, in their genuine hope of finding a home of parents with love and affection, which they had been all through denied, and in their eagerness and anxiety to get higher education and grow up in stature and become useful to society. For getting proper education abroad, children from this Country were always sent and even today, affluent families in India prefer to have education for their children in foreign countries. It would be difficult to find for Orphans, adoptive parents - both of whom are Teachers and who**

**are eager to have adoptive children in their home and are ready to give good education to them and bring them up in life by providing a home and security for their future.**

**(ii) The points emerging from the views of the Supreme Court touching the Surrender Document of a minor child to be obtained from such child's biological, parents by an Institution or Centre or Home for child care or social or child welfare agency, to which such child is surrendered, for their proper understanding, could be put thus: (i) The institution or Centre or Home for child care or social or child welfare agency, to which the child is being surrendered for adoption, should, before taking the child sought to be surrendered, acquaint such child's biological parents of the implications of adoption including the possibility of their child being adopted by a foreigner making it impossibe for them to have any further contact with that child, so as to enable them to take a considered decision in the matter of relinquishment of the child; (ii) the biological parents should not be subjected to any duress in the matter of their making a decision as to the relinquishment of their child; (iii) if the biological parents, even with the full knowledge of the implications of adoption of their child and the possibility of such child being given away to a foreigner in adoption, make a decision to surrender the child, they have to be given three more months' time to re-consider their decision. But, the decision taken by the biological parents if is not reconsidered within the time to be so allowed, the surrender of the child must be regarded as irrevocable and the procedure for giving the child in adoption to a foreigner can then be initiated without any further reference to the biological parents by filing an application for appointment of the foreigner as guardian of the child. Thereafter, question of once again consulting the biological parents - whether they wish to get the child in adoption or they want to take it back, could never arise; (iv) when the child is so surrendered by the biological parents, it is necessary for the Institution or Centre or Home for child care or social or child welfare agency, to which the child is surrendered, to take from the biological parents a Document of Surrender to ensure themselves that the child has, in fact, been surrendered by its biological parents. The document of surrender to be so obtained shall contain the names of the biological parents and their addresses, the information in regard to the birth of the child, its background, health and development. The signature of the biological parents should be got on such document of surrender with attestation by atleast two responsible persons…it becomes obvious that the safeguards so provided by the Supreme Court for the biological parents were not intended to cover a case of surrender of their child made before the rendering of the decision of the Supreme Court in Lakshmi Kant Pandey v. Union of India ((1984) 2 SCC 244 : AIR 1984 SC 469) inasmuch as the judicial legislation made in that regard by the Supreme Court cannot be regarded as applying retrospectively to cases of surrender of children made by biological parents earlier. (Para-3)**

**(iii) When ait application is made under the Act for appointment of foreign parents as guardians of minor children available for adoption, the Court concerned may have to first satisfy itself that the Social or Child Welfare Agency sponsoring the applications of foreign parents is a dependable institution. The Court's satisfaction in this regard must necessarily depend upon the past services rendered by such Institution in the field of child welfare. When an Institution is reputed for good work in the field of child welfare, the Court should not conjecture that such institution may throw away its child well taken care of, well nursed, well schooled, for a mere monetary gain or the like. (Para-5)**

**(iv) The District Courts, which receive the applications of the kind i.e, applications for appointment of foreign parents as guardians of minor children of Indian origin, should not shirk the responsibility of disposing them of by themselves having regard to various factors including the emotional factors of children involved in such cases, instead of getting rid of such applications by transferring them to a subordinate Court for disposal.**

The Judgment of the Court was delivered by

**Hon'ble Mr. Justice Venkatachala**

Petitioners in G & W.C No. 17/39, on the file of the Court of I Additional Civil Judge at Mangalore, Dakshina Kannada, have presented this appeal feeling aggrieved by an order made therein on 30-6-1989 refusing to grant the application made under Sections 7, 10, 17 and 26 of the Guardians and Wards Act, 1890 ('the Act'), respecting guardianship of two minor children.

2. Mr. Urbano Cerantola and Mrs. Mariella Lunardon Cerentola are husband and wife of Italian nationality and domicile. While the former is the Head Master and Teacher of a State Secondary School, the latter is a Teacher in a Lower Secondary School, both residing in their own residential villa composed of three floors and 15 rooms at 41, Mons, Rodolfi, 36061 Bassano del Grappa (Vicenza), Italy. Their annual income is said to be of the order of Lire 63, 163, 603, its equivalent in Indian Rupees being of the order of 6,60,000-00. The husband aged 46 years and the wife aged 40 years though are said to be fond of having children, are unable to have any of their own being afflicted with irreversible sterility. Their fondness for children and anxiety to become parents have made them register themselves with 'Amici Trentini' of Italy to obtain eligible minor children of Indian origin for adoption. That 'Amici Trentini' - a Child Welfare Agency recognised by the Government of Italy and enlisted by the Government of India, as an Agency to sponsor inter-country adoption of Indian minor children, having obtained a home-study report from the Social and Health Department of the District relating to the said husband and wife, who were eager to take in adoption two Indian children, has found them, taking into account their academic qualifications, financial status, dwelling conditions, mutual compatibility as married partners, psychological factors, tax, temperance and social records, medical records and the reports of a Psychologist and Social Worker received in the matter, to be a couple not only eligible but most suitable to adopt two minor girls from India. The Juvenile Court of Venice, which is the Competent Authority in the matter of adoptions to be made by the Italian couples according to the adoption laws of Italy, on an examination of the couple, has found them to be morally, ethically and financially fit to adopt two minor foreign children.

Anitha Marina born on 4-2-1974 and Savitha Marina born on 15-2-1977 are two minor siblings. Their father, who married after the death of their mother and did not like to have the siblings to live at his home with his second wife, gave them away on 1-7-1981 to St. Joseph's Prashant Nivas - a reputed Centre (Orphanage) to take care of and give protection to children who are abandoned or have become destitutes or orphans. Thus, the two minor siblings lost their parental home, parental care and concern, parental love and affection, and lived and grew for several years in the Orphanage, among other similar unfortunate children, resigning themselves to their unfortunate lot and adjusting to the living conditions of an Orphanage obviously cursing their selfish father who had abandoned them by sacrificing their future and well-being, preferring a joyous life with his second wife taken after the death of their loving and affectionate mother, his first wife.

Society of Sisters of Charity, St. Gerosa Convent, Malleswaram, Bangalore, which has been running the Orphanage - St. Joseph's Prashant Nivas at Jeppo in Mangalore, it appears, shifted in the year 1988 its inmates - Anitha Marina and Savitha Marina, the siblings, to Nirmala Social Welfare Centre at Ullal in Mangalore - another Orphanage also run by them, the latter Centre taking care of children available for adoption, in its hope and endeavour to find for the siblings suitable adoptive parents who could provide them a family life and take proper care of their future education, upbringing and well-being. Then, Society of Sisters of Charity, St. Gerosa Convent, cunning the aforesaid two Orphanages in Mangalore, being a Society recognised by the Ministry of Social Welfare, Government of India as eligible to process cases of minor Indian children for inter-country adoption, is said to have Informed the 'Amici Trentini' at Italy, the Government's recognised Association which finds children to its members for adoption, about the availability of the said siblings for adoption by Italian parents. That 'Amici Trentini', which had, as its members, Mr. Urbano Cerantola and Mrs. Mariella Lunardon Cerantola, on a thorough study, appears to have persuaded them to take the siblings in adoption, having regard to their tender age, health, character, intelligence, school results, etc. Readiness expressed by the said Italian couple to become adoptive parents of the siblings and take care of their well-being, education, future careers, is said to have brought to the

siblings cheer, joy and hope of their good future, which obviously might not have been there earlier, in that, in Indian conditions, the girls brought up in Orphanages are not treated on par with girls brought up in family homes. Society of Sisters of Charity having found, on a thorough consideration of all matters relating to suitability of Mr. Urbano Cerantola and Mrs. Mariella Lunardon Cerantola to become adoptive parents of the siblings, who had been under its care and protection for over nine years, filed a petition before the Court of District Judge at Mangalore, Dakshina Kannada, seeking appointment of Mr. Urbano Cerantola and Mrs. Mariella Lunardon Cerantola as guardians of the minor siblings with a view to bring about effectual adoption by them of the siblings according to the adoption laws prevailing in Italy, the Society of Sisters of Charity being petitioner-1 and Mr. Urbano Cerantola and Mrs. Mariella Lunardon Cerantola being petitioners 2 and 3 respectively therein. Along with the petition, all the documents including the photographs of the adoptive parents and their residential villa were produced. The Court of District Judge since transferred the said case to the Court of I Additional Civil Judge, Mangalore, for disposal in accordance with law, the latter Court has made an order on 30-6-1989 dismissing the petition filed by the petitioners. It is that order which is under appeal, as stated at the outset.

3. We have thoroughly examined the order under appeal and anxiously considered all aspects of the matter dealt with by the Court of Civil Judge, having regard to the emotional involvement of the siblings and the tender age of the young girls of mature understanding and their future upbringing and well-being. Besides hearing the learned Counsel on all aspects of the matter dealt with by the order under appeal, we have appraised ourselves of the correct state of mind of each of the siblings, of their feelings and of their choices as to their proposed adoption by petitioners 2 and 3, by talking to them individually after getting them to our Chambers and creating an atmosphere of full freedom for expression of their views on all matters. The Court of Civil Judge, as seen from its order under appeal, on a consideration of all the material which became available in the case, has held that petitioners 2 and 3 would be the suitable parents and guardians for the minor siblings, recording a finding thus:

"So all this goes to show that petitioners 2 and 3 are a suitable couple. They are employed and their financial position is sound and they have owned a residential villa therein. They are hale and healthy and they have no any symptoms of either physical or mental disease and as such petitioners 2 and 3 are a suitable couple to adopt and to be appointed as guardians."

Despite the said findings, the Court of Civil Judge has refused to grant the petitioners' application for appointing petitioners 2 and 3 as guardians of minor siblings and permitting them to take the minor siblings to Italy for their eventual adoption in accordance with adoption laws prevailing in that Country, the reasons weighing with it therefor being-

(i) that the siblings are not the inmates of Nirmala Social Welfare Centre, Ullal, as they are living in the house of Sister Dorothy Saldana at Jeppoo;

(ii) that the siblings, who are sisters being aged 15 and 12, are capable of looking after themselves and they will shine in India itself as they are intelligent and good in their studies in the School;

(iii) that in the petitioners' application, it is not stated that they have been offered for adoption by an Indian couple and that no Indian couple has come forward to adopt them;

(iv) that the Surrender Document of the father of the siblings surrendering them to St. Joseph's Prashant Nivas, Jeppoo, Mangalore, in the year 1981, is not produced; and

(v) that the name of the father of the siblings is not disclosed and it is not shown that the mother of the siblings had died.

4. What has to be now seen by us is whether the said reasons which have weighed with the Court of Civil Judge for rejecting the petitioners' application for appointment of petitioners 2 and 3 as guardians of minor siblings and permitting them to take the minor siblings to Italy for their adoption in accordance

with adoption laws prevailing in that Country, are sustainable or unsustainable as sought to be made out on behalf of the petitioners as would call for the reversal of the order under appeal. Hence, we shall proceed to examine the sustainability or otherwise of the said reasons seriatim.

Re. Reason (i):

The minor siblings, according to the Court of Civil Judge, are not the inmates of Nirmala Social Welfare Centre, Ullal, in that, they have stated in their statements made before it that they are residing in the house of Sister Dorothy Saldana at Jeppoo, Mangalore. The statement of Anitha Marina, which is marked as Exhibit P-1, is in Kannada and in her hand-writing. According to that statement, Anitha Marina and her younger sister having become orphans after the death of their mother, were surrendered by their father to the Orphanage — St. Joseph's Prashant Nivas, in that, he (their father) and his second wife were not prepared to look after them in their house; their father has never turned up thereafter; if they had their parents, they would not have been left in the lurch; fortunately for them, they have been looked after by the Sisters in the Orphanage and schooled by them because of their kindness; she was worried of her future and she had a longing to join the adoptive parents in the foreign country and was desirous of obtaining higher education there; and she wants the accompaniment of her younger sister and both of them have taken a decision in the said matters on their own. The statement of Savitha Marina, which is marked as Exhibit P-2, is substantially the same. The said statements no-where disclose that the siblings were rssiding in the house of Sister Dorothy Saldana at Jeppoo, as adverted to by the Court of Civil Judge. In fact, when we had an occasion to talk to the siblings by getting them to our Chambers, they made it clear that they were living in the Orphanage-Nirmala Social Welfare Centre, Ullal, after being moved there from the Orphanage - St. Joseph's Prashant Nivas at Jeppoo. The assumption of the Court of Civil Judge that the siblings are residing in the house of Sister Dorothy Saldana at Jeppoo, overlooks the fact that Sister Dorothy Saldana belongs to the Society of Sisters of Charity, St. Gerosa Convent (petitioner-1) and that no Sister can have her own house to reside according to the discipline governing Sisters and Sister Dorothy Saldana stays only in Nirmala Social Welfare Centre, Ullal, as she is put in charge of adoption of children from the Centre. Hence, we are of the view that the said reason should not have weighed with the Court of Civil Judge in rejecting the petitioners' application for appointment of petitioners 2 and 3 as guardians of minor siblings.

Re. Reason (ii):

The reason that the siblings should not be given in adoption to foreign parents as there is a possibility of their coming up in life in India itself because of their intelligence and the progress they are making in their studies, which has weighed with the Court of Civil Judge for refusing to appoint petitioners 2 and 3 as guardians for taking them in adoption, looks rather amusing. When children of mature age are offered for adoption by foreign parents, the latter would never agree for adopting the former if they are not intelligent, healthy and good in their studies, in that, it is difficult to expect of such children to cope up with the problem of then assimilation in the family of foreign adoptive parents arising on account of cultural, racial or linguistic differences. What is overlooked by the Court of Civil Judge in this regard is the recommendation made by the Supreme Court that what should really matter in the case of deciding the suitability of the Indian child of mature age for adoption by foreign parents having regard to the fact that even children past the age of 7 years have been happily integrated in the family of their foreign adoptive parents, in Lakshmi Kanth Pandey v. Union of India1 by observing thus:

"We would suggest that even children above the age of 7 years may be given in inter-country adoption but we would recommend that in such cases, their wishes may be ascertained if they are in a position to indicate any preference."

In the instant case, when the wishes of the siblings ascertained by the Court of Civil Judge were unequivocal as to their preference in the matter of being adopted by foreign parents, which wishes were reiterated before us, the fact of the siblings having grown up, of their being intelligent or of their being good in

studies should not have weighed with the Court of Civil Judge in imposing its own view in the matter. When the siblings stated while we were trying to ascertain their wishes in the matter of their preference of their being adopted by foreign parents, that being girls brought up in an Orphanage, no member from a good Indian family would come forward to take them in marriage and even if taken in marriage by some such person, they would be thrown out of the family as persons unfit to be in the family having grown in an Orphanage, we could not having regard to the prevailing conditions in the Country, say anything to the contrary. The sibllngs the girls, in their age, who are to be regarded as mature enough to take a proper decision as to their future, when have preferred to become the adoptive children of foreign parents and find their home with them having come to know all about them, which, in every respect, is found to be good, it would be harsh and rather dangerous to impose upon them a wish of the Court that they should continue to reside in the Orphanage itself in the hope that they may shine in this Country itself ignoring the realities prevailing in the Country as to the vicissitudes, to which such girls could be exposed. We are, therefore, not left in doubt that the fact that the siblings are intelligent, good in studies, good looking and healthy should not have weighed with the Court of Civil Judge in ignoring their preference to be adopted by foreign parents, in their genuine hope of finding a home of parents with love and affection, which they had been althrough denied, and in their eagerness and anxiety to get higher education and grow up in stature and become useful to society. We cannot help observing that the Court of Civil Judge has lost sight of the fact that for getting proper education abroad, children from this Country were always sent and even today, affluent families in India prefer to have education for their children in foreign countries. It has also overlooked the fact that it would be difficult to find for Orphans, adoptive parents both of whom are Teachers and who are eager to have adoptive children in their home and are ready to give good education to them and bring them up in life by providing a home and security for their future.

Re. Reason (iii):

We find this reason as wholly unfounded, in that, it overlooks what has been stated in Paragraph 9 of the petitioners' application thus:

"It has not been possible considering the age of the said minors Anitha Marina and Savitha Marina to find suitable adoptive parents in India and no one has come forward to adopt them."

Hence, the reason so weighed with the Court of Civil Judge in rejecting the petitioners' application for appointment of petitioners 2 and 3 as guardians of the siblings is baseless.

Re. Reason (iv):

The reason of non-production of the Document of Surrender by the Orphanage, to which the siblings had been surrendered by their father, that has weighed with the Court of Civil Judge for refusing the application of petitioner-1 Sponsoring Agency, in the matter of appointment of petitioners 2 and 3, the intending adoptive parents, as guardians of the siblings, appears to us to be the result of a mis-understanding on the part of that Court of the Judgment of the Supreme Court in Lakshmi Kant Pandey v. Union of India,1 as to when the obtaining of a Document of Surrender by the Orphanage was possible as would warrant demand of its production. We are, therefore, impelled to excerpt the material observations from the Judgment of the Supreme Court in Lakshmi Kant Pandey v. Union of India1 to know the exact views of the Supreme Court respecting a Document of Surrender of a surrendered child to be obtained from its biological parents, before dealing with the case on hand.

Particulars of a Surrender Document:

"…..to make sure that the child has in fact been surrendered by its biological parents, it is necessary that the Institution or Centre or Home for Child Care or social or child welfare agency to which the child is surrendered by the biological parents, should take from the biological parents a document of surrender duly signed by the biological parents and attested by at least two responsible persons and such document

of surrender should not only contain the names of the biological parents and their addresses but also information in regard to the birth of the child and its background, health and development."

When a Surrender Document has to be obtained:

"Now, it should be regarded as an elementary requirement that if the biological parents are known, they should be properly assisted in making a decision about relinquishing the child for adoption, by the Institution or Centre or Home for Child Care or social or child welfare agency to which the child is being surrendered. Before a decision is taken by the biological parents to surrender the child for adoption, they should be helped to understand all the implications of adoption including the possibility of adoption by a foreigner and they should be told specifically that in case the child is adopted, it would not be possible for them to have any further contact with the child. The biological parents should not be subjected to any duress in making a decision about relinquishment and even after they have taken a decision to relinquish the child for giving in adoption, a further period of about three months should be allowed to them to reconsider their decision. But once the decision is taken and not reconsidered within such further time as may be allowed to them, it must be regarded as irrevocable and the procedure for giving the child in adoption to a foreigner can then be initiated without any further reference to the biological parents by filing an application for appointment of the foreigner as guardian of the child. Thereafter, there can be no question of once again consulting the biological parents whether they wish to give the child in adoption or they want to take it back. It would be most unfair if after a child is approved by a foreigner and expenses are incurred by him for the purpose of maintenance of the child and some time on medical assistance and even hospitalisation for the child, the biological parents were once again to be consulted for giving them a locus penitentia to reconsider their decision."

The points emerging from the above views of the Supreme Court touching the Surrender Document of a minor child to be obtained from such child's biological parents by an Institution or Centre or Home for child care or social or child welfare agency, to which such child is surrendered, for their proper understanding, could be put thus:

(i) The Institution or Centre or Home for child care or social or child welfare agency, to which the child is being surrendered for adoption, should, before taking the child sought to be surrendered, acquaint such child's biological parents of the implications of adoption including the possibility of their child being adopted by a foreigner making it impossible for them to have any further contact with that child, so as to enable them to take a considered decision in the matter of relinquishment of the child;

(ii) The biological parents should not be subjected to any duress in the matter of their making a decision as to the relinquishment of their child;

(iii) If the biological parents, even with the full knowledge of the implications of adoption of their child and the possibility of such child being given away to a foreigner in adoption, make a decision to surrender the child, they have to be given three more months' time to re-consider their decision. But, the decision taken by the biological parents if is not reconsidered within the time to be so allowed, the surrender of the child must be regarded as irrevocable and the procedure for giving the child in adoption to a foreigner can then be initiated without any further reference to the biological parents by filing an application for appointment of the foreigner as guardian of the child. Thereafter, question of once again consulting the biological parents-whether they wish to get the child in adoption or they want to take it back, could never arise;

(iv) When the child is so surrendered by the biological parents, it is necessary for the Institution or Centre or Home for child care or social or child welfare agency, to which the child is surrendered, to take from the biological parents a Document of Surrender to ensure themselves that the child has, in fact, been surrendered by its biological parents. The document of surrender to be so obtained

shall contain the names of biological parents and their addresses, the information in regard to the birth of the child, its background, health and development. The signatures of the biological parents should be got on such document of surrender with attestation by atleast two responsible persons.

The above points touching the document of surrender are matters concerning normative and procedural safeguards set down by the Supreme Court for being followed in giving an Indian child in adoption to a foreigner, so as to cover an uncovered field of legislation, becomes apparent from the very observations of the Supreme Court in Lakshmi Kant Pandey v. Union of India2 which read thus:

"Since we found that there was no legislation enacted by Parliament laying down the principles and norms which must be observed and the procedure which must be followed in giving an Indian child in adoption to foreign parents, we entertained the Writ Petition and after hearing a large number of social organisations and voluntary agencies engaged in placement of child in adoption, delivered an exhaustive Judgment on 6th February, 1984 reported in (1984) 2 SCC 244 : AIR 1984 SC 469 discussing various aspects of the problems relating to intercountry adoption and formulating the normative and procedural safeguards to be followed in giving an Indian child in adoption to foreign parents."

While the points, adverted to above, are those concerning the safeguards to be provided to the biological parents of a child surrendered for adoption to a foreigner by means of judicial legislation as indicated by the Supreme Court itself, care has been taken by the Supreme Court to warn the Court dealing with the guardianship application as to the dangers involved in bringing to the notice of the biological parents about the guardianship application relating to their surrendered child, in Paragraph 22 of its Judgment in Lakshmi Kant Pandey v. Union of India,1 thus:

"Lastly, we come to the procedure to be followed by the Court when an application for guardianship of a child is made to it. Section 11 of the Guardians and Wards Act, 1890 provides for notice of the application to be issued to various persons including the parents of the child if they are residing in any State to which the Act extends. But, we are definitely of the view that no notice under this Section should be issued to the biological parents of the child, since it would create considerable amount of embarrassment and hardship if the biological parents were then to come forward and oppose the application of the prospective adoptive parent for guardianship of the child. Moreover, the biological parents would then come to know who is the person taking the child in adoption and wish this knowledge they would at any time be able to trace the whereabouts of the child end they may try to contact the child resulting in emotional and psychological disturbance for the child which might affect his future happiness. The possibility also cannot be ruled out that if the biological parents know who are the adoptive parents they may try to extort money from the adoptive parents. It is therefore absolutely essential that the biological parents should not have any opportunity of knowing who are the adoptive parents taking the child in adoption and therefore notice of the application for guardianship should not be given to the biological parents. We would direct that for the same reasons notice of the application for guardianship should also not be published in any newspaper."

Even in its subsequent decision in Lakshmi Kant Pandey v. Union of India2 the matter relating to the aforesaid warning administered in its aforesaid earlier decision is emphasised thus:

"We may again emphasise, even at the cost of repetition, that notice of the application for guardianship of a child should in no case be published in the newspapers, because otherwise the biological parents would come to know who is the person taking the child in adoption and they might, with this knowledge, at any time be able to trace the whereabouts of the child and they may try to contact the child resulting in emotional and psychological disturbance for the child and the possibility cannot be ruled out that they may also attempt to extort money from the adoptive parents. No notice of the application should for the same reasons be issued to the biological parents and this is particularly important in case of an unwed mother who has relinquished the child, for to disclose her name to the Court or to give her notice would be highly embarrassing."

The aforementioned points touching the documents of surrender, which are in the nature of safeguards provided by the Supreme Court for the biological parents respecting their surrendered child, if seen in the context of the warning administered by the Supreme Court time and again to the Court dealing with the guardianship application of such child against the giving of any intimation or notice to the biological parents in that regard, the legal position, which emerges, could be understood thus-

Any surrender of a child by the biological parents made to the Institution or Centre or Home for child care or social or child welfare agency subsequent to the decision of the Supreme Court in Lakshmi Kant Pandey v. Union of India1 must be supported by a document of surrender obtained from the biological parents by the Institution or Centre or Home for child care or social or child welfare agency. Such document of surrender must be taken in the manner suggested in that decision and should contain not only the particulars of the surrendered child and its biological parents, but also the signatures of the biological parents duly attested by atleast two responsible persons. The fact that the document of surrender should contain the particulars of the surrendered child and its biological parents and that the same should further contain the signatures of the biological parents duly attested by atleast two responsible persons, shows that the obtaining of such document of surrender would become necessary if the surrender of the child had taken place subsequent to the aforesaid decision of the Supreme Court and not before. Further, if the safeguards provided by the Supreme Court in its aforesaid decision in the matter of re-claim of the surrendered child by its biological parents within a period of three months from the date of surrender on re-consideration of their decision as to the surrender (relinquishment), it becomes obvious that the safeguards so provided by the Supreme Court for the biological parents were not Intended to cover a case of surrender of their child made before the rendering of the aforesaid decision by the Supreme Court in Lakshmi Kant Pandey v. Union of India1 inasmuch as the judicial legislation made in that regard by the Supreme Court cannot be regarded as applying retrospectively to cases of surrender of children made by biological parents earlier.

In the light of what we have said about the legal position in relation to a document of surrender to be obtained from the biological parents, what remains for our consideration is whether non-production of a document of surrender concerning the siblings could have been the reason for the Court of Civil Judge in refusing to grant the application of petitioner-1 for appointment of petitioners 2 and 3 as guardians of the siblings.

The two siblings surrendered to St. Joseph's Prashant Nivas at Jeppoo, Mangalore, on 1-7-1981 by their father-Krishna, while they were aged 7 years and 4 years respectively, have stated, as seen from their statements (Exhibits P-1 and P-2), that after the death of their mother, their father, who took a second wife, not being prepared to look after them, brought them to St. Joseph's Prashant Nivas at Jeppoo and surrendered them to that Institution; eversince they are taken care of by the Sisters of that Prashant Nivas and are schooled; however, their father has never turned up to look them eversince. The affidavit of Sister Bernard Kurian, Secretary of St. Joseph's Prashant Nivas, speaks of the surrender of the siblings after the death of their mother. It reads:

"That two minor female children known as Anitha Marina, born on 04-02-1974 and Savitha Marina, born on 15-02-1977 were surrendered by their own father to the authorities of St. Joseph's Prashant Nivas, Jeppoo, Mangalore. The mother of the said children had died and the father remarried. The step mother did not want the children and the father irrevocably surrendered them on 01-07-1981 to our institution. Since then our institution has brought up and educated the said minors. Neither the father nor any other relative has come to see or clain custody of Anitha Marina and Savitha Marina since their surrender to our institution in 1981."

Further, while the certificates of birth relating to the siblings disclose the name of their father as Krishna, a Hindu, the names of the siblings are found to be christian names. This circumstance indicates that after the siblings were surrendered to the Christian institution, Christian names are given to them. Thus,

when the surrender of the siblings in the instant case by their father has occurred in the year 1981 itself, while the decision of the Supreme Court requiring the obtaining of the document of surrender from the biological parents has been rendered in the year 1984, we find it difficult to think that the requirement of obtaining the document of surrender from the biological parents, as envisaged in the decision of the Supreme Court, could apply to the case of the surrender of the siblings which had occurred in the year 1981 itself. In the said view of the matters, we cannot help thinking that non-production of the document of surrender executed by the father of the siblings at the time of surrender could have been the reason for the Court of Civil Judge in refusing to grant the application of petitioner-1 seeking appointment of petitioners 2 and 3 as guardians of the siblings.

Re. Reason (v):

The reason that there was non-disclosure of the name of the father of the siblings surrendered to St. Joseph's Prashant Nivas - the Orphanage, and the non-mentioning of the death of the mother of the siblings by the petitioners, which has weighed with the Court of Civil Judge in rejecting the application of petitioner-1 seeking appointment of petitioners 2 and 3 as guardians of the siblings for their eventual adoption, is rather amusing. As already pointed out in dealing with unsustainability of Reason (iv) given by the Court of Civil Judge for rejecting the guardianship application of petitioner-1, Certificates of Birth produced in the case while clearly disclose the name of the father of the siblings, the statements of the siblings in Exhibits P-1 and P-2 and the affidavit of Sister Bernard Kurian filed in the case, in unequivocal terms, refer to the death of the mother of the siblings, prior to their surrender on 1-7-1981. Hence, Reason (v) weighed with the Court of Civil Judge for rejecting the application of petitioner-1 seeking appointment of petitioners 2 and 3 as guardians of the siblings, is also wholly unsustainable.

5. There is yet another important aspect of the case which needs a specific mention. When an application is made under the Act for appointment of foreign parents as guardians of minor children available for adoption, the Court concerned may have to first satisfy itself that the social or child welfare agency sponsoring the applications of foreign parents is a dependable Institution. The Court's satisfaction in this regard must necessarily depend upon the past services rendered by such Institution in the field of child welfare. When an Institution is reputed for good work in the field of child welfare, the Court should not conjecture that such institution may throw away its child well taken care of, well nursed, well schooled, for a mere monetary gain or the like. In the case on hand, when we look to the Society of Sisters of Charity, St. Gerosa Convent C/o Stella Mary's Convent, Malleswaram, Bangalore, the Sisters of that Society have rendered and have been rendering yeoman service in the sphere of the welfare of children at great sacrifices of their personal happiness. Educational Institutions and Orphanages run by them have acquired a high reputation for good work in this State. Their attention to children, particularly girls, and love and affection, with which orphaned, abandoned or disabled girls are brought up and schooled by them, is well-known. When such an Institution, which is petitioner-1 before the Court of Civil Judge, had made an application sponsoring petitioners 2 and 3 for appointment as guardians of the siblings young girls for their eventual adoption, the Court of Civil Judge should not have dismissed that application with some casual observations, obviously with no due and proper application of its mind to all the important aspects of the matter, particularly the welfare of the siblings, with which the Institution was very much concerned.

6. In the peculiar circumstances of the case and further delay that is likely to occur in the event of our remanding the case to the Court of Civil Judge for its fresh disposal in the light of what we have said of various aspects requiring consideration in cases of the kind, we have considered it our duty to look into the material on record to satisfy ourselves whether good future is in store for the siblings if petitioners 2 and 3 are appointed as guardians and allowed to take the siblings to their Country for their eventual adoption, and proceed accordingly.

Petitioners 2 and 3, who are Head Master of a State Secondary School and a Teacher of a Lower Secondary School in Italy, look gracious when we see them in a photograph produced in the case. Their residential villa, as seen from the photograph produced in the case, looks grand and beautiful. In their substantive affidavit, which is filed in the Court, this is what they have said about their residential villa:

"They are the owners of a residential villa, situated on a site of 970 m. in Bassano Gr., 41, Mons. Rodolfi Street, composed of three floors, fifteen rooms, four bathrooms, a garage, a garden and a kitchen garden for a total value of lit 350,000,000 (Three hundred fifty million lira)."

Banca Popolare of Marostica in its Declaration dated 18-10-1988 produced in the case, states thus:

"We herewith state that Mr. and Mrs. - Prof. Cerantola Urbano born in Rosa on 5-1-1943 - Lunardon Mariella born in Bassano G. on 10-11-1948 are honest and solvent and their economic situation is solid."

The General Certificate issued by the District Attorney for Bassano Del Grappa declares that the said persons are without any criminal record. The President of the Region of Veneto has declared in an affidavit sent to the Court, thus:

"that he knows Mr. Cerantola Urbano and Mrs. Lunardon Mariella personally and he can vouch for their social behaviour and quality of life.

The above-mentioned couple is fully part of our community which is not racially prejudiced and in which other foreign minors, including from India, have already been introduced without any problem.

Our area is proud of its social sanitary, cultural and recreational facilities, such as a modern hospital, museums, secondary and high schools and Universities in Padova, Venezia and Verona, which allow an ideal intergration in the world of study, work and leisure."

The Priest of the Parish of 'Santa Croce', in his Declaration dated October 18, 1988, declares thus:

"he knows Mr. and Mrs. Urbano Cerantola personally and that he can vouch for their moral behaviour and quality of life.

The above-mentioned couple is part of our religious community and they also devote themselves to social activities.

The Parish can testify that other young people from abroad have been successfully brought up in this area and that it offers many possibilities for youth group activities under the guidance of Ecclesiastic Authorities."

The said Declaration of the Priest is also found in the records. Further, the State Professional Institute for Industry and Handicraft has given Declaration of the regular high annual income of the said couple (petitioners 2 and 3). A Declaration, which is sent by the President and the Judge of the Juvenile Court of Venice, reads thus:

"The above mentioned couple qualified for the adoption of two foreign minors born before 5-1-1983 on condition that they are brothers/sisters and so a 'nulla osta' is granted for the entry of the minors into the State territory."

There are other documents produced in the case, which refer to the characteristics of the couple, reason for wanting the adoption and their willingness to adopt the children, thus:

"Characteristics of the couple: they met at work and immediately took a liking to each other.

After having been engaged for a year, they got married in 1973. At first they had some problems in their relationship because of different opinions but as time went by they overcame all their difficulties. Now Mr. and Mrs. Cerantola are a happy couple, with clearly complementary characteristics. They both like

travelling and reading and are socially active. Besides, Mr. Cerantola has a disposition for 'do it yourself' and gardening. Mrs. Cerantola likes embroidery and knitting.

Reasons for wanting the adoption: Mr. and Mrs. Cerantola have only now asked for adoption because they have been five miscarriages. This experience has been a great sorrow for them but it has brought them closer and helped them mature their desire for adopting children. They are aware that the probable age of this child will require a different relationship to that needed with a younger child but they feel prepared to face up to this. Their educational preparation seems to be appropriate as it is supported also by their professional experience.

Child: being aware of the age limit, they are willing to adopt a child (even two, if brothers/sisters) of an age between five and ten. They would have preferred an Italian child but they agreed to adopt a foreign child (having no racial prejudices) even if they are aware of the greater difficulties."

Having looked into all the above material produced in the case and having consulted the wishes of the siblings by getting them to our Chambers, we are fully satisfied that appointment of petitioners 2 and 3 as guardians of the minor siblings and permitting them to take the minor siblings to Italy for their eventual adoption would be a great blessing for them (siblings), which they could not have ordinarily dreamt of in the normal course of events. If the application made for appointment of petitioners 2 and 3 is granted and leave sought for taking the siblings to Italy is granted, we hope and believe that having regard to the nature and favourable circumstances of the adoptive parents and also the nature of the siblings, the siblings would find a good parental home, which had been denied to them for over nine years, in that, they were in the Orphanage, and have bright and prosperous future.

7. Before parting with this case, we cannot help observing that the District Courts, which receive the applications of the kind, i.e, applications for appointment of foreign parents as guardians of minor children of Indian origin, should not shirk the responsibility of disposing them of by themselves having regard to various factors including the emotional factors of children involved in such cases, instead of getting rid of such applications by transferring them to a subordinate Court for disposal.

8. In the result, we allow this appeal, reverse the order of dismissal of the application made under the Act by petitioners, allow the petitioners' application and appoint petitioners 2 and 3 as guardians of the persons of minor siblings - Anitha Marina and Savitha Marina and permit their removal from India to Italy for their eventual adoption by petitioners 2 and 3 and further direct the 'Amici Trentini' - the Association in Italy, to send report to the Court of Civil Judge at Mangalore, Dakshina Kannada, about the adoption of the siblings by petitioners 2 and 3 according to the Italian Adoption Law and in the mean time, also send interim reports to the same Court on the progress of the two minors after their arrival at the Agency for Infants in India or Social Service which is following the case for the designation of the adoptive parents every three months in the first year and every six months in the following year or years until they are effectively adopted and if, for any reason, the proposed adoption does not go through, to arrange to send back the siblings to India.

However, petitioner-1 shall give a bond to the Court of Civil Judge to its satisfaction for due performance of the obligations undertaken by it in relation to the siblings and it shall, in turn, obtain a corresponding bond from the 'Amici Trentini' - the sponsoring social and child welfare agency at Italy, which has sponsored the adoption of the siblings.

Copies of this Judgment be sent to the Ministry of Social Welfare, Government of India, as also the Ministry of Social Welfare, Government of Karnataka.

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# MR. CAPELLOTTO LIVIO AND OTHERS VERSUS INDIA COUNCIL OF SOCIAL WELFARE AND ANOTHER

**Kerala High Court**

**Bench : Hon'ble Mr. Justice K. John Mathew and Hon'ble Mr. Justice K. Narayana Kurup**

*Mr. Capellotto Livio and others*
*Versus*
*India Council of Social Welfare and another*

**MFA Nos. 1006, 1007, 1008 & 1009/93**

**Decided on November 2, 1993**

- **All the requirements and norms prescribed by the Supreme Court have been followed and adopted in these cases Ext. A1 is the General Power of Attorney of the petitioners in favour of the Director of St. Joseph's Children's Home, where the children are being brought up. Ext. A2 is the marriage certificate of the petitioners who are husband and wife, Ext. A3 is the transfer letter, of the Director of Ananda Bbavan, Malampuzha, Palakked in respect of the child Ext. A4 is the relinquishment letter executed by the mother of the minor Mary Regy. Ext. A5 is the copy of the Recognition Certificate of the 2nd respondent, viz. St. Joseph's Children's Home. By Ext. A5 the Ministry of Welfare, Government of India, recognised St. Joseph's Children's Home as an institution to submit application to competent courts for declaration of foreigners as guardians of Indian Children under the Guardians & Wards Act, 1890 Ext. A6 is the sterility certificate of the 2nd petitioner. Ext. A7 is the certificate of income of the 1st petitioner. Ext. A8 is the income certificate of the 2nd petitioner, Ext. A9 is the horns study report of the petitioners' family which is appended to the declaration made by the Juvenile Court of Venice that petitioners are suitable to the adoption of a foreign minor Ext. A10 is the health certificate of the Petitioners Ext. All is the recommendation letter from the petitioners' Parish. Ext. A12 is the recommendation certificate from the Mayor the effect that the petitioners are persons of very good moral and civil conduct and that they have a good economic situation. Ext. A13 is the section certificate from the Juvenile Court of Venice which forms part of Ext. A9. We have already referred to Est. A14 child study report Ext. A15 is a declaration given by the sponsors of the petitioners, which is a recognised child welfare agency for inter-country adoption. It is seen that they had investigated the petitioners' family and prepared their home study report Ext. A16 is the photographs of the petitioners. Ext. A17 is the declaration by the petitioners solemnly declaring that they will legally adopt the minor child and seek to her education etc.**

The Judgment of the Court was delivered by

**Hon'ble Mr. Justice John Mathew**

These are appeals filed under Section 47(d) of the Guardians and Wards Act, VIII of 1890, against separate orders of the District Judge, Kouaym in O.P (G & W) Nos. 173/93, 174/93, 172/93 and 175/93 respectively. Those petitions were filed by the respective petitioners therein for appointing them as guardians of four minors, with permission to take them out of India for adoption. The learned District Judge has stated the facts in detail in the judgments under appeal. It is not necessary to refer to the facts in this judgment since the petitions were dismissed only on one ground. Learned District Judge held that the 2nd respondent did not take every effort to

secure or to find cut members of Indian Families for being appointed as the guardians of the minors. On this ground these petitions were dismissed.

2. Although the petitioners are different and the minors in respect of whom the petitions are filed are different, we are disposing of these appeals by this common judgment, since this common question arises in all these appeals. The only point that arises in these appeals is whether every effort has been made to find out an Indian couple who are desirous of taking the child in adoption within the country.

3. Certain malpractices indulged in by social organisations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents came to the notice of the Supreme Court from a letter addressed by one Lakshmi Kant Pandey, an Advocate practising in that Court. The Supreme Court freaked it as a writ petition and issued notice to the Union of India, the Indian Council of Child Welfare and the Indian Council of Social Welfare to assist the Court in laying down principles and norms which should be followed in determining whether a child should be allowed to be adopted by foreign parents and if so, the procedure to be followed for that purpose, with the object of ensuring the welfare of the child. In the judgment in that proceeding which is reported in Lakshmi Kant v. Union of India - (1984) 2 SCC 244 : AIR 1984 S.C 469, the Supreme Court obseived that since there is no statutory enactment in India providing for adoption of a child by foreign parents or laying down the procedure which must be followed in such a case, the provisions of the Guardians and wards Act can be resorted to for the purpose of facilitating such adoption. Supreme Court also formulated the norms and procedure regarding the adoption of a child by a foreigner. This judgment was clarified by the Supreme Court in the later judgment reported in Laxmi Kant Pandey v. Union of India - 1985 Supp SCC 701 : AIR 1986 S.C 272.

4. The Supreme Court in Lakshmi Kant's ease ((1984) 2 SCC 244 : AIR 1984 S.C 469) referred to the Declaration of the Rights of the Child adopted by the General Assembly of the United Nations, in para 7 of the judgment and formulated the norms to be adopted for inter-country adoption with the primary object being the welfare of the child. The Supreme Court emphasized that great care has to be exercised in permitting the child to be given in adoption to foreign parents, lest the child may be neglected or abandoned by the adoptive parents in the foreign country or the adoptive parents may not be able to provide to the child a life of moral or material security or the child may be subjected to moral or sexual abuse or forced labour or experimentation for medical or other research and may be placed in a worse situation than in his own country. The primary purpose of adoption is to provide a permanent family for a child who cannot be cared for by his/her biological family. So those responsible for the child should select the most appropriate environment for the particular child concerned. After referring fo the guidelines formulated by the Regional Conference of Asia and Western Pacific held by the International Council on Social Welfare in Bombay in 1981 (page 478, para 25) the Supreme Court set out the procedure to be followed for giving a child in adoption to foreign parents (Page 484, para 12). Every application from a foreigner desiring to adopt a child must be sponsored by a social or child welfare agency recognised or licensed by the Government of the country in which the foreigner is resident. The social or child welfare agency which sponsors the application for taking a child in adoption must get a home study report prepared by a professional worker indicating the basis on which the, application of the foreigner for adopting a child has been sponsored by it. Every application of a foreigner for faking a child in adoption must be accompanied by a home study report along with a recent phonograph of the family, a marriage certificate of the foreigner and his or her spouse and also a declaration concerning their health together with a certificate regarding their medical fitness duly certified by a medical doctor, a declaration regarding their financial status along with supporting documents and also a declaration stating that they are willing to be appointed as the guardian of the child and undertaking that they would adopt the child according to the law of their country within a period of not more than than two years of the arrival of the child in their country and to give intimation of such adoption to the court appointing them as the guardian as also to the social or child welfare agency in India processing their case, that they would maintain the child and

provide it necessary education and upbringing according to their status and they would also send to the court as also to the social or child welfare agency in India reports relating to the progress of the child along with its recent photograph. The progress reports are to be sent quarterly during the first two years and half yearly for the, next three years. The application of the foreigner must also be accompanied by a Power of Attorney in favour of in officer of the social or child welfare agency in India which is requested to process the case, in case the foreigner is not in a position to come to India. The social or child welfare agency sponsoring the application of the foreigner must also certify that the foreigner seeking to adopt a child is permitted to do so according to the law of his country. These certificates declarations and documents which must accompany the application of the foreigner for taking a child in adoption, should be duly notarised by a Notary Public whose signature should be duly attested either by an Officer of the Ministry of External Affairs or Justice or Social Welfare of the country of the foreigner or by an Officer of the Indian Embassy or High Commission or Consulate in that country. The social or child welfare agency sponsoring the application of the foreigner must also undertake while forwarding the application to the social or child welfare agency in India, that it will ensure adoption of the child by the foreigner according to the law of his country within a period not exceeding two years and as soon as the adoption is effected, if will send two certified copies of the adoption order to the social or child welfare agency in India through which the application for guardianship is processed, so that one copy can be filed in Court and the other can remain with the social or child welfare agency in India. The social or child welfare agency sponsoring the application must also agree to send to the concerned social or child welfare agency in India progress reports in regard to the child, quarterly, during the first year and half yearly for the subsequent year or years until the adoption is effect edit must also undertake that in case of disruption of the family of the foreigner before adoption can be effected, it will take care of the child and find a suitable alternative placement for it with the approval of the concerned social or child welfare agency in India and report such alternative placement to the court handling the guardianship proceedings and such information shall be passed on both by the court as also by the concerned social or child welfare agency in India to the Secratiry, Ministry of Social welfare, Government of India. The Government of India shall prepare a list of social or child welfare agencies licensed or recognised for inter - country adoption by the Government of each foreign country where children from India are taken in adoption.

5. The safeguards which should be observed in so far as the child proposed to be taken in adoption is concerned, are specified in para 15 of the judgment. The Supreme Court observed that the Indian Council of Social Welfare and the Indian Council for Child Welfare are two social or child welfare agencies operating at the national level and recognised by the Government of India, Apart from these two recognised social or child welfare agencies functioning at the national level there are other social or child welfare agencies engaged in child care and welfare if they have good standing and reputation and are doing commendable work in the area of child care and welfare, the Supreme Court observed that there was no reason why they should not be recognised by the Government of India or the Government of a State for the purpose of inter - country adoptions. The Court also directed the Government of India to consider and decide whether any of the institutions or agencies deserve to be recognised for inter - country adoptions. The Supreme Court also observed that it will be desirable if a Central Adoption Resource Agency (CARA) is set up by the Government of India wish regional branches at a few centers which are active in inter - country adoptions. Such CARA can act as a clearing house of information in regard to children available for inter - country adoption. All applications by foreigners for taking Indian children in adoption will be forwarded by the social or child welfare agency in the foreign country to such CARA and that agency will have to forward them to one or the other recognised social or child welfare agencies in the country. Before any such application from a foreigner is considered, every effort must be made by the recognised social or child welfare agency to find placement for the child by adoption in an Indian family. It is only if no Indian family comes forward to take a child in adoption, that the child may be regarded as available for inter - country adoption. The original period of two months specified in Lakshmi Kanf's case ((1984) 2 SCC 244 : AIR 1984 S.C 469) was reduced to three to four weeks by the

Supreme Court in 1985 Supp SCC 701 : AIR 1986 S.C 272 at page 280, where there is a Voluntary Co-ordinating agency or any other Centralized agency which maintains a register of children available for adoption as also a register of Indian adoptive parents. In that judgment the Supreme Court also endorsed and recommended the Setting up of a Voluntary Co-ordinating Agency (VCA) in each State. It was also stated that there may be more than one VCA in a State. The VCA or Centralised agency can immediately contact the Indian family which is on its register and inform them that a particular child is available for adoption, is within a period of three to fear weeks the child is not taken in adoption by in Indian family, it should be regarded as available for inter-country adoption.

6. It is not necessary to consider all these guidelines and norms prescribed by the Supreme Court in these judgments since the petitions were dismissed only on the ground that enquiries regarding the availability of Indian parents who are willing to adopt the Indian child were not properly made.

7. We will consider the evidence in M.F.A No. 1006/93 (O.P (G & W) No. 173/93) since similar evidence is adduced in the other cases also Ext. A14 is the child study report of minor child Mary Regy in respect of whom the petition was filed. That report was prepared by the Director of St. Joseph's Children's Home where the child is being brought up. The petitioner produced Ext. P1 certificate of clearance from the Project Co-ordinator of the Voluntary Co-ordinating Agency for adoption. In that certificate it is stated as follows:

"Certificate of Clearance: This is to certify that VCA for adoption, Kerala gives clearance to St. Joseph's Children's Home, Kummanpor for placement of child MARY REGY (Female) born on 02/03/1988 for inter country adoption, as we are satisfied that maximum efforts have been taken to place the child in Indian Adoption and that he/she has completed his/her stipulated waiting period".

8. The petitioner also produced Ext. P2 which is a letter from the Secretary of the Central Adoption Resource Agency (CARA), Government of India, Ministry of Welfare, stating that the CARA has no objection for the placement of the above mentioned children in inter-country adoption and that the Direction of St. Joseph's Children's Home, may process the cases of these children in the competent court for award of guardianship in favour of the respective petitioners.

9. It may be observed that Ext. P1 was issued by the Project Co-ordinator of the VCA envisaged by the Supreme Court in paragraph 16 of the case reported in (1984) 2 SCC 244 : AIR 1984 SC 469 and Ext. P2 was issued by CARA. There is no reason to reject their certificates or to doubt its genuineness. In Ext. P2 it is clearly mentioned that the CARA has no objection in proceeding with the cases for award of guardianship in favour of the petitioners. The certificates of these institutions have to be accepted by the court unless there are strong circumstances to take a different view.

10. All the requirements and norms prescribed by the Supreme Court have been followed and adopted in these cases Ext. A1 is the General Power of Attorney of the petitioners in favour of the Director of St. Joseph's Children's Home, where the children are being brought up. Ext. A2 is the marriage certificate of the petitioners who are husband and wife, Ext. A3 is the transfer letter, of the Director of Ananda Bbavan, Malampuzha, Palakked in respect of the child Ext. A4 is the relinquishment letter executed by the mother of the minor Mary Regy. Ext. A5 is the copy of the Recognition Certificate of the 2nd respondent, viz. St. Joseph's Children's Home. By Ext. A5 the Ministry of Welfare, Government of India, recognised St. Joseph's Children's Home as an institution to submit application to competent courts for declaration of foreigners as guardians of Indian Children under the Guardians & Wards Act, 1890 Ext. A6 is the sterility certificate of the 2nd petitioner. Ext. A7 is the certificate of income of the 1st petitioner. Ext. A8 is the income certificate of the 2nd petitioner, Ext. A9 is the horns study report of the petitioners' family which is appended to the declaration made by the Juvenile Court of Venice that petitioners are suitable to the adoption of a foreign minor Ext. A10 is the health certificate of the Petitioners Ext. All is the recommendation letter from the petitioners' Parish. Ext. A12 is the recommendation certificate from the Mayor the effect that the petitioners are persons of very good moral and civil conduct and

that they have a good economic situation. Ext. A13 is the section certificate from the Juvenile Court of Venice which forms part of Ext. A9. We have already referred to Est. A14 child study report Ext. A15 is a declaration given by the sponsors of the petitioners, which is a recognised child welfare agency for inter-country adoption. It is seen that they had investigated the petitioners' family and prepared their home study report Ext. A16 is the photographs of the petitioners. Ext. A17 is the declaration by the petitioners solemnly declaring that they will legally adopt the minor child and seek to her education etc.

11. In the nature of the evidence produced we hold that the petitioners have complied with all the legal formalities for allowing their prayer for appointing them as guardians of the minor. The finding of the learned District Judge that sufficient steps were not taken to find out an Indian family for being appointed as the guardian of the minor child was not justified. That finding is set aside. We hold that sufficient steps were taken to find out an Indian family for being appointed as the guardian of the minor child and that the waiting period is over.

12. The further directions contained in Lakshmi Kant v. Union of India, (1984) 2 SCC 244 : AIR 1984 SC 469, as modified by Laxmi Kant Pandey v. Union of India, 1985 Supp SCC 701 : AIR 1986 SC 272 and Laxmi Kant v. Union of India, (1987) 1 SCC 66 : AIR 1987 SC 232 will also have to be compiled with Accordingly we direct the petitioners and their counsel to comply with all the guidelines contained in the above mentioned judgments. We direct that the District Court, Kottayam will be the court responsible to implement this judgment. The petitioners should undertake to the District Court, Kottayam to produce the minor child in that court whenever required, to communicate the particulars of the minor to the Indian Council of Social Welfare, Rajagiri Kalamassery by 31st day of December of every year, to take proper care, look after, properly educate and to bring up the minor as if she was a child of the petitioners and to treat the said minor on an equal footing with their natural and or adopted children, if any, in all matters of maintenance, education and succession Before the minor child is taken out of India the petitioners shall also execute a bond either personally or through their duly constituted attorney in India in favour of the District Judge, Kottayam in the sum of Rs. 25,000/- to repatriate the said minor to India by Air, should it become necessary for any reason to do so and further undertaking to adopt the said minor within a period of two years after the arrival of the said minor in their country, to the home of the petitioners in accordance with the laws of petitioner's country, and to submit to the District Judge, Kottayam copy of adoption order. They should undertake to send to the District Court, Kottayam till adoption, every three months for the first two years and every six months for the next three years, progress report of the said child along with recent photographs made or verified as true and correct by the sponsoring organisation which made the study report regarding the minor's moral and material progress and the minor's adjustment in the house of the petitioners with other family members. Copies of these reports shall also be sent to Indian Council of Social Welfare, Rajagiri, Kalamassery and to the St. Joseph's Children's Home, Kummannoor.

13. Similar documents are produced in all appeals. It is not necessary to consider those documents separately. The direction issued above will apply to all the petitioners (appellants).

14. M.F.A No. 1006 of 1993: Subject to the general directions in this judgment the appellants are hereby appointed as guardians without any remuneration for the minor female child MARY REGY born on 2-3-1988 whose latest photograph duly certified as such by the counsel for the appellants and countersigned by the Registrar of this Court will be attached to this judgment as Annexure 'A'. This child is presently in custody and care of the St. Joseph's Children's Home, Kummannoor. It is further ordered that after executing the bond as aforesaid by the appellants, or their duly constituted power of attorney, they are hereby granted leave to remove the said minor from the jurisdiction of this Court and to take her away to the country of the appellants or wherever the appellants may desire and for that purpose they may make applications to the passport authorities or any other authorities to fake away the said minor female child MARY REGY out of the jurisdiction of this Court.

15. M.F.A No. 1007 of 1993: Subject to the general directions in this judgment the appellants are hereby appointed as guardians without any remuneration for the minor female child MARY NISHA born on 14-2-1985 whose latest photograph duly certified as such by the counsel for the appellants and countersigned by the Registrer of this Court will be attached to this judgment as Annexure 'B'. This child is presently in custody and care of the St. Joseph's Children's Home, Kummannoor. It is further ordered that after executing the bond as aforesaid by the appellants or their duly constituted power of attorney they are hereby granted leave to remove the said minor from the jurisdiction of this Court and to fake her away to the country of the appellants or wherever the appellants may desire and for that purpose they may make applications to the passport authorities or any other authorities to take away the said minor female child MARY NISHA out of the jurisdiction of this Court.

16. M.F.A No. 1008 of 1993: Subject to the general directions in this judgment the appellants are hereby appointed as guardians without any remuneration for the minor female child USHA born on 8-10-1991, whose latest photograph duly certified as such by the counsel for the appellants and countersigned by the Registrar of this Court will be attached to this judgment as Annexure 'C'. This child is presently in custody and care of the St. Joseph's Children's Homer Kummannoor. It is further ordered that after executing the bond as aforesaid by the appellants or their duly constituted power of attorney, they are hereby granted leave to remove the said minor from the jurisdiction of this Court and to take her away to the country of the appellants or wherever the appellants may desire and for that purpose they may make applications to the passport authorities or any other authorities to take away the said minor female child USHA out of the jurisdiction of this Court. M.F.A No. 1009 of 1993; Subject to the general directions in this judgment the appellants are hereby appointed as guardians without any remuneration for the minor female child JYOTHI born on 4-6-1991 whose latest photograph duly certified as such by the counsel for the appellants and countersigned by the Registrar of this Court will be attached to this judgment as Annexure 'D'. This child is presently in custody and care of the St. Joseph's Children's Home, Kummannoor. It is further ordered that after executing the bond as aforesaid by the appellants or their duly constituted power of attorney, they are hereby granted leave to remove, the said minor from the jurisdiction of this Court and to take her away to the country of the appellants or wherever the appellants may desire and for that purpose they may make applications to the passport authorities or my other authorities to take away the said minor female child JYOTHI out of the jurisdiction of this Court.

17. The District Court is authorised and directed to take further steps for complying with the directions of this Court in this judgment, the respective judgments of the District Court, Kottayam, are set aside and the appeals are allowed as above.

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LANDMARK JUDGMENTS ON

# ROLE AND DUTIES OF FAMILY COURT

# AMINA BHARATRAM VERSUS SUMANT BHARATRAM AND ORS.

**Delhi High Court**

**Bench : Hon'ble Mr. Justice Manmohan Singh**

*Amina Bharatram*
*Versus*
*Sumant Bharatram and ors.*

**Decided on 09 June, 2014**

**I.A. No.12186/2010**

**in**
**CS(OS) No.411/2010**

**Family and Personal Laws—Family Courts Act, 1984—Ss. 7 and 8—Interpretation—Whether jurisdiction of High Court excluded in a suit arising out of marital relationship—Suit filed for maintenance and separate residence under Ss. 18, 20 and 23 of the Hindu Adoption and Maintenance Act, 1956—Observed, there is no express exclusion of jurisdiction of High Court under the Family Court Act—Further, observed that implied exclusion of jurisdiction of civil court cannot be inferred from the mere fact of the existence of the statutory tribunal or court—However, divergent views held by different High Courts—In view judicially inconsistent opinion existing in the field of law matter referred to a larger Bench—Questions framed (i) Whether High Court while exercising the Original Civil Jurisdiction is deemed to be a District Court? and (ii) Whether the original civil jurisdiction of High Court excluded for any suit ?**

**Hon'ble Mr. Justice Manmohan Singh**

The plaintiff, Mrs.Amina Bharatram has filed the suit for maintenance and separate residence under Sections 18, 20 & 23 of the Hindu Adoption & Maintenance Act, 1956 as well as for permanent and mandatory injunction and declaration, against the four defendants.

2. Defendant No.1, Mr.Sumant Bharatram is the husband of the plaintiff. Defendants No.2 & 3, namely, Dr.Vinay Bharatram and Ms.Panna Bharatram are the father-in-law and mother-in-law of the plaintiff and defendant No.4, Mr.Hemant Bharatram is the brother of defendant No.1.

3. Few relevant facts are necessary; the same are that the plaintiff and defendant No.1 were married according to the Hindu Rites and Ceremonies on 5th January, 1994 at Delhi Air Force Officers Mess at Dhaula Kuan, New Delhi. From the wedlock, two children were born, namely, Yuv Bharatram on 10th June, 1995 and Rahil Bharatram on 16th November, 1999. The plaintiff along with defendant No.1 is living at Panchsheel Park, New Delhi. The plaintiff is a housewife, and the children, who are minors, have all along been in her care and custody, as per averments made in the plaint. It is alleged in the plaint that defendant No.1 for the past few years has been insisting upon the plaintiff to give him a divorce so as to let him live an independent life. There are various controversies between the husband and the wife. Therefore, the plaintiff has filed the suit for maintenance and separate residence under the various provisions of the Hindu Adoption and Maintenance Act, 1956.

4. It appears from the record that various applications are pending for disposal. Two main applications are pressed at this stage; one is I.A. No.12185/2010 filed by defendant No.1 under Order VII Rule 11 read

with Section 151 CPC, for rejection of plaint, on the ground that the suit has not been properly valued for the purposes of Court fee and jurisdiction. The second application is I.A. No.12186/2010 filed by defendant No.1 under Section 8 of the Family Courts Act, 1984 (66 of 1984) (in short, called the FC Act). Both said applications were taken up on 15th May, 2014. However, when the matter was adjourned for 19th May, 2014, both parties have addressed their submissions only in I.A. No.12186/2010 as the order to be passed in this application may have some impact in other application.

5. The objections of defendant No.1 in the said application are that this Court has no jurisdiction to entertain the suit which has arisen out of the marital relationship between the plaintiff and defendant No.1. The jurisdiction only lies with the Family Courts, as the same is governed by Section 7 read with Section 8 of the FC Act which bars the jurisdiction of other Courts.

6. The application is strongly opposed by the plaintiff who states that the High Court has the jurisdiction to decide all the matters fall under its original civil jurisdiction. The Family Courts Act does not oust the jurisdiction of this Court. The application is merely a misuse and abuse to the process of the law.

7. In order to appreciate and decide the issues in hand, it is imperative to refer Sections 7 & 8 of the FC Act. The same read as under:

> 7. Jurisdiction. (1) Subject to the other provisions of this Act, a Family Court shall (a) have and exercise all the jurisdiction exercisable by any district Court or any subordinate Civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and (b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district Court or, as the case may be, such subordinate Civil Court for the area to which the jurisdiction of the Family Court extends. Explanation The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:- (a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage; (b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person; (c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them; (d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship; (e) a suit or proceeding for a declaration as to the legitimacy of any person; (f) a suit or proceeding for maintenance; (g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor. (2) Subject to the other provisions of this Act, a Family Court shall also have and exercise (a) the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and (b) such other jurisdiction as may be conferred on it by any other enactment.
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> 8. Exclusion of jurisdiction and pending proceedings Where a Family Court has been established for any area, (a) no District Court or any subordinate Civil Court referred to in sub-section (1) of section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section; (b) no magistrate shall, in relation to such area, have or exercise any jurisdiction or power under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974); (c) every suit or proceeding of the nature referred to in the Explanation to sub-section (1) of section 7 and every proceeding under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974), (i) which is pending immediately before the establishment or such Family Court before any district court or subordinate court referred to in that sub-section or, as the case may be, before any magistrate under the said Code; and (ii) which would have been required to be instituted or taken before or by such Family Court if, before the date on which such suit or proceeding was instituted or taken, this Act had come into force and

such Family Court had been established, shall stand transferred to such Family Court on the date on which it is established.

8. It is the admitted position that the Family Courts Act was enacted on 14th September, 1984. Its application was extended to Union Territory of Delhi on 19th November, 1986 vide notification dated 18th November, 1986. CS(OS) No.411/2010 were established for the areas falling under the Union Territory of Delhi.

9. The statement of the objects and reasons for establishing the Family Courts is read as under:

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

2. The Bill, inter alia, seeks to:(a) provide for establishment of Family Courts by the State Governments: (b) make it obligatory on the State Governments to set up a Family Court in every city or town with a population exceeding one million; (c) enable the State Governments to set up such courts in areas other than those specified in (b) above; (d) exclusively provide within the jurisdiction of the Family Courts the matters relating to:(i) matrimonial relief, including nullity of marriage, judicial separation, divorce, restitution of conjugal rights, or declaration as to the validity of marriage or as to the matrimonial status of any person. (ii) the property of the spouses or of either of them; (iii) declaration as to the legitimacy of any person; (iv) guardianship of a person or the custody of any minor; (v) maintenance, including proceedings under Chapter IX of the Code of Criminal Procedure; (e) make it obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or a settlement between the parties to a family dispute. During this stage, the proceedings will be informal and rigid rules of procedure shall not apply; (f) provide for the association of social welfare agencies, counsellors, etc., during conciliations stage and also to secure the service of medical and welfare experts; (g) provide that the parties to a dispute before a Family Court shall not be entitled, as of right, to be represented by legal practitioner. However, the Court may, in the interests of justice, seek assistance of a legal expert as amicus curiae; (h) simplify the rules of evidence and procedure so as to enable a Family Court to deal effectively with a dispute; (i) 10. provide for only one right of appeal which shall lie to the High Court.

The Government of National Capital Territory of Delhi (Department of Law, Justice and Legislative Affairs) has also issued the Notification in exercise of powers conferred by Section 4 of the FC Act, and all other powers enabling him in this regard, the Lieutenant Governor of the NCT of Delhi has appointed the Judicial Officers for the post of Judges of Family Courts at District Court, Saket, Delhi, from the date they assume charge of their offices.

11. One set of decisions passed in various Courts is that the expression District Court will include the High Court having original jurisdiction. See (i) Bakhshi Lochan Singh and others vs. Jathedar Santokh Singh and others, ILR (1971) I Delhi 615 (DB), in which it was held as under:

It was held by the Division Bench that after the coming into force of the Delhi High Court Act, 1966, as amended, this Court (Delhi High Court) has become the principal Civil Court of original

jurisdiction with respect to every suit the value of which exceeds fifty thousand rupees. In view of the non obstante clause contained in sub- section (2) of Section 5 of the Delhi High Court Act, 1966, the Court of the District Judge, Delhi, has ceased to remain the principal Civil Court of original jurisdiction with respect to any suit value of which exceeds fifty thousand rupees. Full effect has to be given to the language employed in sub-section (2) of Section 5 "notwithstanding anything contained in any law for the time being in force" and that can be done only by saving that for purposes of Section 92 of the Code of Civil Procedure, the Court of the District Judge, Delhi, will be the principal Civil Court of original jurisdiction in every suit the value of which does not exceed fifty thousand rupees but in other suits the value of which exceeds fifty thousand rupees, this High Court will be the principal Civil Court of original jurisdiction.

(ii) Raja Soad Factory and others vs. S.P. Shantharaj and others, AIR1965Supreme Court 1449, in which it was held as under:

...The expression "District Court" has by virtue of S. 2(e) of Act 43 of 1958 the meaning assigned to that expression in the Code of Civil Procedure, 1908. Section 2(4) of the Code defines a "district" as meaning the local limits of the jurisdiction of a principal civil court called the District Court and includes the local limits of the ordinary original civil jurisdiction of a High Court. If, therefore, a High Court is possessed of ordinary original civil jurisdiction, it would, when exercising that jurisdiction be included, for the purpose of Act 43 of 1958, in the expression "District Court".

12. In the case of Romila Jaidev Shroff vs. Jaidev Rajnikant Shroff, AIR2000Bombay 356, it was held that when the High Court exercises its Ordinary Original Civil Jurisdiction in relation to the matters under the Family Court Act, it would be a district Court. Similarly, in the case of Kamal V. M. Allaudin and etc. etc. vs. Raja Shaikh and etc. etc., AIR1990Bombay 299, in which it was observed that Sections 7 and 8 of the Act speak of a 'District Court', when it exercises matrimonial jurisdiction, it covers by the definition of a 'District Court' contained in Section 2(4) of the Code of Civil Procedure.

13. Similar view has been taken in the following decisions. The relevant paras of the said judgments are as under:(i) Kamal V. M. Allaudin and etc. etc. vs. Raja Shaikh and etc. etc., AIR1990Bombay 299, paras 64, 65 & 68 read as under:

64. In the light of the above discussion, I am inclined to interpret the words 'district Court' occurring in Sections 7 and 8 of the Family Courts Act in a wider sense. That does not come in conflict with the status of the High Court as superior and the Apex Court. Even assuming that the High Court may not be described as the district Court, it can certainly be held that it was exercising the same powers and same jurisdiction of the district Court if one were to exist in the city of Bombay prior to the establishment of the City Civil Court. In that sense, when this Court was entertaining suits between Muslim parties and Jews and even Hindus when the dispute did not fall within the confines of the Hindu Marriage Act, and was doing so to the same extent as the district Court would have done, taking away that jurisdiction and vesting it in the Family Court by enacting the Family Courts Act the Legislature cannot be said to have taken any step which comes in conflict with its inherent jurisdiction under the Letters Patent which is meant to be exercised in the absence of any other law. I am inclined to take the view that there is no reason not to hold the Family Court as a district Court within the meaning of Section 2(4) of the Code of Civil Procedure having regard to the context in which the Court has come to be established and the purpose for which it would exist.

65. The main thrust of the argument of Mr. Dada is that the special jurisdiction of the High Court under its Letters Patent (under clauses 35 and 17) is sacrosanct and could not be

equated with the exercise of powers by a district Court. It is not possible to accept that view as the Letters Patent can be amended by the Legislature. It would therefore be consistent with the scheme of the Act and its purpose and also in the public interest to take the view that the phrase 'district court' in Sections 7 and 8 of the Family Courts Act includes the jurisdiction that was being exercised by this Court on its Original Side in respect of matters covered by Clauses (a) to (g) of Explanation to Section 7. It is true, as submitted by Mr. Dada, that a Court would be zealous in guarding its own jurisdiction. Undoubtedly, this Court is the superior Court and its jurisdiction cannot be lightly tinkered with. However, times have changed. New dimensions of public interest and social reform arc emerging taking us in the direction of fulfilment of the obligations arising under Chapter IV of the Constitution of India. This Court cannot be oversensitive and feel touchy lover loss of its jurisdiction to entertain certain kinds of suits which cannot in any manner come in conflict with its position as the superior Court and a Court of Appeal.

66. x x x x x

67. x x x x x

68. This discussion made so far leads me to take the following view:- i) All suits and petitions falling under any of the Clauses (a) to (f) the Explanation to Section 7 of the Courts Act, 1984, excluding matters governed by the Indian Divorce Act, 1869, and Parsi Marriage and Divorce Act, 1936; which were cognizable by the High Court on the Original Side, in exercise of jurisdiction Under the Letters Patent, lie to the Family Court as from 7-10-1989, and the jurisdiction of the High Court stands excluded to that extent in relation to the area over which the Family Court, Bombay, exercises jurisdiction; ii) No final opinion is expressed as regards matters matrimonial to which Indian Divorce Act and the Parsi Marriage and Divorce Act applies. Prima facie, such matters will continue to be cognisable by the High Court until jurisdiction in that respect is conferred by express statutory provision upon the Family Court; iii) All suits and petitions of the description mentioned in Clause (i) above and pending in this Court (High Court) on the Original Side on 7-10-1989 and thereafter stand transferred and arc liable to be transferred to the Family Court, Bombay, under Section 8 of the Family Courts Act, 1984; iv) However, each suit and/or petition will be required to be examined on merits after hearing the parties (unless they consent) to determine whether it falls under any of the Clauses (a) to (f) of the Explanation to Section 7 of the Family Courts Act and is required to be transferred to Family Court. If the cause does not fall under any of the aforesaid Clauses, it will continue to be entertained by the High Court; v) Suits or petitions wherein matrimonial relief is not sought in the nature contemplated by any of the Clauses (a) to (f) of Explanation to Section 7 but is based on non-existence of matrimonial relationship such as where the marriage is denied or is alleged to be void will not be cognizable by the Family Court and will not be liable to be transferred from the High Court; vi) Suits and petitions where relief of the nature covered by any of the Clauses (a) to (f) of Explanation to Section 7 of the Family Courts Act is sought only incidentally along with principal relief of general nature these will continue to be cognizable by the High Court and pending matters of such nature will not be liable to be transferred to the Family Court (e.g. share in a matrimonial home or maintenance is claimed in a suit for general partition of undivided Joint Hindu Family property). vii) Petitions relating to guardianship falling under Clause (g) of Explanation to Section 7 of the Family Courts Act will be cognizable by the Family Court as explained earlier in Para 61 above; viii) All suits and petitions relating to Muslim Women where the cause arises under the Dissolution of Muslim Marriages Act 1939, and Muslim Women (Protection of Rights on Divorce) Act,

1986 as well as matrimonial causes amongst Jews are cognizable by the Family Court and all such pending matters are liable to be transferred to the Family Court.

(ii) S. Leelavathi & Anr. Vs. M.S. Shivashankar (deceased by L.Rs.) & Ors., para 10 reads as under:-

10. Before parting, it is necessary to obtain serve that even though the Civil Court had jurisdiction when the suit in O.S. No.62/1996 was instituted by the petitioners. The jurisdiction of the Civil Court was excluded by virtue of Section 8 of the Family Courts Act and consequently, on establishment of the Family Court for District of Mysore with effect from 25.05.1998, necessarily the suit had to be transferred to the said Family Court. Neither the learned District Judge of the District, nor the Civil Judge concerned have noticed this fact, as a result of which the bonafide legal pursuit of the petitioners has been frustrated. It is a matter of regret that despite clear mandate contained in Section 8 of the Family Courts Act, the learned Civil Judge concerned has continued to try the suit, who by then had no jurisdiction over the subject-matter. Non-transferring of the case to the Family Court as required under Section 8 and continuing to adjudicate the claim, has resulted in passing of a decree on 07.12.2001 and the petitioners could not realise the fruits of the decree as it, under law is a nullity. Consequent to such lapses on the part of the learned District Judge concerned in non-transferring the suit to the Family Court and the lapses on the part of the learned Civil Judge in continuing to try the suit while Family Court was functioning, has landed the petitioners in a serious predicament without their fault.

14. Learned counsel for defendant No.1, apart from other judgments, has referred a decision of the Full Bench of Bombay High Court, in the case of Romila Jaidev Shroff vs. Jaidev Rajnikant Shroff, reported in AIR2000Bombay 356, where the Full Bench of the Bombay High Court while dealing with Section 8 of the Family Courts Act and interpreting Section 2(4) CPC, has held as under:

24. With utmost respect of the learned Judges of the Full Bench of Madras High Court, if one turns to the provisions of the Family Courts Act and anomalous position, that will arise under the provisions of Family Courts Act, as submitted by the defendant, it will not be possible to hold that in spite of the said provisions of the Family Courts Act, the High Court retains its Ordinary Original Civil Jurisdiction.

25. Sections 7 and 8 are prescribed by section 6 providing for counsellors, officers and other employees of Family Courts. It is followed by the provisions of duty cast of Family Court to make efforts for settlement as well as for providing enough latitude to the Family Court to devise its own procedure with a view to arrive at a settlement in respect of the subject matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other, subject to this rider, the provisions of the Code of Civil Procedure and the Code of Criminal Procedure both, including Rules framed thereunder are made applicable to the Family Court. Section 13 provides for right to legal representation; section 14 provides for application of Indian Evidence Act, 1872 which has virtually been done away with; under section 15, an option is left to the Family Court to record oral evidence or not; and section 16 provides for Evidence of formal character on affidavit. In this background, if one turns to section 5 subject to the rules framed thereunder, the Family Court is free to take assistance of and allow the association of institutions or organization engaged in social welfare or the persons professionally engaged in promoting the welfare of the family and so on.

26. In this background, one has to turn to the provisions of section 20 where the Act shall have overriding effect, which reads as under:

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

27. Letters Patent would be included in expression any law for the time being in force, and would certainly be covered the expression "instrument". The overriding effect given to the Act is thus confined not only to the Code of Civil Procedure but also to the Evidence Act. The Evidence Act is also an instrument having effect by virtue of law. Looking to the provision of the restricted right of an Advocate to appear in a matter obviously, the Advocates Act of 1961 also has effect to that extent.

28. Virtually, the litigation before the Family Court is a mixture of inquisitorial trial, participatory form of grievance redressal and adversorial trial. As the Family Court is left to devise its own practice, it can have a judicious mixture of all three of them and can as well proceed under any of- them exclusively.

29. The anomaly would thus be obvious. The Ordinary Original Civil Jurisdiction is held to be retained as per the learned Judges of the Division Bench and the learned Judges of the Pull Bench of the Madras High Court. The procedure will be in accordance with the respective rules of the High Court on its Original Side when legal representation being a certainty with all trappings of a full-fledged trial and the Evidence Act, 1872 will apply with force and rigour.

30. The litigants deciding to litigate within the limits of the City of Mumbai will thus continue to operate under the existing system. The litigants other than that litigating with new system will have the benefit of the aforesaid Family Courts Act which with reference to the aforesaid changes brought about in the conduct of the matters before the Family Court is clearly radical departure from the accepted form of a trial of a Civil Court. If the Legislature in its wisdom has decided to make this departure while interpreting any provision of it, in our opinion, the interpretation should be in furtherance of the objective.

15. Learned Full Bench of Bombay High Court in the case of Romila Jaidev Shroff (supra) also interpreted that, .....In our opinion, the conclusion would be inescapable that when the High Court exercises its Ordinary Original Civil Jurisdiction in relation to the matters under the Family Court Act, it would be a District Court as understood therein. It would, therefore, lose its jurisdiction.

16. Learned counsel for the plaintiff Ms.Malavika Rajkotia, Advocate, in her submissions, has raised various legal points in support of her arguments which are outlined as under:(a) She states that there are differences between the Delhi High Court and other Presidency High Courts. The latter are the principal Civil Courts of the original side for their territory, though the Delhi High Court is for the State of Delhi and has below it District Courts as the principal Court of the original jurisdiction. There is no separate territory governed by the Delhi High Court as a Court of principal of original jurisdiction. The Delhi High Court constituted by the Delhi High Court Act, 1966 which succeeded the Punjab Courts Act, 1918 who succeeded the Letters Patent Lahore. (b) Even Section 3(17) of the General Clauses Act defines the District Court. The High Court is excluded from the definition of a District Court, but in contrast, Section 2(4) CPC limits the definition to a District and then includes the High Court in exercise of its original jurisdiction as the principal Court in a District. The said expressions are used in relation to different context and it implies a limit to territorial jurisdiction. (c) Counsel has referred few decisions in which it was clarified that the High Court cannot be called as District Court. In the context of executing the money decree of `20 lac to mean only the District Court which is subordinate to the High Court when, in fact, the District Court has no jurisdiction whatsoever if such a suit is to be presented in the District Court. In Delhi, above `20 lac, it is the High Court which has jurisdiction in its capacity as the High Court. The Delhi High Court Act Section 4 and also under Section 6 CPC bars matters in other Court from entertaining the matter if it is outrightly above the pecuniary limits. (d) It is also argued that Section 21 of the FC Act makes a specific reference to the High Court with no qualification as to its meaning anything other than the High Court. Thus, Section 8 of the Act excludes jurisdiction only of the Civil Court limit to the District Court within city civil limits of the High Court. She argued that

there is no notification or amendment to the High Court Act and Rules that release the Family Court from its pecuniary jurisdiction limit. Thus, the suit cannot be entertained by the Family Courts where the pecuniary jurisdiction limit is more than `20 lac. She states that since the pecuniary jurisdiction limit of the present case is more than `20 lac, therefore, this Court has got the jurisdiction to entertain and try the present suit which is the civil suit and all the suits of civil nature except the same are expressly or implicitly barred. (e) Lastly, she has argued that even otherwise, the present suit is not entertainable in the Family Courts by virtue of the fact that the subject matter is the assets of Bharatram family held as a joint family (HUF) where besides the husband of the plaintiff, her father-in-law and brother-in-law continued to be the parties to the suit after the demise of her mother-inlaw. Since the claim of the third party is involved, therefore, the said dispute cannot be adjudicated by the Family Court. As the question involved in the present case raises a question of scope of Section 18, which is a question of law that needs to be addressed by the High Court.

17. It is pertinent to mention that exactly, the contrary view is taken on the similar issue by the various Courts including this Court and Full Bench of Madras High Court. The Full Bench of Madras High Court has taken the view at earlier point of time which is contrary to the view taken by Full Bench of Bombay High Court at the later stage who did not agree the view of Madras High Court. The relevant paras of the said decisions are mentioned and read as under:(i) Mary Thomas vs. Dr.K.E.Thomas, AIR1990Madras 100, in which it was held as under:

20. On a consideration of the relevant provisions of law and the decisions which have been cited, we are clearly of the opinion that the jurisdiction of the High Court on its Original Side is not ousted by any of the provisions contained in the Act and the High Court shall continue to exercise the jurisdiction vested in it under the Letters Patent and all other laws, notwithstanding the provisions of S. 7 and S. 8 of the Act. In this view, therefore, we hold that the decision of Abdul Hadi, J. in Patrick Martin. In the matter of the Minor Rekha, (1989) 103 Mad LW241 and confirmed by the Division Bench in O.S.A. No.186 of 1988 and reported in Patrick Martin Mr. etc. Appellants, (1989) 103 Mad LW246: (AIR1989Mad 231) is no longer good law.

21. We answer the Reference as follows: After the constitution of the Family Court for the Madras area, the original Jurisdiction of the High Court in respect of matters that may fall under the Explanation to S. 7 of the Act is not ousted and the High Court can continue to exercise its jurisdiction notwithstanding the coming into force of the Family Courts Act, 1984.

(ii) Kanak Vinod Mehta vs. Vinod Dulerai Mehta, AIR1991Bombay 337 (by Division Bench comprising S.P. Bharucha and B.N.Srikrishna, JJ), in which it was held as under:

7. The principal question that must be answered is: Is the High Court a District Court when it entertains, hears and decides suits and proceedings of the nature referred to in the Explanation to sub-section (1) of Section 7 of the said Act. The Full Bench of the Madras High Court in Mary Thomas' case posed the same question in paragraph 10 and answered it in paragraph 20 thus: "On a consideration of the relevant provisions of law and the decisions which have been cited, we are clearly of the opinion that the jurisdiction of the High Court on its Original Side is not ousted by any of the provisions contained in the Act and the High Court shall continue to exercise the jurisdiction vested in it under the Letters Patent and all other laws, notwithstanding the provisions of S. 7, and S. 8 of the Act."

8. This is a Central statute. It is a recognised principle that, so far as is possible, the same construction should be placed by a High Court upon a Central statute as has found favour with another High Court. Upon that principle alone we would be obliged to hold as the Full Bench of the Madras High Court has held. Additionally, the point here concerns the jurisdiction of the High Court. It would be awkward if suits and proceedings of the nature referred to in the Explanation to subsection (1) of Section 7 were entertained by one High Court and not by another. We have read the Full Bench

judgment of the Madras High Court in Mary Thomas' case and are in respectful agreement with what is held therein. We may, however, set out further grounds for taking the same view.

9. x x x x x 10. Emphasis was laid on behalf of the defendant upon Section 2(4) of the Code which defines "District" to mean "the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called the "District Court") and includes the local limits of the ordinary original civil jurisdiction of a High Court."

It was submitted that, therefore, when the word 'Court' was appended to the word

'District' as defined in the Code, the High Court stood defined as a District Court and, therefore, fell within the meaning of that expression in the said Act. It is not possible to accept this submission because regard must be had to the terms of Section 3 of the Code which says, "For the purposes of this Code, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes as subordinate to the High Court and District Court". It is clear that a distinction is drawn by the Code between a High Court and a District Court and the expressions are used therein in different contexts.

11. The learned Judge was right in placing reliance upon the Bombay Civil Courts Act, 1869; Section 7 thereof states that the District Court shall be the principal court of original civil jurisdiction in the district within the meaning of the Code. This is the Court which is relevant for the purpose of Section 2(4) of the Code. Though the area within which the High Court exercises original jurisdiction is a district, a High Court is not a District Court for it exercises jurisdiction, on its appellate side, not only over that district but over the entire State.

12. We must also have regard to the canons of interpretation of statutes. The established rule is that a "statute should not be construed as taking away the jurisdiction of the Courts in the absence of clear and unambiguous language to that effect."

This is a principle enshrined in the judgments of Indian and English Courts. The principle applies with even greater vigour when the statute purports to take away the jurisdiction of a superior Court such as the High Court. We do not find in the provisions of the said Act words that clearly or unambiguously indicate the intention of Parliament to oust the jurisdiction of the High Court in regard to the categories of suits and proceedings mentioned in the Explanation to sub-section (1) of Section 7. The words that are used apply in clear and unambiguous terms only to the jurisdiction of District Courts and subordinate Civil Courts.

13. It was argued on behalf of the plaintiff that even if the jurisdiction of the High Court had been ousted, as contended by the defendant, even so this suit did not stand transferred to the Family Court inasmuch as it was not a suit that fell within the Explanation to sub-section (1) of S.

7. It was pointed out that the suit as it was now laid involved joint family property and the karta thereof and was, therefore, not a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them. This contention must be upheld.

14. It was also submitted that this clause of the Explanation (clause (c)) should be read down so that it was only property which had been acquired by the parties to a marriage or either of them at or about the time of the celebration thereof that would be covered thereby. To so do would, it was urged, bring clause (c) in accord with S. 27 of the Hindu Marriage Act, 1955, and S. 42 of the Parsi Marriage and Divorce Act, 1936. Having regard to the frame of clause (c). It is difficult to accede to the submission, though we must say that we envisage some difficulties when we have regard to the provision in the said Act that evidence is not required to be taken in accordance with the provisions of the Indian Evidence Act, a full transcript thereof is not required to be maintained and legal representation is not ordinarily obtainable.

15. At this point we must note that each of the clauses of the Explanation refers to "a suit or proceeding". It is not as if the reliefs that are mentioned there are to be sought in a matrimonial proceeding of the nature indicated in clauses (a) and (b). Even when such reliefs are independently sought the suit or proceeding would be in the Family Court.

16. Clause (g) of the Explanation mentions a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor. Guardianship, custody and access to a minor are not sought only in matrimonial causes. Such reliefs may also be sought under the provisions of the Guardians and Wards Act, 1890, the Indian Lunacy Act, 1912 and the Hindu Minority and Guardianship Act, 1956. It is far from clear whether Parliament intended that proceedings even under these statutes in relation to guardianship, custody or access to a minor should be filed before the Family Court if instituted by a member of the minor's family.

(iii) N. Kanageswary vs. T. Shrikandarah Rubindranathan, 2013 (1) CTC165 in which it was held as under:

21. There is no dispute that Sections 7 & 8 of the Family Courts Act confer jurisdiction on the Family Court to decide the disputes between the parties to a matter, including property disputes. In case, proceedings for dissolution of marriage or any other proceeding between the parties are pending adjudication before the Family Court, it would be in the best interest of both parties to resolve the property dispute also through the said Court. The Parallel proceedings would cause difficulties to the parties. In case the Matrimonial proceedings are pending before the Family Court and proceeding relating to property, before the Original Side of the High Court, it would be reasonable to make a request before the High Court to transfer the Suit to the Family Court. However, it cannot be said that the High Court has no jurisdiction at all to entertain the Suit between the spouses.

(iv) This Court in the case of Manita Khurana vs. Indra Khurana reported in 2010 (167) DLT58while dealing with section 7 of the Family Courts Act, in paras 12 to 17 has held that the right of a party in the proceeding before the Family Courts are materially different from it, such proceedings had been before the ordinary civil court so as the approach of a civil court. The claim of a third party to a marriage cannot be adjudicated before the Family Court. The cause of action for the suit is refusal of the defendant to vacate the house of which the plaintiff claims to be the exclusive owner. Merely because certain facts leading to the cause of action referred to the marital relationship of the plaintiff and defendant would not make suit arising out of a marital relation. Paras 18 and 19 of the said decision referred the various decisions of Supreme Court which are reproduced hereunder:

18. The Supreme Court in State of Madhya Pradesh v. Shobharam, AIR1966SC1910has held that our Constitution lays down in absolute terms a right to be defended by ones own Counsel; it cannot be taken away by ordinary law. Though subsequently in Lingappa Pochanna Appelwar v. State of Maharashtra, AIR1985SC389it has been held that no litigant has a fundamental right to be represented by a lawyer in any court and where the Legislature felt that for implementation of the legislation, it would not subserve the public interest if lawyers were allowed to appear, plead or act, the Legislature is entitled to provide so. However, the fact remains that where the Legislature has not expressly provided for depriving such right to Counsel, the said right cannot be taken away. There is nothing in the Act to show that the Legislature contemplated depriving the owner of a property suing for possession of such a right merely because the defendant was her daughter-in-law.

19. As far as the contention of the counsel for the petitioner of purposive interpretation is concerned, the same is to come into play only where the golden rule, that the words of the statute must prima facie be given their ordinary meaning, fails. The Supreme Court in Harbhajan Singh v. Press

Council of India, AIR2002SC1351cited with approval the speech of Lord Simon in Suthendran v. Immigration Appeal Tribunal, (1976) 3 All ER611to the effect Parliament is prima facie to be credited with meaning what is said in an Act of Parliament. The drafting of statutes, so important to a people who hope to live under the rule of law, will never be satisfactory unless Courts seek whenever possible to apply 'the golden rule' of construction, that is to read the statutory language, grammatically and terminologically, in the ordinary and primary sense which it bears in its context, without omission or addition. Of course, Parliament is to be credited with good sense; so that when such an approach produce injustice, absurdity, contradiction or stultification or statutory objective the language may be modified sufficiently to avoid such disadvantage, though no further."

Yet again in Rishab Chand Bhandari v. National Engineering Industry Ltd., (2009) 10 SCC601it was held that only if a literal interpretation leads to absurd consequences, it should be avoided and a purposive interpretation be given. Similarly in Raghunath Rai Bareja Vs. Punjab National Bank, (2007) 2 SCC230it was held that the mischief rule and the purposive interpretation rule can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or if read literally would nullify the very object of the statute.

18. In para 24 of the decision of Romila Jaidev Shroff (supra), the learned Full Bench of Bombay High Court did not agree with the Full Bench of Madras High Court and took the entirely different view that inspite of provisions, i.e. 7 and 8 of the Family Courts Act, the High Court retains its Ordinary Original Civil Jurisdiction and the anomaly would thus be obvious and procedure will be in accordance with the respective rules of the High Court of its original side. When legal representation being a certain will all trapping of a full-fledged trial and the Evidence Act, 1872 will apply with force and rigour and on the other hand, virtually the litigation before the Family Court is mixture of inquisitorial trial, participatory form of grievance redressal and adversorial trial and Family Court is left to devise its own practice.

19. There is no doubt that under section 7, the Family Court shall have all the jurisdiction exercisable by any District Court or by any subordinate Civil Court under the law for the time being in force in respect of suit and proceedings for maintenance. The Family Court shall also have jurisdiction of the matter relating to maintenance including proceedings under Chapter IX of the Code of Criminal Procedure including the application filed under Section 125 Cr.P.C.

20. The relevant principles regarding ouster of jurisdiction of Civil Court were laid down by the Apex Court in Dhulabhai vs. State of MP, AIR1969Supreme Court 78 at page 89 (para 32) which reads as under:

(1) Where the statute gives a finality to the orders of the special tribunals the civil courts jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of juridical procedure. (2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court. Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunal so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statue or not. (3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constitutes under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals. (4) When a provision is

already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit. (5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected, suit lies. (6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry. (7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply.

21. It is also necessary to appreciate Section 9 of the CPC which provides when the jurisdiction of the civil court is either expressly or impliedly barred, it reads as under:

> 9. Courts to try all civil suits unless barred The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. [Explanation I]. A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies. [Explanation II].- For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place.].

22. It is well-settled that the exclusion of jurisdiction of civil court cannot be readily inferred and the normal rule is that civil courts have jurisdiction to try all suits of a civil nature except those of which cognizance by them is either expressly or impliedly excluded. It is true that ordinarily, the Civil Court has jurisdiction to go into and try the disputed questions of civil nature, where the fundamental fairness of procedure has been violated.

23. There is no express exclusion of jurisdiction under the Family Court Act that no High Court referred to in sub-section 7 shall exercise any jurisdiction in respect of any suit and proceeding of nature referred to in the explanation of that sub-section. It appears to me, that the decision rendered by the courts from time to time on the basis of either with a view to promote conciliation and to secure settlement of dispute regarding marriage and family affairs and for matters connected therewith as the Act inter alia seems to exclusively provide with the jurisdiction of the Family Court or perusal of section 20 of the Family Court which mandates that the Act shall have overriding effect on all other enactments in force dealing with this issue meaning thereby that the jurisdiction of the High Court in such matters is implicitly barred.

24. Implied exclusion of jurisdiction of civil court cannot be inferred from the mere fact of the existence of the statutory tribunal or court which may give the same relief as may be had in civil court. There must be something in the provisions of the statute for providing such proceedings to clearly rule out remedy of a suit in the civil court where a statutory enactment creates rights but does not provide the remedial form, the doors of the civil court are always open however where a complete machinery for redressal is available, civil courts jurisdiction may be impliedly barred.

25. Having gone through all the decisions and important issues involved in the present matter, though my views are same with the views taken by the Division Bench of Bombay High Court in the case of Kanak Vinod Mehta (supra) and in the case of Manita Khurana (supra) of this Court, due to undisputed fact in the present case that the plaintiff is claiming rights in the assets of Bharatram family held as joint family (HUF) and it was claimed that besides the husband of the plaintiff, her father-in-law and brother-in-law continued to be the parties after the demise of her mother-in-law. In a way third parties interest is also involved where evidence of the parties are necessary. Even otherwise, I feel that under Section 7 of the Family Courts Act, use the words only to the jurisdiction of District Courts and subordinate Civil Courts, the said expressions are used there in different contexts otherwise it amounts to ignoring Section

3 of the CPC which makes it clear for the purpose of this Code, the District Court is subordinate to the High Court and every Civil Court of a grade inferior to that of a District Court and every Court of small causes or subordinate to the High Court and District Court. Anyhow, these are my views in the matter.

26. Although I have expressed my views in the matter as well as the analysis done above supports the same, yet as a matter of judicial proprietary and in view of judicially inconsistent opinion existing in the field of law, I deem it expedient to refer the important questions to the larger Bench of this Court. These questions are required to be answered authoritatively by a larger Bench so that authoritative judgment may be rendered by the Court discussing the legal position so that the inconsistent trend of approvals and dissents can be put to quietus and there must be certainty in the field of law.

27. Thus, this Court deems it appropriate to refer the following questions to the larger Bench for their kind consideration, as finding of which, would help many Courts to decide various pending cases and many more to come in future of this nature.

28. Accordingly, the following questions are referred to the larger Bench which are:

29. (i) Whether the High Court while exercising the Original Civil Jurisdiction is deemed to be a District Court within the meaning of Section 2(4) of CPC in the context of Section 7(1)(a) of the Family Courts Act, 1984?. (ii) Whether the original civil jurisdiction of the High Court excluded for any suit or petition by virtue of Sections 7 & 8 of the Family Courts Act, 1984. This matter be placed before Honble the Chief Justice, on 30th July, 2014 for further directions.

**(MANMOHAN SINGH) JUDGE**

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# BHAVANA RAMAPRASAD VERSUS YADUNANDAN PARTHASARATHY

**Karnataka High Court**

**Bench : Hon'ble Mr. Justice A.N. Venugopala Gowda**

*Bhavana Ramaprasad*
*Versus*
*Yadunandan Parthasarathy*

**WRIT PETITION NO.40037/2014 (GM-FC)**

**Decided on 31 October, 2014**

**Duties of Family court—Family court Act- sec-9, Sec. 89 CPC-the Preamble of 'the Act' is, "establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairsand for matters connected therewith". The preamble sufficiently indicates the jurisdiction that is vested in the Family Court, under the provisions of the Act, which was enacted for adopting a human approach to the settlement of family disputes and achieving socially desirable results.--- The primary purpose of the Family Court is to promote conciliation and amicably settle the matters relating to matrimonial and family disputes, rather than adjudicate on the same.**

**In AFCONS INFRASTRUCTURE (supra), it has been observed that all cases arising from strained or soured relationships including disputes relating to matrimonial causes, maintenance, custody of children, disputes relating to partition / division among family members / coparceners / co-owners are normally suitable for reference to ADR process. .**

**In view of the foregoing, Family Court having committed the breach, the impugned order being illegal, is quashed. The Family Court shall refer M.C.No.1163/2014, to the Bangalore Mediation Centre and take up the case for consideration, after receiving report from the Mediation Centre.**

**ORDER**

**Hon'ble Mr. Justice A.N. Venugopala Gowda**

This writ petition was filed by the petitioner - wife, being aggrieved by the order dated 06.08.2014 passed in M.C.No.1163/2014, by the Prl. Judge, Family Court, Bangalore. With consent of learned counsel on both sides, the writ petition is taken up for final hearing.

2. Brief facts of the case are that, following the Hindu Vedic rites, the marriage of the petitioner and the respondent was solemnized on 27.06.2013, at Nijaguna Kalyana Mantapa, Basavanagudi, Bangalore. The marriage was also registered. The respondent - husband, through his power of attorney holder, filed on 11.03.2014, in the Family Court, Bangalore, M.C.No.1163/2014, under S.12(1)(c) of the Hindu Marriage Act, 1955 (for short, 'the H.M. Act') to pass a declaratory decree that the marriage is null and void ab-initio. Petitioner having entered appearance on 18.06.2014, filed a memo on 23.07.2014, to refer the case for mediation, by placing reliance on the decision in AFCONS INFRASTRUCTURE LTD. AND ANOTHER Vs. CHERIAN VARKEY CONSTRUCTION CO.(P) LTD. AND ORS., (2010) 8 SCC 24. The Family Court Judge, having briefly noticed the facts of the case, passed the impugned order. The relevant portion reads thus:

"When the prayer is to declare the marriage as null and void ab initio such a matter cannot be referred to mediation. The law cannot given in the hands of parties to decide by themselves as to what is a nullity and what is a fraud the plea that a party to a marriage certainly needs recording of evidence and does not depending upon then say of the party. Thus on facts it is not a proper case to exercise discretion to refer to the mediation. With regarding to the Ruling cited in para 18 it is held cases involving allegation of fraud coercion are not suitable for ADR process. In para No.19(ii) it is held that all case arises from disputes relating to matrimonial causes may be referred to but in para No.19(v) it is suitable clarified that the enumeration of suitable and categorization of cases is not intended to exhaustive or rigid. They are illustrative which can be subjected to just exceptions of the court exercising the discretion. Thus I am afraid to misapply the said ruling and refer the matter to mediation."

3. Sri A. Ravishankar, learned advocate, severely criticised the impugned order and argued that the Judge of the Family Court committed serious error in holding that the case is not fit for reference to mediation. He contended that the impugned order is a mindless order. He submitted that the clear statutory mandate and the object and purpose of S.9 of the Family Courts Act, 1984 (for short 'the Act'), has been negated, since there is virtual encouragement of litigation between the estranged spouses. He contended that the entire approach of the Judge, to the case, is in utter breach of the relevant statutory provisions. He submitted that the impugned order suffers not only from procedural irregularities, but also legal infirmities and is not a judicious order. Submission of the learned advocate is that the impugned order being in violation of the relevant provisions of the Act, H.M. Act & the Code of Civil Procedure (for short 'the Code'), is liable to be quashed.

4. Sri M.V.V. Ramana, learned advocate, on the other hand, strenuously supported the impugned order. He submitted that without even filing the counter and placing on record the defence, if any, to the case, it is not open to the petitioner, to demand as a matter of right, reference of the matter to mediation. He submitted that the conciliation or mediation, if found necessary, can take place at a later stage. He argued that the Family Court did not commit any error by refusing to refer the matter, at this stage of the case, to mediation. He submitted that with an intention to delay the decision of the case, a memo seeking reference to mediation was filed and that there being lack of bona fides, the impugned order was passed and the same is justified.

5. Having regard to the rival contentions, the point for consideration is, whether the Family Court has not acted in a manner, which is required of it, having regard to the jurisdiction vested on it, under the Family Courts Act, 1984 and the Hindu Marriage Act, 1955?

6. In the 59th report, the Law Commission, emphatically recommended that the court, in dealing with the disputes concerning family, ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts for an amicable settlement, before the commencement of trial. The same view was reiterated in the 230th Report of the Law Commission. Despite the amendment to the Code, it was felt that the matters concerning family disputes were not being dealt with a conciliatory approach. The State Governments were expected to set up the Courts and family disputes were to be dealt with by the specially constituted Courts.

7. The most important feature, the Preamble of 'the Act' is, "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 preamble sufficiently indicates the jurisdiction that is vested in the Family Court, under the provisions of the Act, which was enacted for adopting a human approach to the settlement of family disputes and achieving socially desirable results. The primary purpose of the Family Court is to promote conciliation and amicably settle the matters relating to matrimonial and family disputes, rather than adjudicate on the same.

8. S.3 of the Act enables the establishment of Family Court by issue of a Notification by the State Government after consultation with the High Court. S.4 enables the State Government with the concurrence of the

High Court, to appoint Judge to Family Court. S.6 is with regard to providing Counsellors, Officers and other employees to Family Courts. S.7 is with regard to the jurisdiction of Family Court. S.8 is with regard to the exclusion of jurisdiction and pending proceedings. S.9 refers to the duty of Family Court to assist and persuade the parties to come to a settlement. S.10 makes the provision of the Code applicable to the proceedings before a Family Court. S.11 is with regard to the proceedings to be held in camera, if the Court so desires and shall be held so, if either party so desires. S.12 is with regard to the assistance of medical and welfare experts. S.13 is with regard to the right to legal representation. Remaining provisions of the Act, are not relevant for deciding this petition.

9. The statutory provisions to be kept in view to decide this petition are the following: (i) S.9 of the Family Courts Act, 1984 which reads as follows:

"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 of the subject-matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit.

(2) If, in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Family Court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement.

(3) The power conferred by sub-section (2) shall be in addition to, and not in derogation of any other power of the Family Court to adjourn the proceedings."

(ii) Rule 7 of the Family Courts (Karnataka) Rules 1987, which reads as follows:

"Rule 7. Reconciliation.- (1) The Court shall make every effort for brining about reconciliation or settlement between the parties in the first instance in every case where it is possible to do so consistent with the nature and circumstances of the case in such manner as deem fit, with the help of counsellors nominated by the Court"

(iii) S. 89 and Order XXXII-A of CPC, which read as follows: "S.89. Settlement of disputes outside the Court.- (1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for-

(a) arbitration;

(b) conciliation

(c) judicial settlement including settlement through Lok Adalat; or

(d) mediation.

(2) Where a dispute has been referred-

(a) to (c) ******

(d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

*** *** *** Order XXXII-A

SUITS RELATING TO MATTERS CONCERNING THE FAMILY 1 . Application of the Order.-- (1) The provisions of this order shall apply to suits or proceedings relating to matters concerning the family.

(2) *****

(3) So much of this Order as relates to a matter provided for by a special law in respect of any suit or proceeding shall not apply to that suit or proceeding.

2. *****

3. Duty of Court to make efforts for settlement.-- (1) In every suit or proceedings to which this Order applies, an endeavour shall be made by the Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject-matter of the suit.

(2) If, in any such suit or proceeding, at any stage it appears to the Court that there is a reasonable possibility of a settlement between the parties, the Court may adjourn the proceeding for such period as it thinks fit to enable attempts to be made to effect such a settlement.

(3) The power conferred by sub-rule (2) shall be in addition to, and not in derogation of, any other power of the Court to adjourn the proceedings.

4. Assistance of welfare expert.-- In every suit or proceeding to which this Order applies, it shall be open to the Court to secure the services of such person (preferably a woman where available), whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family as the Court may think fit, for the purpose of assisting the Court in discharging the functions imposed by Rule 3 or this Order.

5. *****

6. *****

(iv) S.23 of The Hindu Marriage Act, 1955 which reads thus:

"S.23. Decree in proceedings.- (1) In any proceeding under this Act, whether defended or not, if the court is satisfied that - ***** (2) Before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties:

[Provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clause (ii), clause (iii), clause (iv), clause (v), clause (vi) or clause (vii) of sub-section (1) of section 13.] (3) For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be and has been, effected and the court shall in disposing of the proceeding have due regard to the report."

(underlined for emphasis)

10. In BALWINDER KAUR Vs. HARDEEP SINGH, (1997) 11 SCC 701, Apex Court has held as follows:

"15..... A duty is also cast on the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties. Under sub-section (3) of Section 23 of the Act, the court can even refer the matter to any person named by the parties for the purpose of reconciliation and to adjourn the matter for that purpose. These objectives and principles govern all courts trying matrimonial matters."

(Italicised for emphasis)

11. In JAGRAJ SINGH Vs. BIRPAL KAUR, (2007) 2 SCC 564, Apex Court has held as follows:

"26. From the above case-law, in our judgment, it is clear that a court is expected, nay, bound, to make all attempts and endeavours of reconciliation. To us, sub-section (2) of Section 23 is a salutary provision exhibiting the intention of Parliament requiring the Court "in the first instance" to make every endeavour to bring about a reconciliation between the parties. If in the light of the above intention and paramount consideration of the legislature in enacting such provision, an order is passed by a matrimonial court asking a party to the proceeding (husband or wife) to remain personally present, it cannot successfully be contended that the court has no such power and in case a party to a proceeding does not remain present, at the most, the court can proceed to decide the case ex parte against him/her. Upholding of such argument would virtually make the benevolent provision nugatory, ineffective and unworkable, defeating the laudable object of reconciliation in matrimonial disputes. The contention of the learned counsel for the appellant, therefore, cannot be upheld." (underlined for emphasis)

12. In GAURAV NAGPAL Vs. SUMEDHA NAGPAL, (2009) 1 SCC 42, with regard to the duty of Court to bring about conciliation in divorce and judicial separation proceedings, Apex Court made the following observations:

"58. .....It is a disturbing phenomenon that large number of cases are flooding the courts relating to divorce or judicial separation. An apprehension is gaining ground that the provisions relating to divorce in the Hindu Marriage Act, 1950 (in short "the Marriage Act") have led to such a situation. In other words, the feeling is that the statute is facilitating breaking of homes rather than saving them. This may be too wide a view because actions are suspect. But that does not make the section invalid. Actions may be bad, but not the section. The provisions relating to divorce categorise situations in which a decree for divorce can be sought for. Merely because such a course is available to be adopted, should not normally provide incentive to persons to seek divorce, unless the marriage has irretrievably broken. Effort should be to bring about conciliation to bridge the communication gap which leads to such undesirable proceedings. People rushing to courts for breaking up of marriage should come as a last resort, and unless it has an inevitable result, courts should try to bring about conciliation. The emphasis should be on saving marriage and not breaking it." (Italicised for emphasis)

13. In H.S.UMA Vs. G.K. SUMANTH ARYA, ILR 1993 KAR 1774, with regard to the duty of the Family Court, with reference to Sub-section(1) of S.9 of the Act and Sub- section(2) of S.23 of the H.M. Act, to make every effort for reconciliation, with reference to the word "every endeavour", it was held as follows:

"7. .....It may be noticed that in contra distinction to just the word "endeavour" mentioned in Section 9(1) of the Family Courts Act, in Section 23(2), a duty is cast on the Court in the first instance to make every endeavour. The use of the word "every" before the word "endeavour" in this Section assumes great importance in respect of the duty cast on the Court dealing with a proceeding under the Hindu Marriage Act to bring about reconciliation.

**** **** ****

9. .....In this case we are entirely in agreement with the contention advanced on behalf of the wife that the impugned order is liable to be set aside solely on the ground that the solemn duty cast on the lower Court under the Sections referred to already has not been discharged by it."

(Italicised for emphasis)

14. In SMT. PADMAVATHI Vs. SRI M. SURESH BALLAL, ILR 2012 KAR 3926, it was emphasized as follows:

" 23.....Matrimonial matters must be considered by Courts with human angle and sensitivity. Delicate issues affecting conjugal rights have to be handled carefully. Sub-section (2) of S.23 is a salutary provision exhibiting the intention of Parliament requiring court 'in the first instance' to make every endeavour to

bring about a reconciliation between the parties. Where the estrangement between the parties to the marriage might seem to be acute, it is the duty of the court to make every endeavour to bring the parties to reconciliation. The failure to make such an endeavour deprives the court of the jurisdiction to try and decide the case. If no endeavour had been made by the court, it will undoubtedly be a serious omission which has to be taken into account.

**** **** ****

25..... Then it should further indicate that he made efforts to bring about further settlement. It is only when his efforts to reconcile between the husband and wife fails, he gets jurisdiction to proceed to pass an order of divorce. (Italicised for emphasis)

15. S.9 of the Act, requires the Family Court, to endeavour, in the first instance, where it is possible to do so, consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject matter of the proceeding and for that purpose, the Family Court may follow the procedure under Rule 7 of Karnataka Family Courts (Procedure) Rules, 1997, framed to give effect to S.9.

16. A matrimonial case is not like other cases before a Court. Annulment of marriage, not only affects the parties and their families, but also the society, which feels its reverberations. Endeavour should always be made on preserving the institution of marriage, which is the requirement of law, particularly keeping in view the provisions made under S.9 of the Act and Sub-section (2) of S.23 of the H.M. Act. In view of the said provisions, it is obligatory on the part of Family Court, to endeavour, in the first instance, to effect a reconciliation or settlement between the parties to the family dispute.

17. In RELIANCE AIRPORT DEVELOPERS (P) LTD. VS. AIRPORTS AUTHORITY OF INDIA AND OTHERS, 2006(10) SCC 1, in the matter of exercising discretion and the parameters to be followed, Apex Court has held as follows:

"28. "Discretion" when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful but legal and regular.

**** **** ****

31. The word "discretion" standing single and unsupported by circumstances signifies exercise of judgment, skill or wisdom as distinguished from folly, unthinking or haste; evidently therefore a discretion cannot be arbitrary but must be a result of judicial thinking. The word in itself implies vigilant circumspection and care, therefore, where the legislature concedes discretion it also imposes a heavy responsibility.

**** **** ****

33. If a certain latitude or liberty accorded by statute or rules to a judge as distinguished from a ministerial or administrative official, in adjudicating on matters brought before him, it is judicial discretion. It limits and regulates the exercise of the discretion, and prevents it from being wholly absolute, capricious, or exempt from review.

34. Such discretion is usually given on matters of procedure or punishment, or costs of administration rather than with reference to vested substantive rights. The matters which should regulate the exercise of discretion have been stated by eminent judges in somewhat different forms of words but with substantial identity. When a statute gives a judge a discretion, what is meant is a judicial discretion, regulated according to the known rules of law, and not the mere whim or caprice of the person to whom it is given on the assumption that he is discreet (per Willes J. in Lee v. Bude Rly. Co., (1871)6 CP 576 and in Morgan v. Morgan, 1869 1 P & M 644)." (underlined for emphasis)

18. The impugned order, reproduced in para 2 supra, shows that the Family Court Judge has proceeded, as if, he has discretion, in the matter of referring or otherwise, of a case to mediation. There is absolute

misconception in saying so. The statutory provisions, extracted in para 9 supra, cast duty on the Court, in the first instance, to make every efforts for bringing about reconciliation or settlement between the parties. There is no discretion conferred, to bypass the said statutory provisions, which are mandatory.

19. The Judge of the Family Court has failed to notice that he was seized of a matrimonial dispute between the estranged spouses. The paramount duty of the Court should be to restore peace amongst the parties. To achieve the said object, the Court should encourage and persuade the parties to reconcile, by referring them to conciliation / mediation. Instead, the observations made in the impugned order, extracted in para 2 supra, would push the parties further into conflict and litigate in the matter. In matrimonial cases, only as a last resort, the Court ought to decide the case on its merit i.e., when all the efforts made by the Court by encouraging and persuading the parties to reconcile fail.

20. In AFCONS INFRASTRUCTURE (supra), it has been observed that all cases arising from strained or soured relationships including disputes relating to matrimonial causes, maintenance, custody of children, disputes relating to partition / division among family members / coparceners / co-owners are normally suitable for reference to ADR process. It has been observed that the enumeration of 'suitable' and 'unsuitable' categorization of cases is not intended to be 'exhaustive or rigid' and they are 'illustrative' which can be subject to just exceptions or additions by the court exercising its jurisdiction under S.89 read with Rule 1A of Order X CPC requiring the Court to direct the parties to opt for any of the five alternative dispute resolution processes. It has been further observed that the appropriate stage for considering a reference to ADR process in a civil suit is on completion of pleadings whereas in matrimonial disputes it is better to refer the parties to ADR on completion of service of notice and before respondent submits his / her pleadings.

21. In K. SRINIVAS RAO Vs. D.A. DEEPA, (2013) 5 SCC 226, while touching upon an issue, in the interests of victims of matrimonial disputes, Apex Court has observed as follows:

"31. .....In matrimonial disputes there is hardly any case where one spouse is entirely at fault. But, then, before the dispute assumes alarming proportions, someone must make efforts to make parties see reason. In this case, if at the earliest stage, before the Respondent-wife filed the complaint making indecent allegation against her mother-in-law, she were to be counseled by an independent and sensible elder or if the parties were sent to a mediation centre or if they had access to a pre- litigation clinic, perhaps the bitterness would not have escalated. Things would not have come to such a pass if, at the earliest, somebody had mediated between the two.....

32. Quite often, the cause of the misunderstanding in a matrimonial dispute is trivial and can be sorted. Mediation as a method of alternative dispute resolution has got legal recognition now. We have referred several matrimonial disputes to mediation centres. Our experience shows that about 10 to 15% of matrimonial disputes get settled in this Court through various mediation centres. We, therefore, feel that at the earliest stage i.e. when the dispute is taken up by the Family Court or by the court of first instance for hearing, it must be referred to mediation centres. Matrimonial disputes particularly those relating to custody of child, maintenance, etc. are preeminently fit for mediation. Section 9 of the Family Courts Act enjoins upon the Family Court to make efforts to settle the matrimonial disputes and in these efforts, Family Courts are assisted by Counsellors. Even if the Counsellors fail in their efforts, the Family Courts should direct the parties to mediation centres, where trained mediators are appointed to mediate between the parties. Being trained in the skill of mediation, they produce good results." (Italicised for emphasis)

22. On a careful reading of the impugned order, it is clear that not only the relevant statutory provisions but also the settled position of law, by catena of decisions, including that of AFCONS INFRASTRUCTURE LTD., which was brought to its notice, has not been appreciated. The impugned order, extracted in para 2 supra, is diametrically opposite to the elucidation of law made in AFCONS INFRASTRUCTURE LTD.

23. S.89 CPC enables the Court to refer the subject matter of a case to either of the five Alternative Disputes Resolution processes shown therein. Except, Arbitration, the four other processes are non-adjudicatory dispute resolution processes, wherein, there is no decision, but there can only be a settlement by mutual consent of the parties.

24. In the instant case, the Family Court has not acted in a manner which is required of it, having regard to the jurisdiction vested on it, under the Act, particularly S.9, which casts a duty to assist and persuade the parties to arrive at a settlement by referring them to alternative dispute resolution processes of conciliation and / or mediation. The Family Court Judge has not shown a human approach which he is expected to have while dealing with the matrimonial dispute, since, the marriage is an institution of great social relevance. The impugned order is against the spirit of the Act and also settled position of law.

25. The number of litigations being on rise, for small and trivial matters, people approach the Courts. The judicial system is overburdened, causing delay in adjudication of the disputes. Mediation Centres, Arbitration and Conciliation Centres, were opened, by keeping in view S.89 of CPC, to ease the burden of the Courts. Earnest efforts have to be made to resolve the disputes amongst the litigants by having recourse to alternative dispute resolution processes, more particularly the matrimonial dispute(s), by referring them to Mediation Centre(s).

In view of the foregoing, Family Court having committed the breach, the impugned order being illegal, is quashed. The Family Court shall refer M.C.No.1163/2014, to the Bangalore Mediation Centre and take up the case for consideration, after receiving report from the Mediation Centre. Ordered accordingly.

Registry shall send a copy of this order, for guidance, to all the Family Courts in the State.

A copy of this Order be sent to the Director, Bangalore Mediation Centre, who shall circulate copies of the same amongst all the Mediation Centres in the State, for information.

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# BHARAT KUMAR VERSUS SELMA MINI

**Kerala High Court**

**Bench : Hon'ble Mr. Justice Kurian Joseph & Hon'ble Mr. Justice K. Padmanabhan Nair**

*Bharat Kumar*
*Versus*
*Selma Mini*

**WP(C) No. 33380 of 2005(W)**

**Decided on 22 January, 2007**

**Family Court Act, 1984,Section 7(1)(e)- Jurisdiction-Whether paternity of a child is an issue to be considered by the Family Court under Section 7(1)(e) of the Family Court Act, 1984, without a matrimonial cause, ---The jurisdiction conferred on the Family Court is settlement of issues arising out of matrimonial causes.Matrimonial cause is a cause relating to rights of marriage between husband and wife. Paternity and legitimacy are two different concepts. Paternity by itself may not, in all circumstances, be a matrimonial cause, as in the instant case.---It was also held by the Supreme Court in the said decision that the Family Court cannot entertain any proceedings for declaration as to the legitimacy of any person without any claim on marital relationship. -- The case admittedly is of extra marital relationship. The dispute is with regard to the paternity of a child born in the said extra marital relationship. That is not a matter falling within the jurisdiction of the Family Court. Paternity of a child can be gone into as incidental to a dispute on the legitimacy arising only out of a claim on marital relationship between the parties. Such a question also may incidentally arise in deciding a guardianship petition. No such situation arises in this case ---Therefore, we allow the writ petition. O.P.No.1234/2005 on the file of the Family Court, Ernakulam is struck off. However, we make it clear that the judgment will not stand in the way of the respondents approaching the civil court for the declaration on paternity.**

## JUDGMENT

**Hon'ble Mr. Justice Kurian Joseph**

Whether paternity of a child is an issue to be considered by the Family Court under Section 7(1)(e) of the Family Court Act, 1984, without a matrimonial cause, is the question to be considered in this case.

2. The first respondent before the Family Court, Ernakulam, in O.P.No.1234/2005 is the petitioner herein. The relief claimed by the first respondent herein before the Family Court reads as follows:-

"Therefore, it is humbly prayed that this Hon'ble Court be pleased to declare that Bharat Kumar K.Palicha (the 1st respondent) is the father of Bhagat Kumar B., aged 3 years (2nd petitioner) delivered by Selma Mini (1st petitioner) on 9th day of August 2002 at Lakshmi Hospital, Dewans Road, Ernakulam."

The second respondent is the husband of the first respondent at the relevant time. According to the first respondent she had developed extra marital relationship with the petitioner and that the child Bhagat Kumar is born in that relationship. Hence the petition for declaration W.P(C) NO.33380/2005 that the petitioner herein is the father of the said child. The contention of the petitioner is that such a petition for deciding the paternity of a person is not maintainable before the Family Court, without a matrimonial cause.

3. The Family Courts Act, 1984 has been enacted mainly for settlement of "disputes relating to marriage and family affairs and for matters connected therewith". Section 3 deals with establishment of Family Courts for exercising the jurisdiction and powers conferred on the courts under the Act. Section 7 deals with jurisdiction which reads as follows:-

"7. Jurisdiction.- (1) Subject to the other provisions of this Act, a Family Court shall -- (a) have and exercise all the jurisdiction exercisable by any District Court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

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

W.P(C) NO.33380/2005 Explanation. -- The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:-

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

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

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

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

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

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

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

(a) the jurisdiction exercised by a Magistrate of W.P(C) NO.33380/2005 the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

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

We are concerned with explanation (e) of Section 7(1) - for declaration as to the legitimacy of any person.

4. The jurisdiction conferred on the Family Court is settlement of issues arising out of matrimonial causes. Matrimonial cause is a cause relating to rights of marriage between husband and wife. Paternity and legitimacy are two different concepts. Paternity by itself may not, in all circumstances, be a matrimonial cause, as in the instant case. Paternity is the state or fact of being the father of a particular child. Legitimacy of a child is its right to be officially accepted as such. Admittedly the petitioner is not the husband of the first respondent. According to the 1st respondent, she had only extra marital relationship with the petitioner. The second respondent herein is the husband. He did not have a case regarding legitimacy of the child. The Family Court gets jurisdiction to go into the question of legitimacy of any W.P(C) NO.33380/2005 person only if such a question arises in a matrimonial cause. An investigation on the paternity of a person is required only when the question of legitimacy of the person is to be decided by the Family Court. That

question arises only out of a matrimonial cause where there is a claim on matrimonial relationship out of which the said person is born. It may also arise in situations covered by explanation (g) to Section 7(1), in the case of guardianship, as held by the Supreme Court in Renubala Moharana v. Mina Mohanty, (2004) 4 SCC 215 (2004 (2) KLT SN 38 (SC)). It was also held by the Supreme Court in the said decision that the Family Court cannot entertain any proceedings for declaration as to the legitimacy of any person without any claim on marital relationship. In the case before us the petitioner before the Family Court, the first respondent herein, does not have a case of marital relationship with the petitioner herein. The case admittedly is of extra marital relationship. The dispute is with regard to the paternity of a child born in the said extra marital relationship. That is not a matter falling within the jurisdiction of the Family Court. Paternity of a child can be gone into as incidental to a dispute on the W.P(C) NO.33380/2005 legitimacy arising only out of a claim on marital relationship between the parties. Such a question also may incidentally arise in deciding a guardianship petition. No such situation arises in this case.

Therefore, we allow the writ petition. O.P.No.1234/2005 on the file of the Family Court, Ernakulam is struck off. However, we make it clear that the judgment will not stand in the way of the respondents approaching the civil court for the declaration on paternity.

**(KURIAN JOSEPH, JUDGE)**

**(K.PADMANABHAN NAIR, JUDGE)**

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# SAIDALI K.H. VERSUS V.SALEENA

**Kerala High Court**

**Bench : Hon'ble Mr. Justice Kurian Joseph and Hon'ble Mr. Justice Harun-Ul-Rashid**

*Saidali K.H.*
*Versus*
*V.Saleena*

**Mat.Appeal.No. 94 of 2007()**

**Decided on 22 October, 2008**

**Role and duties of Family court- Dissolution of Muslim Marriages Act, 1939Section 2(ii), (iv) and (viii) (a) (d) and (f) --**

**Can a Muslim husband exercise his right of divorce indiscreetly? Can he marry more than one upto four at a time - is it an unbridled authority for him? If not, should Muslim women suffer this tyranny for all times? Should their personal law remain so cruel towards these unfortunate wives?**

**The progressive outlook and wider approach of Islamic Law cannot be permitted to be squeezed and narrowed by unscrupulous litigants, apparently indulging in sensual lust sought to be quenched by illegal means, who apparently are found to be guilty of the commission of the offence under the law to which they belonged before their alleged conversion.**

**We appeal to all concerned within the community and the administrative authorities and the Government to study the problem faced by the helpless and destitute women and children and to bestow thoughts on the ways and means to alleviate such social problems. ---reasons stated by the Family Court that the second marriage contracted by the respondent/husband and the refusal of the petitioner/wife to live with the husband on account of his second marriage are not by themselves sufficient grounds to grant a decree for dissolution of marriage under the Dissolution of Muslim Marriages Act. Refusal of the wife to share the conjugal home with the co-wife is justified for claiming maintenance. In such circumstances, it is the duty of the husband to set up separate residence for her. At the same time, we find that the petitioner/wife had pleaded several other grounds permissible under law for divorce. Inequitable treatment to one wife against the Quranic injunction gives rise to a tenable claim for divorce. The Family Court failed to examine whether the petitioner/wife was entitled to a decree for dissolution of marriage under any or all the heads for which there is sound foundation in the pleadings. --- the order under appeal is set aside and the case is remanded to the Family Court**

## JUDGMENT

**Hon'ble Mr. Justice Harun-Ul-Rashid**

Can a Muslim husband exercise his right of divorce indiscreetly? Can he marry more than one upto four at a time - is it an unbridled authority for him? If not, should Muslim women suffer this tyranny for all times? Should their personal law remain so cruel towards these unfortunate wives? These are some of the questions arising for consideration in this case.

2. This appeal is directed against the order of the Family Court, Thrissur in O.P. No.1095 of 2006. The said Original Petition was filed by the respondent/wife under Section 2(ii), (iv) and (viii) (a) (d) and (f) of

the Dissolution of Muslim Marriages Act, 1939 for dissolution of her marriage with the appellant. By the impugned order, the Family Court allowed the Original Petition. Hence, the appeal by the husband. The parties herein are referred to as petitioner and respondent as in the Original Petition.

3. The marriage between the petitioner and respondent was solemnised on 1.6.2002. Their only child is now aged five years. The petitioner/wife alleged that her husband and his family members behaved very cruelly towards her contrary to her expectations, that they ill treated her mentally and physically and misappropriated 46 sovereigns of gold ornaments which were given to her at the time of marriage. She further alleged that after two months' of the marriage, her father was forced to give Rs.50,000/- to the respondent/husband for starting a garment shop and that the respondent/husband and his family members frequently ill treated her demanding more dowry and even asked her to leave the matrimonial home if more dowry was not paid. It is also pleaded in her petition for divorce that the respondent failed to perform his marital obligations, that he withdrew from co-habiting with her and also failed to maintain her and their child. According to the petitioner, her status in the matrimonial home was that of a housemaid. It is also pleaded by her that her husband is a man of means, that he is running a barber shop as well as a garment shop, that he has landed property and is getting a monthly income of Rs.15,000/- and inspite of that he is not willing even to satisfy the basic needs of the petitioner and the child. In paragraph 8 of the petition, it is pleaded that the respondent/husband has married another lady by name Regina. In paragraph 10 of the petition, she has stated that their relationship as husband and wife has irretrievably broken and that the respondent deliberately deserted her and the child. She has also stated that the failure on the part of the respondent/husband to perform his marital obligations and to maintain her and the child has also led to their separation which cannot be repaired or revived.

4. The respondent filed a detailed objection denying the averments contained in the petition. He denied having ill treated the petitioner demanding more dowry and also the misappropriation of gold ornaments given to her at the time of marriage. He also pleaded that the entire gold ornaments are still in her possession. He also stated that he used to maintain his wife and child. He denied that he is the proprietor of a barber shop and a garment shop. He also denied his monthly income as alleged by the petitioner. According to him, the petitioner/wife left the matrimonial home without any reason and that he is ready and willing to live with the petitioner and child and maintain them. He filed O.P. No.360 of 2004 before the Family Court, Thrissur for restitution of conjugal rights and O.P. No.614 of 2005 for custody of his child. It is further contended by him that he is not bound to maintain the petitioner/wife since she is living separately for no reason. The averment contained in paragraph 8 of the petition that the respondent has contracted a second marriage is not denied in the objection filed by him.

5. Section 2 of the Dissolution of Muslim Marriages Act deals with the grounds for a decree of dissolution of marriage. The Section reads as follows:

"Grounds for decree for dissolution of marriage:- A woman married under muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely :

(i) that the whereabouts of the husband have not been known for a period of four years;

(ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;

(iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;

(iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;

(v) that the husband was impotent at the time of the marriage and continues to be so; (vi) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;

(vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years:

Provided that the marriage has not been consummated;

(viii) that her husband treats her with cruelty that is to say,--

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(b) associates with women of evil repute or leads an infamous life, or

(c) attempts to force her to lead an immoral life, or

(d) disposes of her property or prevents her exercising her legal rights over it, or

(e) obstructs her in the observance of her religious profession or practice, or

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran;

(ix) on any other ground which is recognised as valid for the dissolution of marriages under Muslim Law :

Provided that --

(a) no decree shall be passed on ground (iii) until the sentence has become final;

(b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the court that he is prepared to perform his conjugal duties, the court shall set aside the said decree; and

(c) before passing a decree on ground

(v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the court within such period, no decree shall be passed on the said ground."

The grounds for dissolution of marriage alleged in the petition are: (i) failure to provide maintenance to the wife for two years, (ii) failure to perform the marital obligations, (iii) subjecting the wife to physical and mental cruelty, (iv) depriving her of her property and (v) contracting a second marriage but not treating her equitably in accordance with the injunctions of the Qur'an.

6. Going by the pleading in the Original Petition, we find that there is sufficient foundation in the grounds raised for dissolution of marriage. Before the Family Court, the respondent admitted the fact of having contracted a second marriage on 9.4.2006. The Family Court did not post the case for evidence, but decided the case on 25.1.2007 holding that since the second marriage is admitted by the respondent/ husband, the petitioner/wife is entitled to a decree of divorce. The Family Court also held that the respondent/husband having married again, the petitioner/wife was not willing to join him and that the said fact is sufficient to grant a decree for dissolution of marriage.

7. Though the petitioner sought a decree for dissolution of marriage on different grounds under the Dissolution of Muslim Marriages Act, without adverting to any such ground, the Family Court granted divorce on the only reason that the respondent/husband contracted a second marriage. The question

now raised in this appeal is whether the wife is entitled to a decree of divorce for the only reason that the husband contracted a second marriage. If the reason stated by the Family Court is to be accepted, a Muslim man cannot marry more than once when his first marriage subsists. Apart from the religious and legal aspects of marriage, there is a social aspect also under Islamic law. Islamic law gives a high social status to the women after marriage. Restrictions are placed upon the unlimited polygamy of pre Islamic times and a controlled Polygamy is allowed. Prophet Mohammed both by example and precept, encouraged the status of marriage. The prophet restrained polygamy by limiting the maximum number of contemporaneous marriages and by making absolute equity towards all, obligatory on the man. It is worthy to note that the clause in the Qur'an which contains the permission to contract four contemporaneous marriages is immediately followed by an injunction which puts the preceding passage to its normal and legitimate dimensions. The former passage says that a man can marry two, three or four times, but not more. The subsequent lines declare that if the man cannot deal equitably and justly with all, he shall marry only one.

8. In India, polygamy is positively unlawful. It calls for a strong moral if not a religious factor to eradicate polygamy from among the Mussalmans. We have recognized the custom of drawing up a deed of contract of marriage containing a formal renunciation of the right on the part of the future husband to contract a second marriage during the existence of the first. On execution of such a contract, a Muslim wife as of right is entitled to enforce the terms.

9. True, Islam recognizes polygamy. The Holy Qur'an in Chapter 4 Verse 3 (Al Nisa'a - meaning "woman") teaches as follows:

"If ye fear that ye shall not be able to deal justly with the orphans marry women of your choice, two, or three or four; but if ye fear that ye shall not be able to deal justly with them, then only one or that your right hands possess. That will be more suitable to prevent you from doing injustice."

The permission to take more than one wife is made conditional, that is , he should be able to deal justly with all the wives. The prophet has permitted polygamy and has limited it to four. But it has been further ordained to deal with them justly in matters of food, dress, residence and cohabitation without discrimination, irrespective of whether one is rich or poor, high or low. It is not permissible for a man to marry more than one woman if he apprehends that he will be dealing with them unjustly or that he will be failing in respecting their rights. If he is able to fulfill his duties to three but not able to fulfill his duty towards the fourth, then the fourth marriage is prohibited for him. If he is able to fulfill his duties to two but not able to fulfill his duty towards the third, then the third marriage is prohibited for him. Likewise, if he is able to fulfill his duties to one but not able to fulfill his duty towards the second, then the second marriage is prohibited for him. This is what the Quranic verse establishes: "Marry two or three or four women of your choice. If you fear that you will not be able to do justice to them, then marry only one. Otherwise you accept those who are brought under your control as captives of war." What has been commanded by God is external and possible equality in dealings.

10. Various authors and authoritative writings say that there cannot be any equality in love and affection since it will not be possible to maintain equality in those matters. This applies to sexual relationship also. A man who is not infatuated by one woman may be infatuated by another and the man cannot be blamed for such an attitude. The law regarding equality does not apply to him in this regard because it is beyond his capabilities. It is , therefore, clear that Qur-anic injunctions in the matter of dealing justly and fairly with all the wives is in matters of residence, food, cohabitation, dress etc. and not in love and affection.

11. The practice of having more than one wife, though not totally prohibited, is discouraged by imposing stringent conditions making it almost impossible to keep more than one wife at a time. These stringent conditions were imposed on the man even during the life time of Prophet Mohammed. The concept of polygamy, limited to four, with restrictions was permissible during that time due to unavoidable facts and circumstances prevalent during the said period. Going by Quranic versions, permission to marry

more than one woman, but not more than four was given at a time when there were lots of orphans, widows and captives of war who were unable to lead a dignified life and their strength was far more than the men which gave rise to social problems in the society. Appeal to the people to marry orphans, widows and captives of war was necessitated on account of social inequality, economic distress and like conditions to which women were put to suffer. The mandate issued by Prophet Mohammed was intended to save the destitute and to protect their belongings . Even after fifteen centuries, some people of our country seem to be very particular in following the aforesaid tenets of Islam unmindful as to whether such circumstances exist or not. People of the community contract more than one marriage mostly for their personal pleasure. There is no system in our country to ascertain and decide whether such persons are eligible to contract more than one marriage during the subsistence of the first marriage. We have seen women and children standing in the verandah of courts who are either divorced women or second, or third or fourth wife of such persons seeking maintenance from their husbands. Unrestricted freedom to marry women of their choice was enjoyed by men and subsequently to casually pronounce talaq according to their whims and fancies. The indiscreet conduct of such persons in marrying and keeping more than one wife is continuing without any restriction. Most of such marriages are illegal since they are against Quranic injunctions. What is the status of the wife and children born in such marriages?

12. We find the Bhishmacharya of Indian judiciary V.R. Krishna Iyer J. in his celebrated decision as early as in 1970 in Shahulameedu v. Subaida Beevi, reported in 1970 K.L.T. 4 has referred to the very same situation in his inimitable style in the following terms:

"It follows from these passages that the Koranic injunction has to be understood in the perspective of prevalent unrestricted polygamy and in the context of the battle in which most males perished, leaving many females or orphans and that the holy prophet himself recognised the difficulty of treating two or more wives with equal justice and , in such a situation, directed that an individual should have only one wife. In short, the Koran enjoined monogamy upon Muslims and departure therefrom as an exception. That is why, in the true spirit o the Koran, a number of Muslim countries have codified the personal law wherein the practice of polygamy has been either totally prohibited or severely restricted. (Syria, Tunisia, Morocco, Pakistan, Iran, the Islamic Republics of the Soviet Union are some of the Muslim countries to be remembered in this context). A keen perception of the new frontiers of Indian law hinted at in Art. 44 of the Constitution is now necessary on the part of Parliament and the Judicature.

A. Yusuf Ali in his commentary on the Holy Quran has pointed out with reference to the original text, in its proper context, that the prophet first strictly limited the unrestricted number of wives of the "Times of Ignorance" to a maximum of four, provided you could treat them with perfect equality in material things as well as in affection and immaterial things. As this condition is most difficult to fulfill, the recommendation was understood to be towards the practice of monogamy. Mr. Justice Hidayatullah in his Introduction to Mulla's Principles of Mahomedan Law, 16th Edn, has approved of the modernisation of the family law of the Muslims including the abolition of polygamy.

13. In this context, we have noticed a piece of legislation in Pakistan. Muslim Family Laws Ordinance, 1961 (No.8 of 1961) (hereinafter referred to as "the Ordinance") was issued to give effect to certain recommendations of the Commission on Marriage and Family Laws. Section 6 of the Ordinance deals with polygamy and provides for appointing an Arbitration Council consisting of the Chairman and members. Sub-section (1) of Section 6 reads as follows:

"(1) No man, during the subsistence of an existing marriage, shall, except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall any such marriage contracted without such permission be registered under this Ordinance.

As per sub-section (2) of Section 6 of the Ordinance, for a person to contract another marriage, he shall apply to the Chairman in the prescribed manner together with the prescribed fee and shall state the reasons for the proposed marriage and whether consent of the existing wife or wives has been obtained.

Sub-section (3) mandates that the Arbitration Council constituted, if satisfied that the proposed marriage is necessary and just, grant the permission applied for. Sub-section (4) directs the Arbitration Council to record its reasons for the decision and the aggrieved party can file a petition to the Appellate Authority. Sub- section (5) of Section 6 stipulates that if a man contracts another marriage without the permission of the Arbitration Council, he shall pay immediately the entire amount of the dower due to the existing wife and if not paid shall be recoverable as arrears of land revenue and on conviction upon complaint be punishable with simple imprisonment which may extent to one year, or with fine which may extend to five thousand rupees, or with both.

14. Under sub-section (1) of Section 7 of the Ordinance, any man who wishes to divorce his wife shall, after pronouncing talaq, give notice to the Chairman in writing of his having done so and shall supply a copy thereof to the wife. Sub-section (2) of Section 7 provides that whoever contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may extent to one year, or with fine which may extend to five thousand rupees, or with both. Other conditions are also stipulated in sub-sections (3) to (6) of Section 7 of the Ordinance for effecting Talaq.

15. It is a well accepted view that the arbitrary unilateral power to inflict instant divorce does not accord with Islamic injunctions. The Holy Qur'an expressly prohibits a man to seek pretext for divorcing his wife, so long as she remains faithful and obedient to him. In the absence of serious and permissible grounds, no man can justify a divorce, either in the eye of religion or law. If he abandons his wife or puts her away in simple caprice, he draws upon himself the divine anger, for the curse of God, said the Prophet, rests on him who repudiates his wife capriciously. The law administered in Muslim countries like Iraq is that the husband must satisfy the court about the reasons for the divorce. These provisions are intended to regulate, control and supervise the sanctity of marriage and divorce. By enacting such laws, an effective system is brought about for protecting society and women from indiscreet marriages and divorce. Even in the 21st century, though the practice of polygamy is allowed in the strict sense by Islam, there is no system or measures in India to supervise or control such indiscreet marriages and divorce. Ulemas, Khazis and Clergymen in India have not given their serious thoughts to this social problem nor have they chosen to appeal to the Government to make appropriate legislation on the subject. A legislation for setting up bodies at central and regional levels to regulate, control and supervise the sanctity of marriage and divorce is the need of the hour.

16. Explanation to Section 125(3) Cr.P.C. reads as follows:

"If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him."

The Supreme Court had occasion to consider a question which is relevant in this context in the decision reported in Subanu alias Saira Banu v. A.M. Abdul Gafoor, A.I.R. 1987 S.C. 1103. The Apex Court held that right has been conferred on the wife under the Explanation to Section 125 (3) Cr.P.C. to live separately and claim maintenance from the husband if he breaks his vow of fidelity and marries another woman or takes a mistress. The Explanation is of uniform application to all wives including Muslim wives whose husbands have either married another woman otherwise than in accordance with the teachings of Quran or taken a mistress. The Apex Court further held that in this connection, any offer to take the first wife back cannot be considered to be a bona fide offer unless the husband offers to set up a separate residence for her, for a husband who marries again cannot compel the first wife to share the conjugal home with the co-wife.

17. In the decision reported in Lily Thomas v. Union of India, A.I.R. 2000 S.C. 1650, the Apex Court held that inspite of the first marriage, a second marriage can be contracted by the husband under Mohammedan Law subject to certain religious restrictions. In paragraph 61 of the judgment, Justice R.P. Sethi observed that Muslim Law is based upon a well recognized system of jurisprudence providing many rational and revolutionary concepts which could not be conceived by the other systems of Law in force at the time of

its inception. It is further observed that the concept of Muslim law is based upon the edifice of Shariat and that Muslim Law as traditionally interpreted and applied in India permits more than one marriage during the subsistence of one and another though capacity to do justice between co-wives in law is condition precedent and that even under Muslim Law plurality of marriages is not unconditionally conferred upon the husband. It is also observed that the progressive outlook and wider approach of Islamic Law cannot be permitted to be squeezed and narrowed by unscrupulous litigants, apparently indulging in sensual lust sought to be quenched by illegal means, who apparently are found to be guilty of the commission of the offence under the law to which they belonged before their alleged conversion.

18. We appeal to all concerned within the community and the administrative authorities and the Government to study the problem faced by the helpless and destitute women and children and to bestow thoughts on the ways and means to alleviate such social problems.

19. Coming to the case on hand, we find that the reasons stated by the Family Court that the second marriage contracted by the respondent/husband and the refusal of the petitioner/wife to live with the husband on account of his second marriage are not by themselves sufficient grounds to grant a decree for dissolution of marriage under the Dissolution of Muslim Marriages Act. Refusal of the wife to share the conjugal home with the co-wife is justified for claiming maintenance. In such circumstances, it is the duty of the husband to set up separate residence for her. At the same time, we find that the petitioner/wife had pleaded several other grounds permissible under law for divorce. Inequitable treatment to one wife against the Quranic injunction gives rise to a tenable claim for divorce. The Family Court failed to examine whether the petitioner/wife was entitled to a decree for dissolution of marriage under any or all the heads for which there is sound foundation in the pleadings.

20. In the result, the order under appeal is set aside and the case is remanded to the Family Court, Thrissur for fresh disposal in accordance with law. There will be no order as to costs.

21. We place on record our deep appreciation for the strenuous efforts taken by Adv. Sri. M.P.M. Aslam as amicus curiae and for his valuable assistance. We would also like to make a special mention of the able assistance of Sri. E.S..M. Kabeer, learned counsel for the appellant and Smt. A. Parvathi Menon, learned counsel for the respondent.

The Registry shall send a copy of this judgment to the Ministry of Law and Justice, Government of India, New Delhi, the Chief Secretary to the Government of Kerala, Thiruvananthapuram and the Chairman, Kerala State Wakf Board.

**(KURIAN JOSEPH) JUDGE**

**(HARUN-UL-RASHID) JUDGE**

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# BINI VERSUS SUNDARAN

**Kerala High Court**

**Bench: Hon'ble Mr. Justice Kurian Joseph & Hon'ble Mr. Justice Harun-Ul-Rashid**

*Bini*
*Versus*
*Sundaran*

**AIR 2008 Ker 84, 2008 (1) KLJ 162, 2008 (1) KLT 331**

**Decided on 12 December, 2007**

**Hindu Marriage Act Section 13--whether conciliation is mandatory after the introduction of the Family Courts Act in a petition under Section 13 of the Hindu Marriage Act even on the excepted grounds of conversion to another religion, renunciation of the world, mental disorder, venereal diseases and leprosy.**

**The respondent-husband approached the Family Court, Thrissur under Section 13 of the Hindu Marriage Act, 1955 seeking a decree of divorce on the ground that the appellant-wife had ceased to be Hindu by conversion to another religion. On appearance of the appellant and on the mere admission of such fact, the Family Court granted a decree of divorce. Aggrieved, the appeal at the instance of the wife contending mainly that by conversion to another religion alone the marriage does not ipso facto get dissolved and that the Family Court should have made an attempt to see whether a reconciliation or settlement is yet possible in the matter.**

**--Thus though under the Hindu Marriage Act, 1955 no endeavour for reconciliation need be made in a petition for divorce on the ground of conversion to another religion, or other grounds excepted under Section 13(1) of the Hindu Marriage Act or on similar or other grounds available under any other law also, after the introduction of the Family Courts Act, 1984, the Family Court is bound to make endeavours for reconciliation and settlement. The requirement is mandatory. That is the conceptual change brought out by the Family Courts Act, which is a special statute. In the instant case the Family Court has not made any efforts for conciliation. On the mere admission of conversion, a decree has been ranted, without making any endeavour for reconciliation and settlement. That is against the spirit and mandate of the provisions under the Family Courts Act, 1984. -- impugned order set aside -matter remitted to the Family court to proceed afresh in the matter in accordance with law.**

## JUDGMENT

**Hon'ble Mr. Justice Kurian Joseph**

1. The need for and role of conciliation for reconciliation and settlement in disputes relating to marriage and family affairs pending before the Family Courts is the crux of the subject matter arising in this appeal. In the process, a noval question to be decided is, whether conciliation is mandatory after the introduction of the Family Courts Act in a petition under Section 13 of the Hindu Marriage Act even on the excepted grounds of conversion to another religion, renunciation of the world, mental disorder, venereal diseases and leprosy.

2. The respondent-husband approached the Family Court, Thrissur under Section 13 of the Hindu Marriage Act, 1955 seeking a decree of divorce on the ground that the appellant-wife had ceased to be Hindu by conversion to another religion. On appearance of the appellant and on the mere admission of such fact, the Family Court granted a decree of divorce. Aggrieved, the appeal at the instance of the wife contending

mainly that by conversion to another religion alone the marriage does not ipso facto get dissolved and that the Family Court should have made an attempt to see whether a reconciliation or settlement is yet possible in the matter.

3. The Family Courts Act, 1984 was introduced 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. In the Statement of Objects and Reasons it is stated thus:

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

4. It is further stated that the Bill was intended "to make it obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or a settlement between the parties to a family dispute. During this stage, the proceedings will be informal and the rigid rules of procedure shall not apply". It is clear from the Statement of Objects and Reasons for introducing the law relating to Family Courts that in dealing with the disputes regarding family affairs the first attempt of resolution of such disputes should be by conciliation, so as to enable the parties to have reconciliation or settlement. It is with that object in mind only, it was provided under Section 13 of the Act that a legal practitioner shall not be entitled to represent the parties as a matter of right. In dealing with the procedure before the Family Court it was made obligatory on the part of the Family Court to make every endeavour in the first instance to assist and persuade the parties to arrive at a settlement in respect of the subject matter of the proceedings before the Court. If there is a reasonable possibility of settlement of the disputes between the parties, the Family Court is bound to adjourn the proceedings for such period in order to facilitate attempts for reconciliation or settlement. To the extent relevant Section 9 reads as follows:

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 of the subject matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit.

(2) If, in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Family Court may adjourn the proceedings for such period as it thinks fir 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 4 derogation of, any other power of the Family Court to adjourn the proceedings.

5. Under Rule 18 of the Family Courts (Procedure) Rules. 1989 framed by the High Court of Kerala in exercise of its power under Section 21 of the Act for carrying out the purpose of the Act, it is provided as follows:

18. Reconciliation.- The court shall make every reasonable effort for bringing about reconciliation or settlement between the parties in the first instance in every case where it is possible to do so consistent with the nature and circumstances of the case, in such manner as it deems fit, with the help of counsellors nominated by the Court.

Under Rule 14 of the Family Courts (Kerala) Rules, 1989 framed by the Government of Kerala in consultation with the High Court of Kerala in exercise of its power under Section 23 of the Act, for the purpose of this Act, it is provided that 'There shall be attached to each Family Court a Counselling Centre to be known as "The Counselling Centre of the Family Court of..." Under Rule 15 there shall be a Principal Counsellor and such number of Counsellors as determined by the Government; in consultation with the High Court. Under Rule 22 the Family Court Judge is bound to direct the parties to consult the specified counsellor for the purpose of counselling. Under Rule 24 while dealing with the counselling procedure it is provided that "the parties shall be bound to consult the counsellor on the date and the time so fixed." Under Rule 25 in case any party does not co-operate with the counselling the Family Court is even entitled to take appropriate action against such defaulting party. Rule 26 reads as follows:

26. Duties and functions of a Counsellor,- (1) Counsellor entrusted with any petition shall assist and advise the parties regarding the settlement of the subject matter of dispute between the parties or any part thereof. The Counsellor shall also help the parties in arriving at reconciliation.

(2) The Counsellor in the discharge of his duties shall be entitled to pay home visits to the homes of any of the parties.

(3) The Counsellor in the discharge of his duties shall be entitled to interview relatives, friends and acquaintances of parties or any of them.

(4) The Counsellor in the discharge of his duties may seek such information as he may deem fit from the employer of any of the parties.

(5) The Counsellor may in the discharge of his duties refer the parties to an expert in any other area such as medicine or psychiatry.

Under Rule 35 "When the parties arrive at a settlement before the Counsellor relating to the dispute or any part thereof, such settlement shall be reduced to writing and shall be signed by the parties and countersigned by the Counsellor. The court shall pronounce a decree or order in terms thereof unless the court considers the terms of the settlement unconscionable or unlawful". Under Section 37 even if a matter is closed before the Family court, the Counsellor is entitled to supervise, guide or assist the reconciled couples.

6. Section 13 of the Hindu Marriage Act, 1955 provides for various grounds for a decree of divorce. Under Section 23 of the Hindu Marriage Act, 1955 the Court is to grant a decree where ground for relief exists. Under Sub-section (2) of Section 23 it is provided that it is the duty of the court first to make an endeavour to bring about reconciliation between the parties. But no such endeavour is necessary where the relief is sought on the grounds provided under Sub-clause (ii) to (vii) of Section 13(1). Section 23 reads as follows:

"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 except in cases where the relief is sought by him on the ground specified in Sub-clause (a), Sub-clause (b)

or Sub-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, and

(b) where the ground of the petition is the ground specified in Clause (i) of Sub-section (1) of Section 13, the petitioner has not in any manner been accessory 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 (bb) when a divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence, and

(c) the petition (not being a petition presented under Section 11) 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 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 of the court in the first instance, in every case where it is possible so to do consistency with the nature and circumstances of the case to make every endeavour to bring about a reconciliation between the parties:

Provided that anything contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in Clause (ii), Clause (iii), Clause (iv), Clause (v), Clause (vi) or Clause (vii) of Sub-section (1) of Section 13.

(3) For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court, as to whether reconciliation can be and has been, effected and the court shall in disposing of the proceeding have due regard to the report.

(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.

Section 13 reads as follows:

13. Divorce.- (1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved 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 (ia) has, after the solemnisation 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 continuously 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 sub-normality 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 venereal 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.

Adultery and cruelty are thus the two areas where possibility for reconciliation is to be explored under the Hindu Marriage Act. The question is, in view of the exclusion of endeavour for reconciliation in respect of the grounds available under Clauses (ii) to (vii) should there be endeavours for reconciliation or settlement by the Family Court.

7. Section 10 of the Family Courts Act has made applicable the provisions of the Code of Civil Procedure to the suits and proceedings before the Family court. Under Section 10(3) the Family Court also is free to evolve its own procedure with a view to arrive at a settlement of the cases. Section 10 reads as follows:

10. Procedure generally.-- (1) Subject to the other provisions of this Act and the Rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings other than the proceedings under Chapter DC of the code of Criminal Procedure, 1973 (2 of 1974) before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a civil court and shall have all the powers of such court.

(2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court.

(3) Nothing in Sub-section (1) or Sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other.

Order XXXII-A was inserted by the C.P.C. Amendment Act 104 of 1976. "The provisions of this Order shall apply to suits or proceedings relating to matters concerning the family", as per Rule 1.

Under Sub-rule (3) to Rule 1 it is also provided that in case there is any special provision or procedure under any special law, to that extent the order will not apply. Order XXXII-A Rule 1(3) reads as follows:

1(3) So much of this Order as relates to a matter provided for by a special law in respect of any suit or proceeding shall not apply to that suit or proceeding.

Under Order XXXII-A Rule 3 it is the duty of a court to make efforts for a settlement. Rule 3 reads as follows:

3. Duty of Court to make efforts for settlement.- (1) In every suit or proceeding to which this Order applied, an endeavour shall be made by the Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject-matter of the suit.

(2) If, an 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 fir to enable attempts to be made to effect such a settlement.

(3) The power conferred by Sub-rule (2) shall be in addition to and not in derogation of, any other power of the Court to adjourn the proceedings.

Recently the Supreme Court had occasion to consider the issue regarding the duty of courts under Order XXXII-A Rule 3 in Jagraj Singh v. Birpal Kaur . It has been held that "Order 32-A Rule 3 CPC requires the court to make efforts for settlement of family disputes. The Hindu Marriage Act, 1955 is a Special Act dealing with the provisions relating to marriages, restitution of conjugal rights and judicial separation as also nullity of marriage and divorce. The approach of a court of law in matrimonial matters is much more constructive, affirmative and productive rather than abstract, theoretical or doctrinaire. Matrimonial matters must be considered by courts with human angle and sensitivity. Delicate issues affecting conjugal relations have to be handled carefully and legal provisions should be construed and interpreted without being oblivious or unmindful of human weaknesses." In Manju Singh v. Ajay Bir Singh the Court went to the extent of even holding that if an endeavour for reconciliation is not made, the order would be illegal. To quote on the principle:

Section 23(2) of the Act gives a direction to the Court that before proceeding to grant any relief under the Act it shall be the duty to endeavour to bring about reconciliation between the parties except in the cases mentioned in the proviso to the sub-section. The intention of the legislature is that an attempt should be made by the Court for reconciliation before proceeding with hearing of the petition. The provision is mandatory and an effort for reconciliation is to be made by the Court 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 filing of 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 deemed appropriate by 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. However, it has to be seen that conciliation is mandatory only in respect of three grounds under the Hindu Marriage Act, namely adultery, cruelty and desertion, which are enumerated under Section 13(1) (i), (i-a) and (i-b). The Delhi Court has taken the view that on grounds of conversion to another religion, renunciation of the word, mental disorder, venereal diseases and leprosy, no conciliation is required since they are expressly excluded under proviso to Section 23(2) of the Act. It has to be noted that there is no discussion as to the impact of the Family Courts Act nor is the issue discussed regarding the impact of the exempted clauses as per proviso" to Section 23(2) by the Apex Court in Jagraj Singh's case (supra). Therefore, the crucial question again is, after the introduction of the Family Courts, Act 1984 is conciliation mandatory in a matrimonial dispute, whatever, be the ground taken for dissolution, divorce or nullity.

9. The Family Courts Act, 1984 has an overriding effect over all other laws, notwithstanding anything inconsistent contained in such laws. The relevant provision, Section 20, reads as follows:

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

It has also to be seen that under Section 9 of the Family Courts Act, there is no such exclusion of endeavours for reconciliation on any ground.

10. The provisions of the Family Courts Act, the Rules framed by the High Court and the State, the amended Code of Civil Procedure would clearly show the role of conciliation for reconciliation/settlement of disputes in family affairs. The primary object is to promote and preserve the sacred union of parties to a marriage. Only if the attempts for reconciliation are not fruitful, the further attempt on agreement on disagreement shall be made by way of settlement. Resolution of the disputes between the parties to a marriage on grounds available under law should be gone into only after the procedure under the Rules is followed through the counsellors to find out the possibility of reconciliation of the parties to the marriage or settlements of their disputes, however grave be the ground for separation. When a man and a woman are called upon to be one, though ideally one would expect them to be one for all purposes, differences of opinion are bound to be there on various grounds. After all, it is a fusion of two personalities. In the event of such bickerings, even if a party to a marriage is entitled to succeed on any of the available grounds under law, the Family Courts shall first make an attempt for reconciliation and if that fails, a further attempt for settlement and thereafter only proceed to the trial. It is one thing to say that a party is entitled to get relief on any of the available grounds under law but it is yet another thing to say that de hors the legal entitlement, reconciliation/settlement ignoring such legal grounds is possible. A settlement in a matrimonial dispute need hot necessarily be based on strict legal grounds but more on what the parties perceive on a just and reasonable settlement bases on mutual concessions. Such a compromise acceptable to the parties need not also coincide with the terms of a legally correct decision. If the law expects that refinement, reconciliation and settlement is to be first attempted, without following such a procedure, the Family Court shall not dispose of the suit or proceedings before it either granting the relief or declining the relief on the entitlement or disentitlement on legal grounds. It is not necessary that by mere conversion the marital tie should be broken. In a secular country like India and a literate State like Kerala where mixed marriage itself is a well accepted course, on the mere ground of conversion to another religion of one of the Hindu parties to a marriage during the subsistence of the marriage, the marital tie need not be broken. The parties can disagree on matters of faith and still lead a happy marital life if they could be convinced that matters of faith should not stand in the way of union of hearts. Thus though under the Hindu Marriage Act, 1955 no endeavour for reconciliation need be made in a petition for divorce on the ground of conversion to another religion, or other grounds excepted under Section 13(1) of the Hindu Marriage Act or on similar or other grounds available under any other law also, after the introduction of the Family Courts Act, 1984, the Family Court is bound to make endeavours for reconciliation and settlement. The requirement is mandatory. That is the conceptual change brought out by the Family Courts Act, which is a special statute.

11. In the instant case the Family Court has not made any efforts for conciliation. On the mere admission of conversion, a decree has been ranted, without making any endeavour for reconciliation and settlement. That is against the spirit and mandate of the provisions under the Family Courts Act, 1984. We set aside the impugned order and remit the matter to the Family court to proceed afresh in the matter in accordance with law.

The Registry shall immediately forward a copy of this judgment to all the Family Courts.

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# DR. A.REKHARANI VERSUS K.C.PRABHU

**Kerala High Court**

**Bench : Hon'ble Mr. Justice Kurian Joseph & Hon'ble Mr. Justice T. R. Ramchandran Nair**

*Dr. A.Rekharani*
*Versus*
*K.C.Prabhu*

**Mat Appeal No. 87 of 2007()**

**Decided on 4 July, 2007**

**Role and Duties of Family Courts- Whether a power of attorney holder is entitled to present a petition for dissolution of marriage by a decree of divorce by mutual consent under Section 13B of the Hindu Marriage Act, 1955 appellant filed O.P.(HMA) No.1470/04 before the Family Court, seeking a decree of divorce under Section 13(1)(i) and (ia) of the Hindu Marriage Act. In the meanwhile, the appellant left for Gulf. However, she executed a power of attorney, appointing herfather as the power of attorney holder to prosecute the case before the Family Court. According to the appellant, O.P.(HMA) No.1470/04 was got dismissed as not pressed on 17.12.2005 and on the same day, a joint petition for dissolution of marriage by mutual consent was filed under Section 13B of the Act. The appellant was represented through the power of attorney holder and the respondent appeared in person. The Family Court took the statements of the appellant's father, the donee of power of attorney, and the respondent-husband on the same day and by order dated 20.12.2005, a decree was passed dissolving the marriage by a decree of divorce by mutual consent.**

**-A general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff. The power of attorney holder of a party can appear only in his personal capacity and cannot appear on behalf of the party in the capacity of that party." Thus the law is well settled that in matters requiring personal knowledge, evidence cannot be adduced through a power of attorney.**

**It needs no further discussion to hold that those are matters requiring personal knowledge and in such matters, the evidence cannot be tendered through the power of attorney older. It is significant to note that in this case the wife herself has stated in the appeal that in the meanwhile the husband and wife met together on many occasions. If that be so, certainly the court lacked jurisdiction to grant the decree as the preconditions are not satisfied. Not only that, under Section 13B of the Act, a petition for dissolution of marriage by a decree of divorce by mutual consent is to be presented by the parties to the marriage and not through the power of attorney holder. They should satisfy the court that as on the date of presentation of the case that they had not been living together as husband and wife for more than one year, that they have not been able to live together and that they have mutually agreed for the dissolution. If after presentation of the petition, during the lie over period the parties have met and lived as husband wife, they are not entitled to the decree for dissolution. The court on motion after the lie over period has to satisfy that the parties had not been living together as husband and wife, at least for one year prior to the presentation of the petition, they are not able to so live together even after the presentation of the petition, and that they have not actually so lived during the lie over period either. The court should also satisfy that the mutuality on consent persisted in both the parties during the lie over period. If one party has change of heart or second thought in the meanwhile, the court has no jurisdiction to grant the decree for dissolution. The endeavour**

**of the court should be as far as possible to sustain and nurture the institution of marriage. The approach made by the Family Court in the instant case is patently erroneous and it is casual too. The inquiry by the Family Court should be with the parties to the marriage, regarding the essential ingredient for a decree of divorce by mutual consent under Section 13B of the Hindu Marriage Act.In the result, the judgment in O.P.(HMA) No.2439/05 on the file of the Family Court, Nedumangad is set aside and the appeal is allowed.**

## JUDGMENT

**Hon'ble Mr. Justice Kurian Joseph**

Whether a power of attorney holder is entitled to present a petition for dissolution of marriage by a decree of divorce by mutual consent under Section 13B of the Hindu Marriage Act, 1955 is the interesting question arising for consideration in this case. The marriage between the appellant and the respondent was duly solemnized on 29.10.2001. After three years, on the grounds of illicit relationship with another person, and cruelty, the appellant filed O.P.(HMA) No.1470/04 before the Family Court, Thiruvananthapuram (later transferred to the Family Court, Nedumangad) seeking a decree of divorce under Section 13(1)(i) and (ia) of the Hindu Marriage Act. In the meanwhile, the appellant left for Gulf. However, she executed a power of attorney, appointing her father as the power of attorney holder to prosecute the case before the Family Court. According to the appellant, O.P.(HMA) No.1470/04 was got dismissed as not pressed on 17.12.2005 and on the same day, a joint petition for dissolution of marriage by mutual consent was filed under Section 13B of the Act. The appellant was represented through the power of attorney holder and the respondent appeared in person. The Family Court took the statements of the appellant's father, the donee of power of attorney, and the respondent-husband on the same day and by order dated 20.12.2005, a decree was passed dissolving the marriage by a decree of divorce by mutual consent. At the risk of redundancy of the factual matrix, in order to appreciate the stand taken by the Family Court, it is necessary to extract two paragraphs from the judgment under appeal, which read as follows :-

> "4. The statements of both the Power of Attorney Holder of the 1st pet itioner and the 2nd pe titioner were recorded. Their statements show that petitioners 1 and 2 got legally married on 29.10.2001 and thereafter they resided together as husband and wife and that due to incompatibility of temperaments they are residing separately from 16.7.2004 onwards. The statements also show that the petitioners have decided to dissolve their marriage by mutual consent and that their decision is not vitiated by fraud, collusion, undue influence or mis- representation. It is also clear that the marital tie is irretrievably broken and it is practically and emotionally dead and that there is no chance for any re-union. Hence the statutory requirement of waiting for a period of 6 months is waived. No children were born in the wedlock. All financial matters between the parties are settled.
>
> 5. The marriage has been broken down and the parties can no longer live together as husband and wife. In the circumstances the life of the spouses shall not be allowed to put in perpetual agony and despair. Hence it may be better to bring the marriage to an end. Therefore, the O.P. is allowed." (emphasis supplied)

2. According to the appellant-wife, she met the respondent on several occasions at Thiruvananthapuram in the meanwhile and she has not given consent for a divorce. It is also contended that the procedural requirements have not been satisfied. Hence the appeal.

3. Section 13B of the Hindu Marriage Act, 1955 reads as follows :- "

> 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 solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnised 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."

The court gets jurisdiction to consider a petition under Section 13B of the Act for divorce by mutual consent, only if a petition for that purpose is presented to the court by both the parties to the marriage together. The parties to the marriage referred to in Section 13B are the husband and wife only. They have to present the petition themselves for dissolution of their marriage by a decree of divorce by mutual consent to the court together. The grounds available to the parties on such a petition are; (1) the husband and wife have been living separately for a period of one year or more and (2) they have not been able to live together and that they have mutually agreed that the marriage should be dissolved. If the petition is not withdrawn by the parties within 18 months, they may move the court after six months of the presentation of the petition, but before 18 months. Thereafter, the court has to conduct appropriate inquiry to enter a satisfaction that consent was not obtained by fraud and that there is no collusion between the parties. The period of minimum six months' time is given in divorce by mutual consent, to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. The mutual consent should continue till the divorce decree is passed. The court should be satisfied about the bona fides and consent of the parties. If the court is held to have the power to make a decree solely based on the initial petition, it negates the whole idea of mutuality, as held by the Supreme Court in Sureshta Devi v. Om Prakash (AIR 1992 SC 1904). There has to be a lie over period, a transitional period; the purpose of such period is to give time and opportunity to the parties to have sound and mature reflections on their move.

4. Whether such a petition can be presented through the power of attorney holder of the party to a marriage and whether the court can enter a satisfaction regarding the areas required for a decree of divorce by mutual consent is the further question to be considered.

5. The Supreme Court in Janki Vashdeo v. Indusind Bank [2005(2) KLT 265 (SC)] also has reiterated that a power of attorney can give evidence only in respect of acts done by him in the exercise of powers granted by the instrument, but he cannot depose for the principal in respect of the matter on which the principal alone can have personal knowledge. It was also held therein that the power of attorney ..."cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined." A Division Bench of this Court in Ummer Farooque v. Naseema (2005(4) KLT 565), on a question as to which sect a party to a marriage belongs to, held that "Power of Attorney can give evidence only in respect of acts done by him in the exercise of powers granted by the instrument, but he cannot depose for the principal in respect of the matter on which the principal alone can have personal knowledge." In Ratheesh Kumar v. Jithendra Kumar (2005(2) KLT 669) in the matter arising under the Buildings (Lease and Rent Control) Act, 1965, another Division Bench of this Court held that "A general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff. The power of attorney holder of a party can appear only in his personal capacity and cannot appear on behalf of the party in the capacity of that party." Thus the law is well settled that in matters requiring personal knowledge, evidence cannot be adduced through a power of attorney.

6. The extracted portions from the judgment under appeal would show that the power of attorney holder of the appellant wife has deposed regarding the emotional incompatibility of temperaments between the wife and the husband. The power of attorney holder has also further deposed that the wife and husband have decided to dissolve their marriage by mutual consent and that the decision is not vitiated by fraud,

collusion, undue influence or misrepresentation. Still further, it is deposed that the marital tie between the wife and husband is practically and emotionally dead and that there is no chance for union. It needs no further discussion to hold that those are matters requiring personal knowledge and in such matters, the evidence cannot be tendered through the power of attorney holder. It is significant to note that in this case the wife herself has stated in the appeal that in the meanwhile the husband and wife met together on many occasions. If that be so, certainly the court lacked jurisdiction to grant the decree as the pre-conditions are not satisfied. Not only that, under Section 13B of the Act, a petition for dissolution of marriage by a decree of divorce by mutual consent is to be presented by the parties to the marriage and not through the power of attorney holder. They should satisfy the court that as on the date of presentation of the case that they had not been living together as husband and wife for more than one year, that they have not been able to live together and that they have mutually agreed for the dissolution. If after presentation of the petition, during the lie over period the parties have met and lived as husband wife, they are not entitled to the decree for dissolution. The court on motion after the lie over period has to satisfy that the parties had not been living together as husband and wife, at least for one year prior to the presentation of the petition, they are not able to so live together even after the presentation of the petition, and that they have not actually so lived during the lie over period either. The court should also satisfy that the mutuality on consent persisted in both the parties during the lie over period. If one party has change of heart or second thought in the meanwhile, the court has no jurisdiction to grant the decree for dissolution. The endeavour of the court should be as far as possible to sustain and nurture the institution of marriage. The approach made by the Family Court in the instant case is patently erroneous and it is casual too. The inquiry by the Family Court should be with the parties to the marriage, regarding the essential ingredient for a decree of divorce by mutual consent under Section 13B of the Hindu Marriage Act.

In the result, the judgment in O.P.(HMA) No.2439/05 on the file of the Family Court, Nedumangad is set aside and the appeal is allowed.

**KURIAN JOSEPH, JUDGE.**

**T.R.RAMACHANDRAN NAIR, JUDGE.**

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# BHASHYAM RAMESH @ RAJAGOPALAN VERSUS R.SAROJA @ K.K.SAROJA

**Madras High Court**

**Bench : Hon'ble Mrs. Justice R. Banumathi and Hon'ble Mrs. Justice S. Vimala**

*Bhashyam Ramesh @ Rajagopalan*
*Versus*
*R.Saroja @ K.K.Saroja*

**C.M.A.No.929 of 2002 against O.S.No.38 of 2000**

**Decided on 24 February, 2012**

**Family court jurisdiction- decree of Divorce passed by Superior Court of California, County San Diego, Family Division, filed by the husband/appellant herein- The wife filed the suit before the 1st Additional Principal Family Court, Chennai, for a declaration that the decree of divorce passed by the Superior Court of California is abinitio void, inoperative and not binding on the plaintiff, which came to be decreed.- the Family Court decreed the suit granting the prayer of the plaintiff.**

**Whether the Family Court has got jurisdiction to entertain the suit- -- Whether the decree of divorce passed by the Foreign Court is legal and valid and binding upon the wife- that the Superior Court of California is not a court of competent jurisdiction to decide the matrimonial dispute of the appellant/husband as they have married under the Hindu Marriage Act and the marriage having been taken place in India. Therefore, the finding of the Family Court that order passed by the Foreign Court is not binding upon the wife is correct. --the suit filed challenging judgment passed by the Superior Court of California by the wife is perfectly maintainable. The order passed by the Family Court is in accordance with well settled principles and the materials on records. Therefore, the appeal has no merits and is liable to be dismissed.**

## JUDGMENT

**Hon'ble Mr. Justice S.Vimala**

The short lived marriage which got solemnized on 24.6.1999 was dissolved on 17.4.2000 by a decree passed by Superior Court of California, County San Diego, Family Division, in Case No.D.454571 ABC, filed by the husband/appellant herein.

1.1. The wife filed the suit before the 1st Additional Principal Family Court, Chennai, for a declaration that the decree of divorce passed by the Superior Court of California is abinitio void, inoperative and not binding on the plaintiff, which came to be decreed. The said judgment passed by the 1st Additional Principal Family Court, decreeing the suit, is under challenge in this appeal.

2. Brief facts:-

The marriage between the appellant and the respondent took place on 24.6.1999 at Sholingapuram, Vellore District as per Hindu Rites and Customs. They started living as husband and wife at Virugambakkam at Chennai. The appellant left the respondent on 12.7.1999 for United States, with promise to take her soon. After going to U.S.A. the communication and the contact between the sources came to an end, as the husband became mute.

2.1. The plaintiff/wife filed a petition for Restitution of Conjugal Rights in O.P.No.383 of 2000. The plaintiff received the summons from the Superior Court of California on 1.10.99. She expressed her desire to contest her proceedings by sending the defence statement in writing. She also prayed for waiver of payment of fee. Thereafter, a decree of divorce was passed by the foreign Court on 17.4.2000.

2.2. Contending that the decree of divorce passed on 17.4.2000 by the Superior Court of California is not binding upon her, the wife filed a suit for declaration to that effect. In the suit, the appellant remained exparte. The main contention of the respondent/plaintiff before the Family Court was that decree for dissolution of marriage made by a foreign Court cannot be regarded as a binding decree on the parties in India. After perusing the oral and documentary evidence, the Family Court has decreed the suit granting the prayer of the plaintiff.

3. The husband has challenged the judgment of the Family Court on the following contentions:-

(i) The wife/respondent after receiving the summons from the Superior Court of California sent her response to the petition and contested the matter by raising various defences. Considering the defences raised, the Superior Court has passed an order on merits. The wife having submitted herself to the jurisdiction of the Foreign Court is now estopped from questioning the jurisdiction of the Foreign Court.

(ii) The Family Court has no jurisdiction and power to entertain the suit.

(iii) Even though the husband remained exparte, there is a duty caused upon the Family Court to see whether the relief sought for is within the scope, ambit and jurisdiction of the Court.

(iv) The judgment of the Family Court did not take into account the participation of the wife before the Superior Court of California.

(v) The respondent/wife did not dispute the jurisdiction of Superior Court of California. Therefore, the suit challenging jurisdiction of Superior Court of California is not maintainable.

4. In view of the contentions raised in the grounds of appeal the following points arises for determination:-

(i) Whether the suit filed by the wife/respondent before the Family Court in O.S.No.38 of 2000 is maintainable?

(ii) Whether the Family Court has got jurisdiction to entertain the suit?

(iii) Whether the conduct of the wife in sending response to the Superior Court of California would amount to submitting herself to the jurisdiction of Foreign Court? If so, the wife having submitted herself to the jurisdiction of Foreign Court is whether estopped from disputing the legality of the order passed by the Foreign Court?

(iv) Whether the decree of divorce passed by the Foreign Court is legal and valid and binding upon the wife ?

5. The first contention of the learned counsel for the appellant is that the Family Court cannot grant a decree as prayed for in the petition, just because the husband remained exparte and has got an independent duty to examine the validity and the legality of the issues raised irrespective of the stand taken by the parties to the case.

5.1. This contention is correct provided the order of the Lower Court is without consideration of evidence and Law. But, in this case, the Family Court while passing the judgment has not passed a mechanical order, just because the respondent has remained exparte. The Family Court has not only considered the evidence of the wife and also the judgment reported in 1955 (a) Law Weekly 53 Dr. David C. Arumainayagam Vs. Geetha C. Arumainayagam by the Madras High

Court wherein, it has been held that a decree for dissolution of marriage made by a foreign Court cannot be regarded as binding on the parties in India. The legal proposition has been correctly applied. Therefore, the contention that the Family Court has mechanically passed the order is not correct and therefore, the Judgment of the Family Court is correct.

6. The second contention of the learned counsel for appellant is that the Family Courts in India have no competency and jurisdiction to declare the Judgment of a Foreign Court as null and void. But, the contention of the learned counsel for the respondent is other way round, and it is his contention that it is not the Family Court which lacks jurisdiction and competency but, it is only the Foreign Court which lacks jurisdiction and competency to pass a decree for divorce.

6.1. In order to appreciate the contentions raised on both sides, it is appropriate to consider the decision reported in Ruchi Majoo Vs. Sanjeev Majoo reported in (2011) 6 SCC 479 wherein the Hon'ble Supreme Court has pointed out, (though in the context of the case of child custody) that as no system of private international law exists that can claim universal recognition on this issue, Indian Courts have to decide the issue regarding the validity of the decree passed by foreign court in accordance with Indian law. The relevant portion of the observation of the Hon'ble Supreme Court is extracted hereunder:

"Recognition of decrees and orders passed by foreign courts remains an eternal dilemma inasmuch as whenever called upon to do so, courts in this country are bound to determine the validity of such decrees and orders keeping in view the provisions of Section 13 CPC as amended by the Amendment Acts of 1999 and 2002. ....."

"Simply because a foreign court has taken a particular view on any aspect concerning the welfare of the minor is not enough for the courts in this country to shut out an independent consideration of the matter. Objectivity and not abject surrender is the mantra in such cases. Judicial pronouncements on the subject are not on virgin ground. Since no system of private international law exists that can claim universal recognition on this issue, Indian Courts have to decide the issue regarding the validity of the decree in accordance with Indian law. Comity of courts simply demands consideration of any such order issued by foreign courts and not necessarily their enforcement." (emphasis supplied) 6.2. The learned counsel for the respondent has relied upon the following rulings in order to support the contention that the Foreign Court has no jurisdiction to pass a decree for divorce when the marriage has taken place in India under the provision of Hindu Marriage Act.

a) 2010 (4) CTC 822 (R.Sridharan Vs.The presiding Officer, Principal Family Court, Chennai-600 106 and another) DIn Narasimha Rao's case, the Supreme Court categorically stated that marriages performed under the Hindu Marriage Act can be dissolved only under the said Act. Naturally, the provisions of the Hindu Marriage Act with regard to jurisdiction would also come into play. Section 19 clearly gives jurisdiction to the Court to deal with Matrimonial proceedings initiated by the wife, if she is residing within the jurisdiction of the said Court. There is no question of the Second Respondent initiating Divorce proceedings before the Court at United States of America invoking the provisions of the Hindu Marriage Act. The moment the Appellant has married the Second Respondent, he has subjected himself to the jurisdiction of the Court designated to deal with matrimonial disputes under Section 19 of the Hindu Marriage Act.DApplying the ratio to the facts of this case, it is clear that the moment the appellant/husband herein has married the respondent wife, he has subjected himself to the jurisdiction of the Courts designated (Family Courts), to deal with matrimonial disputes under Section 19 of the Hindu Marriage Act. There is no question of the husband/appellant initiating divorce proceedings before the Superior Court of California as the husband could not have initiated the proceedings, invoking the provisions of Hindu Marriage Act. The marriage between the appellant and respondent herein could be resolved

only on the grounds set out under Section 13 of the Hindu Marriage Act. It is not the case of the appellant/husband that application for divorce could be made before the Superior Court of California on the grounds mentioned in the Hindu Marriage Act. Therefore, as contended by the learned counsel for the respondent, the Foreign Court i.e. The Superior Court of California which is not a Court of competent jurisdiction and only the Family Court at Chennai which has complete competency and jurisdiction.

b) In 2010 (5) CTC 858 (Deepalakshmi Vs.K.Murugesh) a Single Judge of this Court has held as under:-

"Thus, it is clear that only that Court will be a Court of competent jurisdiction which the Act or the law under which the parties are married recognises as a Court of competent jurisdiction to entertain the matrimonial dispute. Any other Court should be held to be a Court without jurisdiction unless both parties voluntarily and unconditionally subject themselves to the jurisdiction of that Court. The marriages which take place in this country can only be under either the customary or the statutory law in force in this country. Hence, the only law that can be applicable to the matrimonial dispute is the one under which the parties are married, and no other law....DTherefore, the decisions quoted above would clearly go to show that the Superior Court of California is not a court of competent jurisdiction to decide the matrimonial dispute of the appellant/husband as they have married under the Hindu Marriage Act and the marriage having been taken place in India. Therefore, the finding of the Family Court that order passed by the Foreign Court is not binding upon the wife is correct.

7. It is an admitted case of both parties that the wife received summons from the superior Court of California and has sent written response it. According to the learned counsel for the appellant the sending of written response amounts to submitting herself to the jurisdiction of Superior Court of California and therefore, the suit filed by wife challenging the judgment of the Superior Court of California is not maintainable.

7.1. Therefore, the question falling for consideration is whether the conduct of the wife in sending response to the Superior Court of California would amount to submitting herself to the jurisdiction of Foreign Court? If so, the wife having submitted herself to the jurisdiction of Foreign Court is estopped from disputing the legality of the order passed by the Foreign Court is the issue to be decided.

7.2. The learned counsel for the husband has relied upon the decision reported in Supreme Court Reports (1963) (Shaligram Vs. Daulat Ram), wherein it has been held as follows:-

That a person who appeared in obedience to the process of a foreign Court and applied for leave to defend the suit without challenging the jurisdiction of the Court must be held to have voluntarily submitted to the jurisdiction of such Court and therefore this decree did not suffer from any defect which a foreign decree would suffer without such submission.D(underlining added)

7.3. From the facts and circumstances available in this case whether the conduct of the wife in submitting a written representation in response to the summons issued can be construed as amounting to voluntarily submitting herself to the jurisdiction of the Superior Court of California is to be considered. It is necessary to consider the content of the written representation sent by the wife.

7.4. By perusal of the response, it is seen the wife has raised very pertinent issue regarding (a) jurisdiction of the Foreign Court (b) maintainability of the petition for divorce within one year of the marriage (c) maintainability of the petition filed by the husband seeking divorce in a foreign court which lacks jurisdiction, when the wife has initiated a proceeding for Restitution of Conjugal Right in a competent court and (d) inability of her to submit herself to the jurisdiction of the superior court of California.

The details are as extracted below: (a) Issue regarding jurisdiction:

" Both spouses are admittedly Hindus and born at Tamilnadu and brought up at Tamilnadu and their marriage was solemnized in Tamilnadu, India, under the Hindu rites and Customs. So, if at all the parties wanted to seek any remedy that should be under the Courts at Tamilnadu and under the HINDU MARRIAGE ACT."

(b) The next issue raised by the wife is with reference to maintainability of petition for divorce under Section 14 of the Hindu Marriage Act under which no petition for divorce could be presented within one year of the marriage.

"As per the Hindu Marriage Act, no spouse is entitled to terminate the marriage within one year from the date of its solemnisation. But unfortunately, the petitioner herein seeks dissolution of marriage, within one year, that Too from the Superior Court of California."

(c) Expressing her anguish that due to distance and financial constraints and lack of legal knowledge that she will not be able to come to California to contest the case she would state thus:-

Further, the respondent is a poor helpless lady and she is unable to meet out her basic needs without the support from her kins. Under such circumstances, how is it possible to the respondent to come over to California and contest the case.

The respondent did not know the existing law at California and the procedure is being adopted at the Superior Court California, Family Division. As a law abiding citizen she is hereby communicated her response to the Hon'ble Court's notice.

If, the petitioner is a citizen of California, and he is entitled to file a petition for Dissolution of Marriage at California he should reveal the same to the respondent herein before the solemnisation of marriage. Without disclosing such material things to a poor woman and married her and deserted her is not only SIN but also amount to cheating.

(d) After expressing the social stigma faced by the Indian Women, as a divorcee, the respondent has conveyed the message that she has already moved the Indian Courts for restitution of conjugal rights. It is stated as follows:-

The respondent further submits that, she has filed a petition under Section 9 of the Hindu Marriage Act, for Restitution of Conjugal Right before the 1 Additional family Court at Chennai, Tamilnadu, India, in Hindu Matrimonial Original Petition No.383 of 2000 and the same is posted to 4th May 2000 for the appearance of the petitioner herein (let, the petitioner herein may treat this as Notice to him for his appearance in H.M.O.P.383 of 2000 on 4th May 2000)D7.5. Whether the contents of the communication/response sent by the Wife can be construed as amounting to submitting herself to the jurisdiction of California Court is the issue to be decided. The meaning of the word "submit" as downloaded from the site www.thefree dictionary.com is as follows:

"1. To yield or surrender (oneself) to the will or authority of another.

2. To subject to a condition or process.

3. To commit (something) to the consideration or judgment of another.

4. To offer as a proposition or contention: I submit that the terms are entirely unreasonable."

If the written submissions are considered then it would be evident that the wife has offered a proposition challenging the very jurisdiction of the court for consideration. It will not amount to submitting herself to the jurisdiction of the court.

7.6. What is crucial is that the wife has challenged jurisdiction of the Foreign Courts. Only, if a party applies for leave to participate in the proceedings without challenging the jurisdiction one can infer that the party has submitted to the jurisdiction of the Court. But, in this case, the wife on receipt of summons has challenged the jurisdiction of the Foreign Court. While so challenging the wife has categorically stated that due to financial and legal constraints her access to justice has been denied. The contents of written submissions made by the wife to the Superior Court of California itself would clearly go to show that the respondent/wife neither wanted to participate in the proceedings nor subjected herself to the jurisdiction of the Foreign Court, either voluntarily or involuntarily. Under such circumstances, the contention that she has submitted herself to the jurisdiction of the Foreign Court cannot be accepted.

8. The issues discussed above will go to show that the suit filed challenging judgment passed by the Superior Court of California by the wife is perfectly maintainable. The order passed by the Family Court is in accordance with well settled principles and the materials on records. Therefore, the appeal has no merits and is liable to be dismissed.

9. In the result, the appeal filed by the appellant/husband is dismissed with costs. The judgment and decree passed by the 1st Additional Family Court is confirmed.

1. I Additional Family Court, Chennai.

2. The Section Officer, V.R. Section High Court, Madras

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# ANITHA ALFRED VERSUS K.ALFRED

**Madras High Court**

**Bench : Hon'ble Mrs. Justice R. Banumathi and Hon'ble Mr. Justice R. Subbiah**

*Anitha Alfred*
*Versus*
*K.Alfred*

**Civil Miscellaneous Appeal No.1520 of 2011**

**Decided on 10 August, 2012**

**Divorce- Section 19(2) of Family Courts Act --appellant is said to have made an endorsement in the divorce petition (I.D.O.P.No.3962 of 2009) filed by the respondent that "I submit to decree". Thereafter, the divorce petition in I.D.O.P.No.3962 of 2009 was allowed on the ground that the averments in the petition stands uncontroverted by the appellan—Appeal filled on the ground that appellant was misled to make such an endorsement in the petition and she never intended to submit to decree nor compromised the matter and in the absence of any counsel or any legal aid obtained by her, appellant made the said endorsement in I.D.O.P.No.3962 of 2009 and the same cannot be construed as compromise nor does it amount to "uncontroverting the allegations"----**

**The appellant only made an endorsement that "I submit to decree". There was no compromise petition filed by either parties reducing the compromise in to writing. There is nothing to show that appellant was asked whether she is voluntarily and willingly compromising the matter. In the absence of any such materials or compromise memo by the parties, the endorsement made by the appellant in I.D.O.P.No.3962 of 2009 that "I submit to decree" cannot be construed as the decree or order passed by the Family Court with the consent of the parties, so as to bar appeal under Section 19(2) of Family Courts Act.-- In our considered view, the endorsement made in I.D.O.P.No.3962 of 2009 cannot be construed as a decree or order passed with the consent of the parties. In the light of serious allegations against the appellant, she has to be given an opportunity to put forth her case. 18. For the foregoing reasons, the order in I.D.O.P.No.3962 of 2009 on the file of I Additional Principal Judge, Family Court, Chennai is set aside and this appeal is allowed. I.D.O.P.No.3962 of 2009 is ordered to be restored on file. I.D.O.P.No.3962 of 2009 is remitted back to the Family Court, Chennai.**

## JUDGMENT

**Hon'ble Mrs. Justice R. Banumathi**

This appeal arises out of the order in I.D.O.P.No.3962 of 2009 (01.8.2010) allowing the divorce petition filed by the respondent-husband and dissolving the marriage between the appellant-wife and the respondent-husband solemnized on 10.07.1989.

2. Brief facts are:-

Appellant and the respondent got married on 10.7.1989. The marriage was love marriage and appellant-wife converted into Christianity before the marriage. Out of the wedlock, a daughter by name Darren and son by name Steen Jack were born on 13.07.1992 and 29.11.1996 respectively. Respondent got the job as seamen. Out of the earnings, Respondent is said to have purchased a Flat at New No.34/2 (Old No.109/2), East Vanniyar street, Best Apartments, K.K.Nagar (West), Chennai-78. In April, 2006, the respondent was rendered jobless and he had come back from his employment of seamen. Thereafter,

differences arose between the parties and both the appellant and the respondent were living in the house at New No.34/2, (Old No.109/2), East Vanniar Street,

Best Apartment, K.K.Nagar (West), Chennai-78. There are allegations and counter allegations by both appellant as well as the respondent. Respondent issued a legal notice to the appellant on 13.11.2006 seeking divorce. Since then there were number of proceedings Dcomplaint lodged by the appellant under Tamil Nadu Prohibition of Women Harassment Act (Crime No.16 of 2007 on the file of T14, Mangadu Police Station, Chennai-101); maintenance proceedings (M.C.No.79 of 2007 on the file of I Additional Family Court, Chennai); and civil suit in respect of the possession of the Flat at New No.34/2 (Old No.109/2), East Vanniyar street, Best Apartments, K.K.Nagar (West), Chennai-78 (O.S.No.1026 of 2007 on the file of III Assistant Judge, City Civil Court, Chennai) and also another proceedings under Domestic Violence Act (C.C.No.6969 of 2007, on the file of XXIII Metropolitan Magistrate Court, Saidapet, Chennai).

3. In these circumstances, appellant filed petition for divorce in F.C.O.P.No.3839 of 2009 on the ground of cruelty under Section 10 (1)(x) of Indian Divorce Act. Respondent also filed I.D.O.P.No.3962 of 2009 under Section 10(1)(x)(ix) read with Section 14 of Indian Divorce Act seeking divorce.

4. Resisting the divorce petition filed by the respondent [I.D.O.P.No.3962 of 2009], appellant filed counter denying the allegations. She has alleged that respondent compelled her to sign in the Deed of divorce, in order to marry some other lady which she refused. Appellant had also referred the criminal case and also maintenance proceedings and the criminal proceedings pending under Domestic Violence Act in C.C.No.6769 of 2007. Filing a detailed counter, she strongly resisted the petition for divorce filed by the respondent-husband.

5. In the divorce petition [F.C.O.P.No.3839 of 2010) filed by the appellant, on 16.7.2010, appellant made an endorsement withdrawing the petition. In view of the endorsement, the said petition (F.C.O.P.No.3839 of 2010) was dismissed as withdrawn. On the same day (16.7.2010), appellant is said to have made an endorsement in the divorce petition (I.D.O.P.No.3962 of 2009) filed by the respondent that "I submit to decree". Thereafter, the divorce petition in I.D.O.P.No.3962 of 2009 was posted for orders on 01.8.2010. On 01.8.2010, I.D.O.P.No.3962 of 2009 was allowed on the ground that the averments in the petition stands uncontroverted by the appellant.

6. Mr.N.F.J.Ponnudurai, learned counsel for appellant contended that appellant was misled to make such an endorsement in the petition and she never intended to submit to decree nor compromised the matter. It was further submitted that in the absence of any counsel or any legal aid obtained by her, appellant made the said endorsement in I.D.O.P.No.3962 of 2009 and the same cannot be construed as compromise nor does it amount to "uncontroverting the allegations". It was further submitted that if the matter was treated as one of compromise, the order in I.D.O.P.No.3962 of 2009 would have been passed on the same day, but the same was adjourned to 01.8.2010. Drawing our attention to the order dated 01.8.2010, it was submitted that the learned trial judge erred in saying that the allegations in the petition remain uncontroverted.

7. Drawing our attention to the various proceedings, Mr.K.Kannan, learned counsel for respondent submitted that respondent-husband was subjected to harassment by filing number of proceedings viz., criminal proceedings, proceedings under Domestic Violence Act, civil suit and subjected the respondent to harassment and that the appellant does not want to put an end to the proceedings so instituted and she wants to pursue further. It was further submitted that appellant having made an endorsement in I.D.O.P.No.3962 of 2009 that "I submit to decree", it is not open to her to resile from the same. Learned counsel would further submit that the order in I.D.O.P.No.3962 of 2009 dated 01.8.2010 is by consent as per Section 19(2) of Family Courts Act, 1984 and no appeal shall lie from a decree or order passed by the Family Court with the consent of the parties and the order in I.D.O.P.No.3962 of 2009 dated 01.8.2010 being passed by consent, the appeal is not maintainable.

8. We have carefully considered the submissions and perused the materials on record. We have also heard the counsels appearing for the appellant-wife and the respondent-husband.

9. Appellant-wife filed F.C.O.P.No.3839 of 2009 under Section 10(1)(x) of Indian Divorce Act seeking divorce. On 16.7.2010, in F.C.O.P.No.3839 of 2009, appellant made an endorsement that "she is withdrawing F.C.O.P.No.3839 of 2009 and the same may be dismissed as withdrawn'. In view of the endorsement made by the appellant, on the same day i.e. on 16.7.2010, F.C.O.P.No.3839 of 2009 was dismissed as withdrawn. According to appellant, her decision to withdraw F.C.O.P.No.3839 of 2009 was voluntary and the same was in order to better bringing up her children. On the same day on 16.7.2010, appellant also made an endorsement in I.D.O.P.No.3962 of 2009 that "I submit to decree" and the order in I.D.O.P.No.3962 of 2009 dissolving the marriage between the appellant and respondent was passed on 01.8.2010. According to the appellant, the endorsement "I submit to decree" was not voluntary and that it was forced upon by the respondent as well as by the Court. Appellant contends that she did not have any legal assistance and if she was explained about the legal implications, she would have written in clear terms as "I consent to divorce" and she would not have made an endorsement as 'I submit to decree'.

10. The point now falling for consideration is whether the appellant actually intended to submit to decree and whether the order passed by the Court on 01.8.2010 in I.D.O.P.No.3962 of 2009 could be construed as "decree or order passed by the Family Court with consent of parties".

11. The impugned order in I.D.O.P.No.3962 of 2009 dated 01.8.2010 reads as under:-

"4. From the affidavit as well as documents the petitioner has proved the averments in the petition. The averments in the petition stand uncontroverted by the respondent. Therefore, the petitioner is entitled for divorce on the ground of cruelty and desertion.

5. In the result, this petition is allowed and the marriage solemnized between the petitioner and the respondent on 10.7.1989 at Victorious Cross Church, Ashok Nagar, Chennai is dissolved by granting decree of divorce on the ground of cruelty and desertion. No costs."

12. In the above order, it is stated that the averments in the petition stands uncontroverted by the appellant-wife. Trial Court was not right in saying that the averments in the petition stand uncontroverted. As pointed out earlier, appellant-wife filed the counter referring to various proceedings and also vehemently opposing the allegations made in the petition in I.D.O.P.No.3962 of 2009. When the appellant had filed a detailed counter vehemently denying the allegations in the petition, the learned trial judge was not right in saying that the averments in the petition remain uncontroverted.

13. Contention of appellant is that the endorsement in the petition "I submit to decree" was not voluntary. By keeping in view the conduct of the parties and various proceedings, in our considered view the said contention of the appellant is fortified. Let us now briefly refer to various proceedings instituted by the parties in particular the appellant. After the differences arose between the parties, alleging that the respondent-husband had demanded dowry and that he had also harassed her, appellant lodged a criminal complaint before the Commissioner of Police. Based on which, a case was registered in Crime No.16 of 2007 under Section 498(A) IPC read with Section 4 of Tamil Nadu Prohibition of Women Harassment Act on the file of T-14, Mangadu Police Station and subsequently, charge sheet was filed in C.C.No.115 of 2007 on the file of Judicial Magistrate, Tambaram. Later the same was transferred to the District Munsif-cum-Judicial Magistrate, Sriperumbudur and re-numbered in C.C.No.325 of 2008 and the trial is pending.

14. The appellant is alleged to have gone to the respondent's rented residence at Kerugambakkam, Chennai-101. Alleging that the appellant-wife had committed theft in the respondent's residence at Kerugambakkam, the respondent-husband lodged a police complaint in T-14 Mangadu Police Station. Since the police did not take any action, the respondent had filed a direction petition in Crl.O.P.No.6936 of 2007 dated 14.03.2007 directing the Police to register the case. Police registered the case against

the appellant in Crime No.330 of 2007 for theft and the said First Information Report was closed in three days. Respondent filed further investigation petition before the District Munsif-cum-Judicial Magistrate, Sriperumbudur and the same was dismissed on 05.03.2010. Against which the respondent filed Crl.R.C.No.1231 of 2010 before the Principal Sessions Court, Kancheepuram and the same is also said to be pending.

15. Appellant also filed Maintenance Case before the I Additional Family Court in M.C.No.79 of 2007 and the same was dismissed for default on 26.02.2008. Stating that the respondent is trying to dispossess her from New Door No.34/2 (Old No.109/2), East Vanniar Street, Best Apartment, K.K.Nagar (West), Chennai-78, appellant also filed a civil suit in O.S.No.1026 of 2007 for permanent injunction and by the judgment dated 14.6.2007, the said suit was decreed. Alleging that the respondent is continually violating appellant's right and threatened her, appellant filed petition under Sections 18,19,20 and 21 of Domestic Violence Act before XXIII Metropolitan Magistrate, Saidapet, Chennai. By the order dated 12.01.2009, the said petition was allowed. The XXIII Metropolitan Magistrate, Saidapet, Chennai directed the respondent to allot kitchen and one bed room to the appellant and also directed the respondent to pay maintenance of Rs.500/- each per month to each of the two children i.e. Rs.1000/- per month.

16. When the parties are entangled in various litigations and are posing strict resistance to the litigations filed by them, it is highly improbable that appellant would have made an endorsement in I.D.O.P.No.3962 of 2009 that "I submit to decree". This is all the more so, when the respondent has made a serious allegations against the appellant in the petition in I.D.O.P.No.3962 of 2009. When the respondent had not withdrawn those allegations, it is highly improbable that appellant would have voluntarily submitted to decree in I.D.O.P.No.3962 of 2009.

17. Learned counsel for respondent mainly contended that in view of the endorsement made and the decree passed by the Court, as per Section 19(2) of Family Courts Act, no appeal shall lie and the same is to be construed as the order passed with the consent of the parties and therefore, as per Section 19(2) of the Act, no appeal shall lie from the order passed by the Family Court with the consent of the parties. The appellant only made an endorsement that "I submit to decree". There was no compromise petition filed by either parties reducing the compromise in to writing. There is nothing to show that appellant was asked whether she is voluntarily and willingly compromising the matter. In the absence of any such materials or compromise memo by the parties, the endorsement made by the appellant in I.D.O.P.No.3962 of 2009 that "I submit to decree" cannot be construed as the decree or order passed by the Family Court with the consent of the parties, so as to bar appeal under Section 19(2) of Family Courts Act. In our considered view, the endorsement made in I.D.O.P.No.3962 of 2009 cannot be construed as a decree or order passed with the consent of the parties. In the light of serious allegations against the appellant, she has to be given an opportunity to put forth her case.

18. For the foregoing reasons, the order in I.D.O.P.No.3962 of 2009 on the file of I Additional Principal Judge, Family Court, Chennai is set aside and this appeal is allowed. I.D.O.P.No.3962 of 2009 is ordered to be restored on file. I.D.O.P.No.3962 of 2009 is remitted back to the Family Court, Chennai. The Family Court, Chennai is directed to take up I.D.O.P.No.3962 of 2009 and afford sufficient opportunity to the appellant as well as the respondent and proceed with the matter afresh in accordance with law.

Consequently, connected M.P. is closed. No costs.

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# SELVI VIJAYALAKSHMI VERSUS A.SANKARAN

**Madras High Court**

**Bench : Hon'ble Dr. Justice P. Devadass**

*Selvi Vijayalakshmi .. Petitioner/2nd Respondent*
*Versus*
*1. A.Sankaran, 2. Sumathy .. Respondents/Petitioner & Respondent No.1*

**C.R.P.(PD) No.3796 of 2012**

**&**

**M.P.No.1 of 2012**

**Decided on 24 March, 2017**

**Duties of the Family Courts-DNA Test-1st respondent married the 2nd respondent on 9.2.1981 according to Hindu rites and customs. On 13.4.86, a daughter (revision petitioner) was born. Difference of opinion arose between the respondents (spouses). 1st respondent/husband alleged that the 2nd respondent/wife had crossed the fence. 2nd respondent filed counter denouncing his allegation. 1st respondent filed I.A.No.32 of 2008 that as he has doubted the very birth of the revision petitioner to him, he wanted to subject his wife, and the revision petitioner to undergo DNA test, in other words, paternity test.**

**The Sub Court, Arni allowed the petition and ordered the conducting of DNA test. It necessarily involves the taking of blood samples from the respondents and the revision petitioner----Revision filled against the Impuned order-**

**We have seen the contours of Section 112 of the Evidence Act. Revision petitioner was born many years ago, at a time when the respondents/spouses led their happy married life. Onus is upon the 1st respondent to show that he had no access to the revision petitioner's mother. In this case, he did not do so.**

**The revision petitioner will have her own ideology, perception of life. She revolted against giving of her blood sample for DNA test for the sake of a crude thinking of her biological father. She is not for a dangerous test. Absolutely, there is no prima facie case in this case to order for D.N.A. Test. We are not subscribing to the view of the trial Court that such a test will be beneficial to the couples and the view of the Trial Court that no prejudice will be caused to the parties in undergoing such a test is absurd and it is a poor view. --Judges must also alive to the sensitiveness involved in the cases coming before them. Certain cases/issues must be handled with much care and caution like handling explosive substances.--revision succeeds.**

**Impugned order passed by the learned Sub Judge, Arni, Tiruvannamalai District in is set aside.**

**ORDER**

This revision is by the second respondent in I.A.No.32 of 2008 in H.M.O.P.No.2 of 2008 on the file of the learned Subordinate Judge, Arni, Tiruvannamalai District.

2. 1st respondent married the 2nd respondent on 9.2.1981 according to Hindu rites and customs. 1st respondent (husband) was an S.I. of Police. On 13.4.86, a daughter (revision petitioner) was born. She is the revision petitioner.

3. In 2008, 1st respondent was 53 years old, while 2nd respondent, was 43 years old. Revision Petitioner was 22 years old. She was to be married. Difference of opinion arose between the respondents (spouses). 1st

respondent/husband alleged that the 2nd respondent/wife had crossed the fence. 2nd respondent filed counter denouncing his allegation.

4. 1st respondent filed I.A.No.32 of 2008 that as he has doubted the very birth of the revision petitioner to him, he wanted to subject his wife, and the revision petitioner to undergo DNA test, in other words, paternity test. The 2nd respondent and the revision petitioner were shocked by this bombshell. They have resented on the move of the 1st respondent.

5. Upon hearing both sides, the Sub Court, Arni allowed the petition and ordered the conducting of DNA test. It necessarily involves the taking of blood samples from the respondents and the revision petitioner.

6. The reasoning of the learned Subordinate Judge in ordering the D.N.A. test could be found from the following passage in the impugned order passed by the trial Court:

"Now the petitioner is suspect the legality and biological birth of the second respondent. If the doubt is arises it would be detected by the scientific method to save the integrity and trustworthy in the matrimonial home. No one bear the thorn in his chest throughout her life regarding the paternity of the second respondent. The legal steps is alone is sufficient to satisfy the requirement of conscience of the petitioner. If the petition is allowed there is no prejudice will be caused to the respondent. Because, the result is stands with truth it is good for the parties, and averment to the hormonious life in future. Therefore, the petition is allowed for D.N.A test. The petitioner, first respondent, and second respondent are directed to submit for the test to find out truth". (emphasis supplied by me)

7. Aggrieved, the revision petitioner, has directed this revision.

8. The learned counsel for the revision petitioner would contend that the revision petitioner is the daughter of the respondents. She was born to them during the period they lived as husband and wife. In such circumstances, the conclusive proof prescribed in Section 112 of the Evidence Act shuts the mouth of the 1st respondent from speaking otherwise, as to the birth of the revision petitioner to him.

9. The learned counsel for the revision petitioner would further contend that it is too atrocious to ask the revision petitioner, now a married woman and a mother to undergo DNA test.

10. The learned counsel for the revision petitioner would also submit that it will be in violation of her right to privacy. It is as against her right to live with human dignity and decency.

11. The learned counsel for the revision petitioner would also contend that no Court could violate the human right of a woman.

12. To carry home his point of view, the learned counsel for the revision petitioner would cite Bhabani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women and another (2010(8) SCC 633).

13. The learned counsel for the revision petitioner would further contend that the revision petitioner is not a party to the matrimonial dispute between her parents. She has been unnecessarily dragged into their fight. The impugned order will result in causing incalculable damage to her and it will also affect her family life.

14. On the other hand, the learned counsel for the 1st respondent would contend that the 1st respondent is asking divorce also on the ground of adulterous conduct of the revision petitioner's mother(2nd respondent). Incidentally, the very birth of the revision petitioner to the 1st respondent itself is in issue. This issue is to be resolved through a scientific test.

15. The learned counsel for the 1st respondent would further contend that DNA test is a modern scientific method to establish one's paternity. It is a gift of science. Such a test is permissible under Section 45 of the Indian Evidence Act. Medicine will not always taste sweet. Sometimes it tastes bitter. But it is good for health. Taking of blood sample from the revision petitioner will not be to her liking. If the 2nd

respondent passes the scientific test successfully, there ends the matter. Consequently, the very legal status of the revision petitioner also will be confirmed. In these circumstances, considering all the above aspects, the trial Court has adopted a right course.

16. The learned counsel for the 1st respondent contended that ordering of DNA test is not impermissible in law.

17. In this connection, the learned counsel for the 1st respondent cited Bommi and another vs. Munirathinam (2004(5) CTC 182).

18. The learned counsel for the 1st respondent also contended that in her counter 2nd respondent expressed her willingness to undergo D.N.A test.

19. I have anxiously considered the rival submissions, perused the impugned order, materials on record and the decisions cited.

20. In Ramayana, Lord Rama asked Seetha Devi to walk over the fire to prove her chastity. Then there was no DNA test. But, now scientific development pervades all fields. Scientific development is such that one day even human beings itself will be produced by cloning. But, for the sake of scientific development, we cannot give up our hoary past, culture, tradition which is unique and has become our pride to be envied by the westerners. For the sake of scientific development, we cannot disrespect womanhood.

21. As early as in 1872, Sir James Fits James Stephen, in his Magnum Opus, the great Indian Evidence Act, introduced a form of paternity test in Section 112 of the Act.

22. The said section 112 runs as under:

"112- Birth during marriage, conclusive proof of legitimacy-

The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

23. The essential features of the said section is that during the matrimonial life between a man and a woman as spouses, if a child is born to them it is conclusively presumed that it is their child. However, the Draftsman of the said adjective law focusing the possibility of an absurdity has added a rider. He introduced the 'principle of no access'. If the disputant is able to establish that there was no opportunity for him to have link (access) with his wife/woman, then the conclusive presumption introduced in the first part of Section 112 of the Evidence Act will go away. This section is also based on common sense.

24. To understand the nature of the said presumption, let us refer to Section 4 of the Evidence Act which runs as under:

"4 "May presume" - Whenever, it is provided by this Act that Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved or may call for proof of it.

"Shall presume"- Whenever, it is directed by this Act that the court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

"Conclusive proof" - When, one fact is declared by this Act to be conclusive proof of another, the Court shall on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it. (emphasis supplied by me)

25. Presumptions are legal fictions. They are all creations of law. Whether one like it or not, whether it actually exists or not, on the proof of a particular fact, the existence of another fact shall be presumed, in other words, it shall be taken, deemed that it exists.

26. Presumptions are of three kinds. 'May' presume, 'Shall' presume, and 'Conclusive' proof. Conclusive proofs are 'irrebutable'. It is impermissible to refute such a presumption, because it is a presumption in law. There are several instances of such type of presumptions. One such presumption is the presumption as to paternity prescribed in Section 112 of the Evidence Act.

27. The concept of DNA test is much more vogue in USA and U.K. and now, it has been accepted as a scientific mode all over the world. DNA (Deoxyribonucleic Acid) test is not a novice to modern lawyers. But it is to be remembered that the result of D.N.A. test is not analogous to the result of a Dactylography test (finger print). The result of finger print comparison test is 100%, however, it is not so in the case of D.N.A. test. It is a mystery in science.

28. A question as to DNA test cropped up before the Hon'ble Supreme Court in Goutam Kundu vs. State of West Bengal (1993)3 SCC 418) wherein the father of a child disputed his paternity to the child.

29. In Goutam Kundu (supra) the Hon'ble Supreme Court quoted the following passage from Rayden's Law and Practice in Divorce and Family matters (1983), Vol. I 1054), "Medical science is able to analyse the blood of individuals into definite groups, and by examining the blood of a given man and a child to determine whether the man could or could not be the father. Blood tests cannot show positively that any man is father, but they can show positively that a given man could or could not be the father. It is obviously the latter aspect that proves most valuable in determining paternity, that is, the exclusion aspect, for once it is determined that a man could not be the father, he is thereby automatically excluded from considerations of paternity. When a man is not the father of a child, it has been said that there is at least a 70 per cent chance that if blood tests are taken they will show positively he is not the father, and in some cases the chance is even higher, between two given men who have had sexual intercourse with the mother at the time of conception, both of whom undergo blood tests, it has likewise been said that there is a 80 per cent chance that the tests will show that one of them is not the father with the irresistible inference that the other is the father".

30. In Goutam Kundu (supra), the Hon'ble Supreme Court cautioned the Courts that for mere asking DNA test cannot be ordered. And the Hon'ble Supreme Court laid down the following guidelines: "

    1) That courts in India cannot order blood test as a matter of course.

    2) Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

    3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.

    4) The Court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

    5) No one can be compelled to give sample of blood for analysis. "

31. The Two Judge Bench decision in Goutam Kundu (supra) has been reviewed by a Three-Judge Bench of the Hon'ble Supreme Court in Sharda vs. Dharmpal [(2003) 4 SCC 493]. Referring to Goutam Kundu (supra), the three Judge Bench observed as under:

    "39. Goutam Kundu is, therefore, not an authority for the proposition that under no circumstances the court can direct that blood tests be conducted. It, having regard to the future of the child, has, of course, sounded a note of caution as regards mechanical passing of such order. In some other jurisdictions, it has been held that such directions should ordinarily be made if it is in the interest of the child".

32 There was a feeling that Sharda (supra), overrun Goutam Kundu (supra). This was clarified by the Hon'ble Supreme Court in Bhapani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women and another (2010)8 SCC 633) in the following words:

> "23. There is no conflict in the two decisions of this Court, namely, Goutam Kundu and Sharda. In Goutam Kundu it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have roving inquiry; there must be strong prima facie case and the court must carefully examine as to what would be the consequence of ordering the blood test. In Sharda while concluding that a matrimonial court has power to order a person to undergo a medical test, it was reiterated that the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. Obviously, therefore, any order for DNA test can be given by the court only if a strong prima facie case is made out for such a course".

33. Now, what follows from the above analysis of the ratios laid down in Goutam Kuntu (supra) and in Sharda (supra) is that it is not that the Courts have no power to order DNA test. It can order, but it cannot be a routine matter because it involves personal freedom of an individual. Only in rare cases and real cases such a test can be ordered, provided there is a prima facie case for ordering such a test. (See Bommi and another vs. Manirathanam (2004(5) CTC 182).

34 In the light of the above elucidation, we shall revert back to our case.

35. The 2nd respondent might be ready for such a test but she cannot bind her daughter/ revision petitioner also for such a test. Each individual has got liberty, feelings and passion of his own.

36. We must alive to certain aspects in this case. 1st respondent had lived with the 2nd respondent happily at the nascent stage of their matrimonial life. They were happy couples as it is in most of the cases. Sometimes, ego clash crept in in their matrimonial life. It may be mainly due to lack of understanding between them.

37. The reason that propelled the 1st respondent to raise his eyebrows as to the very birth of the revision petitioner is laconic. It is that somebody told him that the revision petitioner does not resemble him. It is sheer absurdity. If this is accepted, many children will be stranded in the street without legal parentage. It will be promoting of basterdity. The 1st respondent lived with the 2nd respondent. If his ideology is accepted then there will be more casualties in society. This revelation came to him after he had lived a full matrimonial life with the 2nd respondent. It is too big a pill to swallow.

38. We have seen the contours of Section 112 of the Evidence Act. Revision petitioner was born many years ago, at a time when the respondents/spouses led their happy married life. Onus is upon the 1st respondent to show that he had no access to the revision petitioner's mother. In this case, he did not do so.

39. The alleged behaviour of the 2nd respondent, who is the mother of the revision petitioner is different from the revision petitioner. The revision petitioner is not a party to the matrimonial dispute between the respondents. Dragging the revision petitioner also into a murky affair at the cost of her personal life is very difficult to digest.

40. The revision petitioner will have her own ideology, perception of life. She revolted against giving of her blood sample for DNA test for the sake of a crude thinking of her biological father. She is not for a dangerous test. Absolutely, there is no prima facie case in this case to order for D.N.A. Test.

41. We are not subscribing to the view of the trial Court that such a test will be beneficial to the couples and the view of the Trial Court that no prejudice will be caused to the parties in undergoing such a test is absurd and it is a poor view.

42. Judges must also alive to the sensitiveness involved in the cases coming before them. Certain cases/issues must be handled with much care and caution like handling explosive substances.

43. In view of the foregoing analysis, I hold that the order of the trial court is flawed.

44. Ordered as under:

(i) This revision succeeds.

(ii) The impugned order passed by the learned Sub Judge, Arni, Tiruvannamalai District in I.A.No.32 of 2008 in HMOP No.2 of 2008 is set aside. (iii) I.A.No.32/2008 is dismissed.

(iv) Consequently, connected miscellaneous petition is closed. However, there is no order as to costs.

(v) Uninfluenced by any observations in this order, the learned Sub Judge, Arni is directed to dispose of H.M.O.P.No.2 of 2008 expeditiously, preferably within four months from the date of receipt of a copy of this order.

24.3.2017 Speaking/Non Speaking order Index : Yes / No Internet : Yes / No vaan Note: As this order deals with an important aspect in gender justice, the Registry is directed to place this order before My Lord, the Hon'ble Acting Chief Justice for orders to circulate the same among the Judicial Officers in this State and in Union Territory of Puducherry for their guidance.

❑❑❑

LANDMARK JUDGMENTS ON

# DOMESTIC VIOLENCE

# RAJAT JOHAR VERSUS DIVYA JOHAR

**Delhi High Court**

**Bench : Hon'ble Mr. Justice I. S. Mehta**

*Rajat Johar ..... Petitioner*
*Mr. Prashant Mendiratta, Advocate with Mr. Harshvardhan Pandhey and Ms. Malvika Choudhary, Advocates*
*Versus*
*Divya Johar ..... Respondent*

**Crl. M.C 1728/2015**

**Decided on November 17, 2017**

**Protectionof Women from Domestic Violence Act,2005 — Ss. 12(1), Object- Held, is to provide speedy remedy in domestic violence matters — It covers protection to victim, financial relief and child custody — The object of the Protection of Women fromDomestic Violence Act, 2005 is to provide for more effective protection Provisions --- Held, husband is bound to provide maintenance to wife who is victim of domestic violence and to dependent child — Relief under the Act, because of the very purpose of the Act, is different from relief under S. 125, CrPC — Monetary relief under the Act can be in addition to relief under S. 125, CrPC — Father cannot evade responsibility on the plea that mother has adequate means — Both parents must fulfil their respective obligations in child's best interests, irrespectiveof their comparative financial position — Ex parte interim relief — Held, Magistrate has such power under S. 23 — Monetary reliefs to victim wife — Effect, if any, of divorce — Held, claims under Ss. 20 to 23 subsist despite divorce.**

**A. Family and Personal Laws — Protectionof Women from Domestic Violence Act,2005 — Ss. 12(1), 12(2), 20, 21 and 23(2) — Objectof legislation — Held, is to provide speedy remedy in domestic violence matters — It covers protection to victim, financial relief and child custody — Provisions regarding maintenance and interim maintenance — Held, husband is bound to provide maintenance to wife who is victim of domestic violence and to dependent child — Relief under the Act, because of the very purpose of the Act, is different from relief under S. 125, CrPC — Monetary relief under the Act can be in addition to relief under S. 125, CrPC — Criminal Procedure Code, 1973, S. 125**

**B. Family and Personal Laws — Protectionof Women from Domestic Violence Act,2005 — Ss. 12(1), 12(2), 20, 21, 22 and 23(2) — Liability towards dependent child — Held, father and mother both are responsible to support child — Father cannot evade responsibility on the plea that mother has adequate means — Both parents must fulfil their respective obligations in child's best interests, irrespectiveof their comparative financial position — Ex parte interim relief — Held, Magistrate has such power under S. 23 — On facts, petitioner-father directed to provide maintenance of child — However, trial court directed to re-assess father's liability towards maintenance after obtaining information from parties in terms ofKusum Sharma v. Mahinder Kumar Sharma, 2015 SCC OnLine Del 6793 — Meanwhile, petitioner husband to continue paying maintenance as ordered by trial court — However, excess amount, if any, paid as a result of re-assessment adjustable in future payments**

**C. Family and Personal Laws — Protectionof Women from Domestic Violence Act,2005 — S. 20 to 23 — Monetary reliefs to victim wife — Effect, if any, of divorce — Held, claims under Ss. 20 to 23 subsist despite divorce**

*Held :*

The object of the Protection of Women from Domestic Violence Act, 2005 is to provide for more effective protection of women's rights guaranteed under the Constitution, who are victims of violence of any kind occurring within the family, and for the matters connected therewith or incidental thereto. The object of awarding maintenance/ interim maintenance qua the aggrieved person is to provide speedy remedy to the aggrieved person(s) who are unable to support themselves and are in distress. It is intended to achieve a social purpose. The maintenance cannot be denied to children on the premise that their mother is employed or has enough means to maintain them, or that they are in mother's custody. Both parents have a legal, moral and social duty to provide to their child the best education and standard of living within their means. Mere fact that the spouse with whom the child is living is having a source of income, even if sufficient, would in no way absolve the other spouse of his obligation to make his contribution towards child's maintenance and welfare even if, the means/income/salary of that spouse may be less than the means/income/salary of the other spouse. The main maintenance petition under Section 12 of DV, Act is pending before the trial Court. The determination of maintenance amount will be done by the trial Court after leading evidence by the respective parties, and on the basis of material documents and income affidavits of the parties. The minor child is staying with the mother/respondent who needs medical attention/care on regular basis and even his paternity is not disputed. The statutory obligation is paramount, compared to father's wish, and he cannot be permitted to limit child's claim on flimsy and baseless grounds.

Since the respondent and her minor son are to be maintained by the petitioner, in the absence of denial of existence of the marriage and denial of minor's paternity who is stated to be requiring constant medical treatment and supervision, the petitioner cannot shy away from his statutory obligation of maintaining his legally wedded wife and his minor son.

The monetary relief as provided under the Act is different from maintenance, which can be in addition to an order of maintenance under Section 125 CrPC, or any other law, and can be granted to meet the expenses incurred and losses suffered by the aggrieved person and child of the aggrieved person as a result of the domestic violence, and the question whether the aggrieved person, on the date of filing the application under Section 12 of DV Act was in a domestic relationship with the respondent, is irrelevant. Section 23(2) empowers the Magistrate to pass such interim order as he deems just and proper. It is within Magistrate's jurisdiction to grant interim ex parte relief, if the Magistrate is satisfied that the application prima facie discloses that respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence.

An act of domestic violence once committed, subsequent decree of divorce will not absolve respondent's liability for offence committed or to deny the benefit to which the aggrieved person is entitled under the Act, including monetary relief under Section 20, child custody under Section 21, compensation under Section 22 and interim or ex parte order under Section 23.

The parties are directed to file a fresh income affidavit in the format prescribed in Kusum Sharma v. Mahinder Kumar Sharma, 2017 SCC OnLine Del 11796 : (2017) 241 DLT 252. The trial Court shall pass a fresh order within a month thereof. In the meanwhile the petitioner is directed to keep on making the payment to respondent as well as her minor child, without prejudice to the rights and contentions of the parties till a fresh order of maintenance is passed by the trial Court and any amount, if paid in excess the same shall be adjusted in future. The impugned order passed by the Additional Sessions Judge is modified to this extent only.

The Judgment of the Court was delivered by

**Hon'ble Mr. Justice I. S. Mehta :—** By way of the instant petition, the petitioner invoke the inherent jurisdiction of this Court under Section 482 of the Code of Criminal Procedure, 1973 for setting aside the impugned orders

dated 17.03.2015 passed by the learned Additional Sessions Judge-03, Patiala House Courts, New Delhi in Criminal Appeal No. 131/14.

2. The brief facts stated are that, a petition under Section 12 of the Protection of Women FromDomestic Violence Act, 2005 was filed by the respondent-Divya Johar against the petitioner-Rajat Johar before the Court of Chief Metropolitan Magistrate, Saket, Delhi. Admittedly, the marriage between the parties was solemnized on 16.05.2009 in accordance with Hindu rites and rituals at Hotel Lutyen's, Mehrauli-Gurgaon Road, Delhi. The respondent before marriage was working as a Manager, Quality Assurance in a reputed MNC in Gurgaon and was earning a decent salary in the year 2008-09, but she was forced to quit the same after marriage to join the petitioner at Hyderabad in the month of May 2009. Thereafter, in the month of August 2010, the respondent was short listed for final interview for the post of full-time faculty (Asst. Professor) with NIFT, Hyderabad but the petitioner was completely againstof taking up a full-time job by the respondent therefore, she did not attend the final interview on the instances of her husband/petitioner.

3. Out of the said wedlock one baby boy (Master Avin Johar) was born on 02.02.2011 He was born about nine weeks prematurely and was diagnosed for blood pressure and kidney problem. As a result of which the minor child is suffering from severe medical ailment since his birth and requires constant medical treatment and supervision. Thereafter, on 03.04.2012, the respondent along with her minor child were thrown outof the matrimonial home and on being harassed by the petitioner and her family members the respondent filed a domestic violence case against the petitioner and other family members. It has been alleged by the respondent that the petitioner has neither taken her and her minor child back nor has made any provision for their maintenance. It has been further alleged that the petitioner has refused the respondent to stay in the matrimonial home and have further refused to hand over the Stridhan articles including jewellery to the respondent despite repeated requests.

4. Subsequently, on 17.07.2012 the respondent filed a petition under Section 12 read with Sections 18, 19, 20, 22 and 23 of the Protection of Women fromDomestic Violence Act, 2005 against the petitioner, father-in-law and mother-in-law, along with an application for interim maintenance under Section 23of DV Act in the Court of Chief Metropolitan Magistrate, Saket Courts, New Delhi.

5. The learned Metropolitan Magistrate after hearing the arguments of both the parties and after considering the complaint, affidavit and other material on record, passed an order dated 12.11.2014 thereby directing the petitioner herein to pay an interim maintenance of Rs. 2,00,000/- per month to the respondent and her minor child which shall be payablefrom the date of filing of the petition, i.e 17.07.2012 till further directed the petitioner herein to pay a sumof Rs. 55,000/- per month as rent in lieu of an alternate accommodation to the respondent and her minor child.

6. Aggrieved by the aforesaid order dated 12.11.2014, the petitioner herein preferred an appeal under Section 29 of the DV Act being Criminal Appeal No. 131/14 before the Court of Sessions Judge, District Courts, Saket, New Delhi on 11.12.2014

7. Consequently, the learned Additional Sessions Judge-03, Patiala House Courts, New Delhi vide impugned judgment dated 17.03.2015 disposed of the said appeal filed by the petitioner by modifying the interim maintenance amount by reducing it to Rs. 1,80,000/- per month and further reduced the amount for alternate accommodation to Rs. 45,000/- per month.

8. Hence, the present petition.

9. The learned counsel for the petitioner has submitted that the petitioner is ready to pay any amount if factually requires but the respondent is in the habit of falsely putting allegations against the petitioner. It is further submitted that the impugned order is bad in law and liable to be set aside on the following grounds:—

i. The calculation is against the income of the petitioner.

ii. The respondent and her mother is joint owner ofa commercial property and she for herself and her minor daughter could contribute from the rent which is coming from the aforesaid property. The document indicating 20% of the rental is of the respondent & 80% of her mother.

iii. As per the record the mother of the respondent and the respondent share 50% but as per the rent deed 20% is shown in favour of the respondent and 80% is in favour of her mother which is not tenable in law as she is concealing her income.

10. The learned counsel for the petitioner has submitted that the interim order is totally illegal and is against the settled principal of law as it shows no consideration to the documents filed by the petitioner and further submitted that the petitioner as got no monthly income therefore, the impugned order be set aside.

11. The learned counsel for the petitioner has submitted that the appellate Court's order is patently illegal therefore, the present matter be remanded back to the appellate Court to decide the appeal of the petitioner afresh and give reasons of coming to the conclusion of reduction and upholding the findings ofthe Trial Court. He further submits that till then let maintenance be not awarded and relied upon the following judgments:—

1) Akanksha Jain v. Manish Jain; CM(M) No. 910/2010 decided on 21.02.2014

2) R.K Sharma v. NDMC; (2006) 1 567.

12. On the contrary the learned counsel for the respondent has submitted that the impugned order passed by the Sessions Court does not require any interference by this Court as the petitioner has not complied with the orders passed by the Trial Court as well as the Sessions Court therefore, the petitioner be directed to comply with the orders and submits that the present petition be rejected for want of merit.

13. The learned counsel for the respondent in support of its contentions has relied upon the following judgments:—

1) Nayanika Thakur Mehta v. Mohit Mehta.

2) Shalu Ojha v. Prashant Ojha; (2015) 2 SCC 99.

3) Rajeev Preenja v. Sarika; 2009 (V) AD (DELHI) 497.

4) Durga Prasad Ray v. Meenu; 191 (2012) DLT 275.

14. In rebuttal the learned counsel on behalf of the petitioner has submitted that the learned Additional Sessions Judge though reduced the maintenance amount, without going into the reasons came up with the imaginary figure, this determination of the interim maintenance has to be based on certain documents to reach to the conclusion as per the new affidavit in compliance to the judgment of this Court in Kusum Sharma v. Mahinder Kumar Sharma; FAO-369/1996 decided on 29.05.2017

15. The object of The Protection of WomenFrom Domestic Violence Act, 2005 is to provide for more effective protection of the rights of womenguaranteed under the Constitution who are victims ofviolence of any kind occurring within the family and for matters connected therewith or incidental thereto.

16. The object of awarding maintenance/interim maintenance qua the aggrieved person is to provide speedy remedy to the aggrieved person(s) who are unable to support themselves and are in distress. It is intended to achieve a social purpose, and maintenance cannot be denied to the children on the premise that their mother is employed or has enough means to maintain them or that they are in the custody of their mother.

17. It is a settled principle of law that both the parents have a legal, moral and social duty to provide to their child the best education and standard of living within their means. The mere fact that the spouse with whom the child is living is having a source of income, even if sufficient, would in no way absolve the other spouse of his obligation to make his contribution towards the maintenance and welfare of the child, even if, the means/income/salary of that spouse may be less than the means/income/salary of the other spouse.

18. The Apex Court in Noor Khatoon v. Mohd. Quasim; 1997 Crl. L.J 3972 has made the observation that a father having sufficient means has the obligation to maintain his minor children who are unable to maintain themselves till they attain majority and in caseof females till they get married.

19. It is an admitted fact coming on record that the main maintenance petition under Section 12 of DV,Act is pending before the Trial Court. The determination of the maintenance amount will be done by the Trial Court after leading of evidence by the respective parties and on the basis of material documents and income affidavits of the parties.

20. Furthermore, in the instant petition it is an admitted case on record that the minor child is staying with the mother/respondent who needs medical attention/care on regular basis and even the paternity is not disputed. The statutory obligation is paramount to the wish of the father and he cannot be permitted to limit this claim of the child on flimsy and baseless grounds. Reliance is placed on the judgment of the Hon'ble Punjab and Haryana High Court in the case Dr. R.K Sood v. Usha Rani Sood; 1996 (3) 114 PLR 486 and the relevant paragraph is reproduced as under:—

"17. Under the Hindu Law father not only has a moral but even a statutory obligation to maintain his infant children. The scope of his duty is to be regulated directly in relation to the money, status, that the father enjoys. The right of maintenance ofa child from his father cannot be restricted to two meals a day but must be determined on the basisof the benefit, status and money that the child would have enjoyed as if he was living with the family, including his mother and father. Irrespectiveof the differences and grievances which each spouse may have against the other, the endeavourof the Court has to be to provide the best to the child in the facts and circumstances of each case and more so keeping the welfare of the child in mind for all such determinations. Liability to maintain one's children is clear from the text ofthis statute as well as the various decided cases in this regard. The statutory obligation is paramount to the wish of the father and he cannot be permitted to limit this claim of the child on flimsy and baseless grounds."

21. Since the respondent and her minor son are to be maintained by the petitioner, in the absence ofdenial of existence of the marriage and denial ofpaternity of the minor son, who is stated to be requires constant medical treatment and supervision, the petitioner cannot shy away from his statutory obligation of maintaining his legally wedded wife and his minor son.

22. The monetary relief as provided under theProtection of Women from Domestic ViolenceAct, 2005 is different from maintenance, which can be in addition to an order of maintenance under Section 125 Cr.P.C or any other law, and can be granted to meet the expenses incurred and losses suffered by the aggrieved person and child of the aggrieved person as a result of the domestic violence, and the question whether the aggrieved person, on the date offiling of the application under Section 12 of DV Actwas in a domestic relationship with the respondent is irrelevant.

23. Sub-clause 2 of Section 23 of DV Actempowers the Magistrate to pass such interim order as he deems just and proper therefore, it is well within the jurisdiction of the Magistrate to grant the interim ex parte relief, if the Magistrate is satisfied that the application prima facie discloses that the respondent is committing, or has committed an act of domesticviolence or that there is a likelihood that the respondent may commit an act of domesticviolence.

24. Furthermore, an act of domestic violenceonce committed, subsequent decree of divorce will not absolve the liability of the respondent from the offence committed or to deny the benefit to which the aggrieved person is entitled under the DomesticViolence Act, 2005 including monetary relief under Section 20, Child Custody under Section 21, Compensation under Section 22 and interim or ex parte order under Section 23 of the Domestic ViolenceAct, 2005.

25. The Apex Court in V.D Bhanot v. Savita Bhanot;(2012) 3 SCC 183, has observed that the conduct of the parties even prior to the coming into force of theProtection of Women from Domestic ViolenceAct, 2005 could be taken into consideration while passing an order under Sections 18, 19 and 20 of DVAct thereof. The relevant paragraph is reproduced as under:

"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 ofthe parties even prior to the coming into force ofthe 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."

26. Therefore, in view of the submissions made by the learned counsel for the petitioner and reliance placed by him on the judgment of this Court in Kusum Sharma v. Mahinder Kumar Sharma; FAO-369/1996 decided on 29.05.2017, the parties are directed to file a fresh income affidavit in view of the said judgment before the Trial Court on or before 15.12.2017 and the Trial Court shall pass a fresh order within a month thereof.

27. In the meanwhile the petitioner is directed to keep on making the payment in favour of the respondent as well as her minor child as per the order dated 17.03.2015, without prejudice to the rights and contentions of the parties till a fresh order ofmaintenance is passed by the Trial Court and any amount if paid in excess the same shall be adjusted in future.

28. Consequently, the impugned order dated 17.03.2015 passed by the learned Additional Sessions Judge-03, Patiala House Courts, New Delhi in Criminal Appeal No. 131/14 is modified to this extent only.

29. The present petition is disposed of in the above terms. The parties are directed to appear before the Trial Court on or before 15.12.2017

30. Let LCR be sent back forthwith along with a copyof this judgment.

31. All the pending applications (if any) are also disposed of.

32. No order as to costs.

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# MISCELLANEOUS

## JUDGMENTS

# R. SRIDHARAN VERSUS THE PRESIDING OFFICER, PRINCIPAL FAMILY COURT, CHENNAI

**Madras High Court**

**Bench : Hon'ble Mr. Justice S. Manikumar**

*R. Sridharan*
*Versus*
*The Presiding Officer, Principal Family Court, Chennai*

**W.P.No.34838 of 2004**

**W.P.M.P. Nos. 42032 to 42034 of 2004**

**Decided on 18-08-2008**

**According to the petitioner, the Family Court has no jurisdiction to entertain the petition for divorce under the Hindu Marriage Act, since the marriage was performed in United States of America.**

**Petitioner submitted that as the marriage between the parties was solemnized in Balaji Temple, Bridge Water, New Jercy, United States of America and since the petitioner is not a domicile in India, Section 1(2) of the Hindu Marriage Act, which extends to the whole of India, except Jammu and Kashmir, cannot be made applicable to the Hindus, who are domiciled outside the territories to which the Act extends.**

**In both the Indian and International Law the concept of Nationality and domicile are recognised as two different conceptions, which necessarily mean, an Indian by retaining his domicile in India may acquire citizenship of other country. In other words, merely because a person has acquired citizenship of some other country that does not necessarily mean that he has abandoned domicile of origin.**

**The uncontroverted fact is that the marriage between the parties was solemnized as per Hindu Rites and Customs and both the parties are Hindus. Though the respondent has disputed the registration of marriage before the Marriage Officer in U.S.A., the form of marriage is admitted.**

**Section 2 of the Hindu Marriage Act does not stipulate any stringent condition that both parties should be residing within or domiciled in the jurisdiction of India for maintaining a petition under the Hindu Marriage Act. In fact, it covers all Hindus, who are residing outside the territory to which this Act extends also.**

**The above said provision enables presentation of the petition before the District Court of competent jurisdiction or Family Court even if the respondent is residing outside the territories to which the Hindu Marriage Act extends.**

**It is the law of the land that Writ of Prohibition will be issued as soon as inferior court/tribunal proceeds to apply a wrong principle of law when deciding a fact on which jurisdiction depends.Prohibition is primarily and principally preventive rather than remedial remedy. The effect of the remedy is an injunction against the court or tribunal commanding it to cease from the exercise of jurisdiction to which it has no legal claim. Prohibition is not a writ of right granted exdebito justice. But one of sound judicial discretion to be granted or withheld according to the consideration of the particular case. When there is entire absence of jurisdiction over the subject matter of adjudication and this is apparent on the face of the proceedings, the granting of reliefs by prohibition is not a matter of discretion, but one of absolute right.**

**In the light of the decisions of the Courts dealing with matrimonial matters with reference to domicile of the parties, I am of the considered view, the Family Court or any other competent Court has got jurisdiction to adjudge any dispute between the contracting parties, one of whom is a foreign national, said to have acquired domicile of his choice.**

## Judgment

(Writ petition is filed under Article 226 of the Constitution of India for issuance of Writ of Prohibition the first respondent from proceeding with the trial in O.P.No.569 of 2004 on its file)

The petitioner has sought for a Writ of Prohibition, prohibiting the first respondent from proceeding with the trial in O.P.No.569 of 2004 on its file.

2. Facts leading to the present Writ Petition are as follows:

The petitioner is a domicile in United States of America, since 1992 and is working as a Software Engineer. The second respondent is known to their family since childhood. Marriage between the parties to this lis was arranged by elders. The second respondent, her parents and relatives came to United States and the marriage was performed on 17.04.2002 and registered on 30.07.2002. The second respondent came to India in the second week of January 2003 for a short visit promising to return after completing a dance programme. But she began to act in films and with ulterior motive, she filed O.P.NO.569 of 2004 on the file of the Principal Family Court, Chennai for divorce under the Hindu Marriage Act, alleging cruelty. Since he was residing in United States, summons were not served and therefore, the second respondent obtained an exparte decree of divorce on 19.07.2004. On his application, the order was set aside on 23.09.2004 and the O.P., was restored. Apprehending trial, the second respondent adopted dilatory tactics and filed C.R.P.(PD)No.1695 of 2004, stating that the proceedings of the Family Court should not be published by the Media and obtained an interim stay. The petitioner has filed a counter affidavit, stating that he has no objection for the proceedings be held in camera and did not want any publicity. Therefore, by order dated 29.10.2004, this Court vacated the interim stay and the O.P., was ready for trial. Inspite of several adjournments, the second respon- dent has not appeared and in these circumstances, the petitioner was constrained to file the present Writ Petition for Prohibition, prohibiting the Family Court from proceeding with the trial in O.P.NO.56 of 2004.

3. According to the petitioner, the Family Court has no jurisdiction to entertain the petition for divorce under the Hindu Marriage Act, since the marriage was performed in United States of America. After the marriage, the petitioner and the second respondent were living as husband and wife in U.S.A and the petitioner, being an American citizen, the provisions of the Hindu Marriage Act, 1955 will not apply. The petitioner has further submitted that he is a domicile in United States of America and not in the territory of India and therefore, Section 1(2) of the Act would come into operation and in the above circumstances, the Family Court at Chennai cannot maintain a petition for divorce. The petitioner has further submitted that unless both the parties are domiciled in India, the petition for divorce under the Hindu Marriage Act is not maintainable.

4. The Second respondent in her counter affidavit has submitted that she got married to the petitioner on 17.04.2002 in Balaji Temple, Bridge Water, New Jercy, U.S.A., in the presence of their parents and relatives, as per Hindu Rites and Customs. Therefore, she has submitted that the rights and the obligations of the parties flow from the provisions of the Hindu Marriage Act. As per Section 19(iii)(a) of the Hindu Marriage Act, inserted by Act 50 of the Central Act, with effect from 20.12.2003, she can institute the proceedings for dissolution of the Marriage at the place where she is residing at the time of presentation of the petition and therefore, the Family Court at Chennai, is competent to decide the lis between the parties.

5. The Second respondent, while rebutting the averments made in Paragraph 6(b), 6(c) and 6(d) of the affidavit filed by the petitioner, has submitted that the petitioner has not explained as to how the O.P., is

not maintainable. According to her, as the parties are governed by the personal laws applicable to them, the rights and obligations arising there from, can be enforced in the Forums created under the Statutes alone and therefore, the Principal Family Court, Chennai is empowered to adjudicate the dispute. The second respondent has further submitted, that though the petitioner has not raised the plea of ouster of jurisdiction in the counter affidavit filed in support of the Original Petition, before the Family Court, however, he has mentioned about the application of Foreign Marriages Act, 1969 and in particular Section 18(1) of the said Act. The second respondent has fur- ther submitted that the marriage was not performed before the Marriage Officer notified under the said Act and it was also not registered before him, as required under the said law and therefore, the provisions of Foreign Marriages Act will not apply to the facts of this case. As a matter of fact, the Family Court itself can decide both the issues regarding jurisdiction and the merits of the case and therefore, the present Writ Petition is not maintainable. It is further submitted that once the petitioner submits himself to the jurisdiction of the Court by filing a counter statement on merits with documents in support of his case, it is not open to 'him to stall the proceedings, by instituting a Writ Petition before this Court and under these circumstances, the petitioner is not entitled to the relief sought for in the Writ Petition.

6. Referring to Section 1(2) of the Hindu Marriages Act, Ms. K.M. Nalini Shree, learned counsel appearing for the petitioner submitted that as the marriage between the parties was solemnized in Balaji Temple, Bridge Water, New Jercy, United States of America and since the petitioner is not a domicile in India, Section 1(2) of the Hindu Marriage Act, which extends to the whole of India, except Jammu and Kashmir, cannot be made applicable to the Hindus, who are domiciled outside the territories to which the Act extends. She further submitted that when the second respondent herself had admitted in her counter affidavit that the petitioner is a resident of USA, supported by the passport issued by the authorities at St.Francisco., USA, the Petitioner's domicile is clearly established and therefore, she submitted that the Principal Family Court, Chennai has no jurisdiction to apply the provisions of the Hindu Marriage Act or Family Courts Act to adjudicate upon the dispute between the parties. According to her, domicile of a person is a place, in which, habitation is fixed without any personal intention of removing therefrom. In support of her contention, she relied on a decision of the Supreme Court in Central Bank of India Ltd. vs. Ram Narain reported in AIR 1995 SC 36.

7. Placing reliance on a decision of the Calcutta High Court in Gour Gopal Roy v. Sipra Roy reported in AIR 1978 Cal. 163, learned counsel for the petitioner submitted that Section 1(2) of the Hindu Marriage Act, extends to the whole of India, except Jammu and Kashmir, to all persons to whom the Act applies, should be within the territory and it excludes those who are domiciled outside the territorial jurisdiction, to which, the provisions of the Act applies. According to her, the provisions of the Foreign Marriage Act alone would apply to the facts of the present case and in view of the Foreign Marriages Act, the question of applying Private International Law does not arise.

8. Placing reliance on a decision in Chandrika v. Bhaiyalal reported in AIR 1973 SC 2391, learned counsel for the petitioner submitted that though the petitioner has filed his counter statement and contested the matter before the Family Court, Chennai, it is always open to him to raise the question of territorial jurisdiction at any stage. As the Family Court lacks jurisdiction, the petitioner has prayed for a Writ of Prohibition, prohibiting the Family Court from proceeding with the trial in O.P.No.56 of 2004.

9. Per contra, Mr.K.Kannan, learned counsel for the second respondent has submitted that the marriage was solemnized according to Hindu Marriage Act and therefore the provisions of the Act are applicable to the parties to the marriage. He further submitted that the petitioner had himself submitted to the jurisdiction of the Family Court and agreed for the trial "in Camera" in a collateral proceedings in C.R.P.(PD)No.1695 of 2004 and therefore, it is not open to the petitioner to raise the plea of jurisdiction in this Writ Petition. According to him, both the parties to the marriage were originally domiciled in the territory to which the Act extends and therefore, the Matrimonial Original Petition is maintainable.

Heard the learned counsel appearing for the parties and perused the materials available on record.

10. Before adverting to the facts of the case, it is relevant to extract few judgments of the Supreme Court, as to when a Writ of Prohibition could be issued by High Courts. A writ of prohibition is issued only when patent lack of jurisdiction is made out. It is true that a High Court acting under Article 226 is not bound by the technical rules applying to the issuance of prerogative writs like Certiorari, Prohibition and Mandamus in United Kingdom, yet the basic principles and norms apply to the writ must be kept in view, as observed by the Supreme Court of India in T.C .Basappa v. Nagappa reported in AIR 1954 SC 440 = (1954) 67 L.W.613.

11. In S .Govindan Menon vs. Union of India reported in AIR 1967 SC 1274, the Supreme Court held that the jurisdiction for grant of Writ of Prohibition is primarily supervisory and object of the Writ is to restrain courts or inferior Tribunals from exercising jurisdiction which they do not possess at all or else to prevent them from exceeding the limits of their jurisdiction. In other words, the objects is to confine court or tribunals of inferior or limited jurisdiction within their bounds. The writ of prohibition lies not only for excess of jurisdiction or for absence of jurisdiction but also in a case of departure from the rules of natural justice. But the writ does not lie to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings. The writ cannot be issued to a court or an inferior tribunal for an error of law unless the error makes it go out side its jurisdiction. A clear distinction has therefore, to be maintained between want of jurisdiction and the manner in which it go out side its jurisdiction. A clear distinction has therefore, to be maintained between want of jurisdiction and the manner in which it is exercised. If there is want of jurisdiction than the matter is coarum non judice and a writ of prohibition will lie to the Court or inferior tribunal forbidding it to continue proceedings therein in excess of jurisdiction. This view was taken following the decision of Regina Versus Controller General of Patents and Designs reported in (1953) 2 WLR 760.

12. In Thirumala Tirupathi Devasthanam and another versus Thallappaka Ananthacharyulu and another (2003) 8 SCC 134=2003-4-L.W.652 at paragraph 14 the Honourable Supreme Court of India held as follows:

"14. On the basis of the authorities it is clear that the Supreme Court and the High Court have power to issue writs, including a writ of prohibition. A writ of prohibition is normally issued only when the inferior court or tribunal (a) proceeds to act without or in excess of jurisdiction, (b) proceeds to act in violation of the rules of natural justice, (c) proceeds to act under law which is itself ultra vires or unconstitutional, or (d) proceeds to act in contravention of fundamental rights. The principles, which govern the exercise of such power, must be strictly observed. A writ of prohibition must be issued only in rarest of rare cases. Judicial discipline of the highest order has to be exercised whilst issuing such writs. It must be remembered that the writ jurisdiction is original jurisdiction distinct from appellate jurisdiction.

13. In the light of judicial pronouncements of the law of the land, on the exercise of extraordinary jurisdiction to issue prohibitory Writs, the provisions of the Hindu Marriage Act, Special Marriage Act, Foreign Marriage Act are required to be extracted for examination, whether the Family Court, Chennai lacks jurisdiction to entertain the matrimonial Original Petition, to adjudicate the dispute, leading to the prayer for divorce between the spouses, where one of the party is an American National and said to have acquired domicile of that country, where the marriage between them is admittedly solemnised as per Hindu Rites and Customs.

14. Sections 1 and 2 of the Hindu Marriage Act, 1955 deals with short title, extent and Application of the Act and they are as follows:

"1. Short title and extent:- (1) This Act may be called the Hindu Marriage Act, 1955

(2) It extends to the whole of India except the State of Jammu and Kashmir and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.

2. Application of Act:- (1) This Act applies-

(a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a Follower of Brahmo, Prathana or Arya Samaj

(b) to any person who is a Buddhist, Jaina or Sikh by religion, and to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed."

15. Section 19 of the Hindu Marriage Act, 1955 is extracted hereunder:

"19. Court is to which petition shall be presented:- Every petition under this Court shall be presented to the District Court within the local limits of whose ordinary original Civil jurisdiction:-

(i) the marriage was solemnized, or

(ii) the respondent, at the time of presentation of the petition, resides, or

(iii) the parties to the marriage last resided together, or

(iv) the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is, at that time, residing outside the territories to which this Act extends, or 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 him if he were alive."

16. Section 31 of the Special Marriage Act (43 of 1954) reads as follows: "31. Court to which petition should be made:

(1) Every petition under Chapter V or Chapter VI shall be presented to the district Court within the local limits of whose original civil jurisdiction-

(i) the marriage was solemnized; or

(ii) the respondent, at the time of presentation of the petition, resides; or

(iii) the parties to the marriage last resided together; or

(iv) the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is, at that time, residing outside the territories to which this Act extends, or has not been heard of as being alive for a period of seven years by those who would naturally have heard of him if he were alive.

(2) `without prejudice to any jurisdiction exercisable by the Court under sub-section (1), the district Court may, by virtue of this sub-section, entertain a petition by a wife domiciled in the territories to which this Act extends for nullity of marriage or for divorce if she is resident in the said territories and has been ordinarily resident therein for a period of three years immediately preceding the presentation of the petition and the husband is not resident in the said territories."

17. Section 4 of the Foreign Marriage Act (33 of 1969) contemplates conditions relating to solemnization of Foreign Marriages and it reads as follows:

"A marriage between parties one of whom atleast is a citizen of India may be solemnized under this Act by or before a Marriage Officer in a foreign country, if, at the time of the marriage, the following conditions are fulfilled, namely:-

(a) neither party has a spouse living,

(b) neither party is an idiot or a lunatic,

(c) the bridegroom has completed the age of twenty-one years and bride the age of eighteen years at the time of marriage, and

(d) the parties are not within the degrees of prohibited relationship.

Provided that where the personal law or a custom governing at least one of the parties permits of a marriage between them, such marriage maybe solemnized, notwithstanding that they are within the degrees of prohibited relationship."

18. Sections 5 and 6 of the Foreign Marriage Act read as follows:

"5. Notice of intended marriage:- When a marriage is intended to be solemnized under this Act, the parties to the marriage shall give notic thereof in writing in the form specified in the First Schedule to the Marriage Officer of the District in which atleast one of the parties to the marriage has resided for a period of not less than thirty days immediately preceding the date on which such notice is given, and the notice shall state that the party has no resided.

6. Marriage Notice Book:- The Marriage Officer shall keep all notices given under section 5 with the records of his office and shall also forthwith enter a true copy of every such notice in a book prescribed for that purpose, to be called the "Magistrate Notice Book", and such book shall be open for inspection to all reasonable times, without fee, by any person desirous of inspecting the same."

19. Section 17 of the Foreign Marriage Act deals with registration of foreign marriages and it reads as follows:

"17. Registration of foreign marriages:- (1) Where-

(a) a Marriage Officer is satisfied that a marriage has been duly solemnized in a foreign country in accordance with the law of that country between the parties of whom one at least was a citizen of India; and

(b) a party to the marriage informs the Marriage Officer in writing that he or she desires the marriage to be registered under this Section, the Marriage Officer may, upon payment of the prescribed fee, register the marriage.

(2) No marriage shall be registered under this section unless at the time of registration it satisfies the conditions mentioned in section 4.

(3) The Marriage Officer may, for reasons to be recorded in writing, refuse to register a marriage under this section on the ground that his opinion the marriage is inconsistent with inter-national law or the comity of nations.

(4) There a Marriage Officer refuses to register a marriage under this Section the party applying for registration may appeal to the Central Government in the prescribed manner within a period of thirty days from the date of such refusal; and the Marriage Officer shall act in conformity with the decision of the Central Government on such appeal.

(5) Registration of a marriage under this section shall be effected by the Marriage Officer by entering a certificate of the marriage in the prescribed form and in the prescribed manner in the Marriage Certificate Book, and such certificate shall be signed by the parties to the marriage and by three witnesses

(6) A marriage registered under this Section shall, as from the date of registration, be deemed to have been solemnized under this Act."

20. Section 18 of the Foreign Marriage Act (33 of 1969) reads as follows:

"18. Matrimonial reliefs to be under Special Marriage Act, 1954 – (1) Subject to the other provisions contained in this Section, the provisions of Chapters IV, V, VI and VII of the Special Marriage Act, 1954, shall apply in relation to marriages solemnized under this Act and to any other marriage solemnized in a foreign country between parties of whom one atleast is a citizen of India as they apply in relation to marriages solemnized under that Act.

Explanation:- In its application to the marriages referred to in this sub-section, Section 24 of the Special Marriage Act, 1954, shall be subject to the following modifications, namely:-

(i) the reference in sub-Section (1) thereof to clauses (a), (b), (c) and (d) of Section 4 of that Act shall be construed as a reference to clauses (a), (b), (c) and (d) respectively of Section 4 of this Act, and

(ii) nothing contained in Section 24 aforesaid shall apply to any marriage:-

(a) which is not solemnized under this Act; or

(b) which is deemed to be solemnized under this Act by reason of the provisions contained in Section 17:

Provided that the registration of any such marriage as is referred to in sub-Clause (b) may be declared to be of no effect if the registration was in contravention of sub-section (2) of Section 17."

21. As domicile and nationality of the petitioner being the core objection of the petitioner to contend that the Family Court has no jurisdiction to entertain the petition under Hindu Marriage Act, let me reproduce the definition of the word `domicile' as extracted in Union of India and others versus Dudhnath Prasad reported in (2000) 2 SCC 20 and how the word should be interpreted in a given case.

"20. In Tomlin's Law Dictionary, "domicile" has been defined as "the place where a man has his home".

21. In Whicker v. Hume [(1858) 28 LJ Ch. 396], it was held that a person's domicile means, a generally speaking, the place where he has his permanent home.

22. In Mc.Muller v. Wadsworth [(1889) 14 AC 631], it was observed that "the Roman law still holds that `it is not by naked assertion but by deeds and acts that a domicile is established–.

23. Lord Macnaghtenin in Winams v. A.G. [1904 AC 287] observed that:

"Domicile of origin, or, as it is sometimes called, perhaps less accurately, domicile of birth, differs from domicile or choice mainly in this---that its character is more enduring, its hold stronger and less easily shaken off."

24. In Ross v. Ross [1930 AC 1], Lord Buck-master while dealing with a case relating to change of domicile observed that:

"Declarations of intention are rightly regarded as determining the question of a change of domicile, but they must be examined by considering the person to whom, the purposes for which, and the circumstances in which they are made and they must further be fortified and carried into effect by conduct and action consistent with the declared expression.

26. Etymologically, "residence" and "domicile" carry the same meaning, inasmuch as both refer to the "permanent home", but under private international law, "domicile" carries a little different sense and exhibits many facts. In spite of having a permanent home, a person may have a commercial, a political or forensic domicile. "Domicile" may also take many colors; it may be the domicile of origin, domicile of choice, domicile by operation of law or domicile of dependence. In private international law, "domicile" jurisprudentially has a different concept altogether. It plays an important role in the conflict of laws. The subject has been elaborately considered by Dicey in his

book Conflict of Laws (6th Edn.) as aldo in another book by Phillimore on domicile. An equally valuable discussion is to be found in Private international Jurisprudence by Foote and by Westlake on private international law.

28. In view of the above, the concept of "domicile" as canvassed by learned counsel for the appellants with reference to change of nationality or change of domicile from one country to another, cannot be imported in the present case. Moreover, "domicile" and "residence" are relative concepts and have to be understood in the context in which they are used, having regard to the nature and purpose of the statue in which these words are used".

22. Y. Narasimha Rao and others versus Y. Venkatalakshmi and another reported in (1991) SCC 451=1991-2-L.W.646, at paragraph 20 and 21, the Supreme Court held that,

"20. From the aforesaid discussion the following rule can be deduced for recognizing a foreign matrimonial judgment in this country. The jurisdiction assumed by the foreign court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married. The exceptions to this rule may be as follows:(i) where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married; (ii) where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contents the claim which is based on a ground available under the matrimonial law under which the parties are married; (iii) where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties.

21. The aforesaid rule with its stated exceptions has the merit of being just and equitable. It does no injustice to any of the parties. The parties do and ought to know their rights and obligations when they marry under a particular law. They cannot be heard to make a grievance about it later or allowed to by pass it by subterfuges as in the present case. The rule also has an advantage of rescuing the institution of marriage from the uncertain maze of the rule of the Private international Law of the different countries with regards to jurisdiction and merits based variously on domicile, nationality, residence- permanent or temporary or ad hoc, forum, proper law etc, and ensuring certainty in the most vital field of national life and conformity with the public policy. The rule further takes account of the needs of modern life and makes due allowance to accommodate them. Above all, it gives protection to women, the most vulnerable section of our society, whatever the strata to which they may belong. In particular it frees them from the bondage of the tyrannical and service rule that wife's domicile follows that of her husband and that it is the husband's domiciliary law which determines the jurisdiction and judges the merits of the case".

23. In Stanely v. Bernes [162E.R.1190],while dealing with the case relating to domicile of origin , the court observed as follows:

"For certain purposes a man takes his character, prima facie, from the place where he is domiciled, and, prima facie, he is domiciled where he is resident, and the force of residence, as evidence of domicil, is increased by the length of time during which it has continued. All these principles are clear; but time alone is not conclusive, for where is the line to be drawn? Will the residence of a month, or a year, or five years, or fifty years be conclusive? As a criterion, therefore, to ascertain domicil, another principle is laid down by the authorities quoted as well as by practice - it depends on the intention, on the quo animo – that is the true basis and foundation of domicil; it must be a residence sine animo revertendi, in order to change the domicilium originis: a temporary residence for the purposes of health, or travel or

business has not the effect: it must be a fixed and permanent residence, abandoning finally and for ever the domicil of origin; yet liable still to a subsequent change of intention."

24. In Sondur Rajini v. Sondur Gopal reported in 2005 (4) Mah.LJ 688, the petition was filed by the wife, seeking a decree for judicial separation for custody of minor child and for maintenance. The respondent-husband after having tied the nuptial knot at Ban-galore was working in Sweden. The couple lived abroad, purchased their own house in Stockholm and were blessed with a child. Thereafter, the respondent-husband went to Australia, but on losing his job, came back to India with children. She filed petition seeking for judicial separation. Objection was raised by the respondent- husband as to the maintain-ability of the petition on the ground that both parties are citizens of Sweden and not domiciled in India. A letter of the respondent was produced before the Court that he never had an intention to permanently settle in Australia. There was also nothing on record to show that he had ever given up his domicile of origin, i.e., India. The Division Bench of Bombay High Court, after analysising the law on domicile, held that the Family Court in Mumbai has jurisdiction to entertain the petition for judicial separation. While upholding the contentions of the wife, the Division Bench ob- served as follows:

"....the marriage was solemnised by Hindu Vedic Rites and registered under H.M. Act. It may be noticed that none of the provisions of H M. Act lay down the time and condition under which it will cease to apply. In other words, once the provisions of H.M. Act apply, it would continue to apply as long as the marriage exists and even for dissolution of the marriage. The Hindu marriage gives rise to bundle of rights and obligations between the parties to the marriage and their progeny. Therefore, the system of law which should govern a marriage, should remain constant and cannot change with vagaries/whims of the parties to the marriage. We may briefly glance at Cheshire and North Pvt.

International Law, wherein the learned Author at page 124 points out that "it has been universally recognised that questions affecting the personal status of a human being should be governed constantly by one and the same law, irrespective of where he may happen to be or of where the facts giving rise to the question may have occurred". The time at which the domicile is to be determined is when the proceedings under H.M. Act are commenced, is accepted then every petition filed by the wife whose husband moves from one country to another for the purposes of job or for any purpose whatsoever, he would be able to frustrate a petition brought by the wife by changing his domicile even between the presentation I the petition and the hearing of the case. The rule is "once competent, always competent" and this will be so even if the party domiciled in India at the time of their marriage has since changed his domicile, disassociated himself from the determination of his status by the Court in India. The proposition of law canvassed, that the time at which the domicile is to be determined is when the proceedings are commenced, therefore, cannot be accepted, insofar as the petitions under H.M. Act is concerned, inasmuch as it would be against the public policy in this country and which may create a serious social problem. The Hindu society is deeply interested in maintaining integrity of the institution of the marriage. Once the parties have selected H.M. Act as their personal law, they cannot abdicate the same at their free will or as per exigencies of situation or according to their whims and fancies. Therefore, we are of the considered opinion that the time at which the domicile is to be determined is when the parties tie nuptial knot under the Hindu Marriage Act and not the date when an application is made for matrimonial reliefs. As a natural corollary thereof, even if a party to the matrimonial petition establishes that after marriage he acquired domicile of some other country, it would not take away the jurisdiction of the Court in India if on the date of the marriage he was domiciled in India. It is unjust that a party to the marriage can change his entire system of personal law by his or her unilateral decision. If that is allowed it would make the position of a wife very miserable or helpless. We have therefore, no hesitation in holding that the provisions of H.M. Act will continue to apply to the marriage of parties who were admittedly domiciled in India on the date of their marriage and they cannot be heard to make a grievance about it later or allowed to by-pass it by subterfuges. The rule, as observed by the Apex Court in the case of Y.

Narsimha Rao also has an advantage of rescuing the institution of marriage from uncertain maze of the rules of the Private International Law of the different countries with regard to jurisdiction.

25. The Division Bench of the Bombay High Court in Navin Chander Advani v. Leena reported in AIR 2005 Bombay 277, considered a case, in which, both parties are Hindus, domiciled in India before marriage, soleminised their marriage in United States of America, according to Hindu Vedic Rites. The Husband invoked the jurisdiction of the Family Court and the petitioner was rejected on the ground of lack of jurisdiction. Aggrieved by the same, he moved the High Court and pleaded that he was domiciled in the State of Maharashtra and the marriage was solemnised, according to Hindu Vedic Rites and registered before the Registrar of San-Jose California State. The appellant submitted that he was a permanent resident of Bombay and professing Hindu Religion. While setting aside the order of the Family Court, the Division Bench held as follows:

"Thus, from reading these averments it appears that the husband and wife both are Indian citizens, domiciled in India. However, they have performed their marriage according to Hindu rites on 19th July, 1998 in U.S.A. Let the fact as it is what we find that since the parties are Indian citizens and domiciled in India, the Courts in India will have jurisdiction. The Family Court has jurisdiction to deal with the matters under the Special Marriage Act and equally under the Hindu Marriage Act. It has even jurisdiction to deal with matrimonial matters where the parties are Muslims. Except, the Parsi Marriage Act for all other marriage the Family Court is having jurisdiction. While deciding the matter the Family Court is only expected to look into personal law of the parties. Looking from this angle with reference to Section 31, sub-section (1), Clause (4) of Special Marriage Act and Section 19, sub- section (1) Clause (4) of the Hindu Marriage Act are at verbatim. Under Section 31(1) it provides that every petition under Chapter V or Chapter VI shall be presented to the District Court within the local limits of whose original civil jurisdiction - (iv) the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is at that time residing outside the territories to which this Act extends ……." and under Section 19 it provides "Every petition under this Act shall be presented to the District Court within the local limits of whose ordinary original civil jurisdiction- (iv) the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is, at that time, residing outside the territories to which this Act extends…… " there by the situation has been contemplated that the appellant is residing within the ordinary civil jurisdiction of the Court and other side namely the respondent is residing outside the territories to which this Act extends. This aspect has not been considered b) the Family Court, therefore, keeping this it view what we find is that it was obligatory for the Family Court to find out as to whether the marriage petition is to be considered under the Hindu Marriage Act or Special Marriage Ad It was equally necessary for the Family Court to look into the provisions pertaining to the jurisdiction which we have quoted from both the enactments. The Family Court has not looker into these provisions and in casual marine stated that the marriage is performed outside India. The parties are residing in USA and has returned marriage petition. In fact on proper application of law even it was obligatory for the Family Court to consider conversion of the petition, if the request for amendment, is made to that effect by the applicant. In short, what we find is that the marriage petition has been re-turned in very casual manner without looking.

26. In Vinaya Nair v. Corporation of Kochi reported in AIR 2006 Kerala 275, a Division Bench of Kerala High Court considered a case of refusal to register a marriage on the ground that husband was a Canadian domicile. The first petitioner therein was a Hindu by birth, professing Hindu Religion, married the second petitioner, a Hindu by religion, as per Hindu Rites and complied with all the conditions for valid Hindu marriage. It was held that the Act does not give much emphasis to the word "domicile" except in Section 1(2) of the Act. In the reported case, the first petitioner husband was an employee of Canada and the second petitioner was his wife. The first petitioner was born in Canada while parents were at Canada and he acquired Canadian citizenship by birth and therefore he has a Canadian domicile by birth. While

directing the municipal authorities to register the marriage, the Division Bench, at Paragraph 6, held as follows:

"Though S.1(2) states that the Act extends to the whole of India except the State of Jammu and Kashmir and also to Hindus domiciled in the territories to which this Act extends, the word "domicile" does not figure in sub-clause (a) and (b) of S.2(1). Sub-Clause (a) of S.2(1) states that the Hindu Marriage Act applies to any persons who is Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Sama. Sub-clause (b) of S.2(1) states that the Act applies to any person who is Buddhist, Jaina or sikh by religion meaning thereby cls. (a) and (b) require the form of Hindu to make Act applicable. Sub-clause (c) states that the Act applies to any other person domiciled in the territories to which the Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of the law. A conjoint reading of Ss.1 and 2 of the Act would indicate that so far as the second limp of S.1(2) of the Act is concerned its intra territorial operation of the Act which applies those who reside out-side the territories. First limp of Sub-Section 2 of S. 1 and Cls.(a) and (UJ of S.2 (1) would make it clear that the Act would apply to Hindus reside in India whether they reside outside the Territories or not. The word "Hindu" as such is not defined in the Act. All the same, Sub-Section (3) of S.2 says that the Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless a person to whom this Act applies by virtue of the provisions contained in the Section. Section 5 as we have already indicated deals with the conditions for a Hindu Marriage. It is not the conditions in Section 5 that the Hindu who is solemnizing the Marriage under Hindu Marriage Act should have domiciled in India. We may in this connection referred to the applicability of the Hindu Succession Act, 1956. Section 1(2) of the Act states that it extends to the whole of India except the State of Jammu and Kashmir. Section 2(1) deals with the applicability of the provisions of the Act and also the jurisdiction of the Court. There is no second part to sub-Section (2) providing for extra territorial operation. Section 2 of the Hindu Succession Act also does not contain any reference to domicile. When we compare the provisions of the Hindu Marriage Act and the Hindu Succession Act, 1956, it is clear that the concept of domicile has been brought only in the second limb of sub-section (2) of S.1 of the Hindu Marriage Act read with S.5(1) of the Act. So far as the present case is concerned, clause applicable is the first limb of sub-section (2) of S.1 read with Cl.(a) of sub-section(2) of S.2 of the Act. Test to be applied is whether both the parties are Hindus by religion in any of its forms and whether they have satisfied the condition laid down in S.5 of the Hindu Marriage Act and whether they have followed the ceremonies of Hindu Marriage Act as provided in S.7 of the Hindu Marriage Act. The concept of domicile as we have already indicated would apply only in a case where the second limb of S.1(2) of the Hindu Marriage Act read with sub-Clause (a) of S.2(1) is attracted. We are of the view that the petitioners have satisfied the conditions laid down in S.5 of the Act and also the first limp of sub-section (2) of S. 1 read with Cls.(a) and (b) of S.2(1) of the Hindu Marriage Act, 1955."

A few judgments on the aspect of relevance of nationality to domicile is also necessary for adjudicating the dispute in this case.

27. In D. P. Joshi v. State of Madhya Pradesh and another reported in AIR 1985 SC 334, the Apex Court observed that citizen-ship and domicile represent two different conceptions. Citizenship has reference to political status of person and domicile to his civil rights. Domicile has reference to the system of law by which a person is governed and when we speak of domicile of a country, we assume that the same system of law prevail all over the country.

28. In Michael Antony Rodrigues v. State of Bombay reported in AIR 1956 Bombay 729, the Court observed that under Article 5 of the Constitution of India nationality and domicile are two different concepts. In Private International Law, a man may have one nationality and different domicile. He may have a national to one country and he may have a domicile in another country.

29. At Cheshire and North's Private International Law, it was observed that,

"Nationality is a possible alternative to domicil as the criterion of the personal law. These are two different conceptions. Nationality rep resents a person's political status, by virtue of which he owes allegiance to some particular country; domicil indicates his civil status and it provides the law by which his personal rights and obligations are determined. Nationality, depends, apart from naturalisation, on the place of birth or on parentage, domicil, as we have seen, is constituted by residence in a par- ticular country with the intention of residing there permanently. It follows that a person may be a national of one country but domiciled in another."

30. It is therefore, clear that in both the Indian and International Law the concept of Nationality and domicile are recognised as two different conceptions, which necessarily mean, an Indian by retaining his domicile in India may acquire citizenship of other country. In other words, merely because a person has acquired citizenship of some other country that does not necessarily mean that he has abandoned domicile of origin.

31. In Udny v. Udny reported in 1989 LR 1 SC Div, it was held that a person may have domicile at one point of time. If a person takes up foreign domicil, his origin or native domicil simply remains in abeyance. As soon as he abandons foreign domicil, the original domicil is automatically received. If the domicil of origin is displaced as a result of acquisition of a domicil of his/her choice, the domicil is merely placed in abeyance for time being.

32. In the present case, the uncontroverted fact is that the marriage between the parties was solemnized as per Hindu Rites and Customs and both the parties are Hindus. Though the respondent has disputed the registration of marriage before the Marriage Officer in U.S.A., the form of marriage is admitted. Judicial pronouncements of the Courts makes it clear that in a case determining the domicile of a person, it should be examined and understood in the context to which the word "domicil" is used having regard to the nature and purpose of the statute. As observed in Stanley v. Berries [162 All. ER 1190], it depends on the intention "on the quo animo", the true basis and foundation of domicil, whether he has abandoned finally and for ever the domicil of origin. As held in Ross v. Ross (cited supra), the declaration of intention, conduct and actions of a person, alleging change of domicile is relevant to conclude as to whether he *has completely abandoned the domicile of his origin and accepted and conducted in a manner, adopting the domicile of his choice. While doing so it should be kept in mind that Citizenship and Nationality has reference only to political status and allegiance to a country and domicil has reference to the system of law which a person is governed and it indicates civil status, personal rights and obligations flowing from the laws to which he/she acquiesces himself/herself to its jurisdiction. It should be borne in mind that Hindu Marriage Act has extra territorial jurisdiction to all Hindus, even if they reside outside the territories of India. The Hindu Marriage Act, hi particular Section 2, does not stipulate any condition that both the parties should be domiciled in India at the time of presentation of the petition before the Family Court or any other Court of competent jurisdiction. Even as per the averments of the petitioner, the members of the family were known to each other before the marriage and they were neighbours residing next door. Admittedly, the petitioner, domiciled in India before setting up his residence in U.S.A. Therefore, his domicile of origin is within the jurisdiction of Family Court, Chennai.

33. As stated supra, Section 2 of the Hindu Marriage Act does not stipulate any stringent condition that both parties should be residing within or domiciled in the jurisdiction of India for maintaining a petition under the Hindu Marriage Act. In fact, it covers all Hindus, who are residing outside the territory to which this Act extends also. Clause 4 of Sub-Section 1 of Section 31 of the Special Marriages Act, and Clause 4 of Section 19 of the Hindu Marriage Act are pari-materia pro-visions. As per Clause 4 of Section 19 of the Hindu Marriage Act, the petition, under this Act shall be presented to the District Court, within the local limits of whose ordinary Original Civil jurisdiction, where the peti- tioner is residing at the time of presentation of the petition, in a case where the respondent is, at the time, residing outside the

territories to which this Act extends, or 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 him of he were alive.

34. The above said provision enables presentation of the petition before the District Court of competent jurisdiction or Family Court even if the respondent is residing outside the territories to which the Hindu Marriage Act extends. Admittedly, the petitioner is domiciled in India by birth and origin and acquisition of domicile of another country by choice or nationality, cannot be imported into Section 2 of the Hindu Marriage Act and it will not oust the jurisdiction of the Family Court/District Court of competent jurisdiction to entertain a petition under the Hindu Marriage Act or Special Marriages Act, as the case may be.

35. Except in Section 1 and 2, the Word `Domicile' does not figure in any of the provisions of the Hindu Marriage Act. A conjoint reading of Sub-Clause (a) and (b) of Section 2(1) and sub-Clause 2(a) of Section 1, would mean that the Hindu Marriage Act applies to any person, who is Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj.

36. The Act only stipulates certain conditions for the valid Hindu Marriage and one of the conditions being that both the parties should be Hindus. It is well settled rule of construction that if there are two or more provisions in a statute, appear to be in conflict with each other, the provisions have to be in- terpreted in a manner to give effect to the pro-visions and that any construction which renders the operation of one provision as ineffective, should not be adopted, except as a last resort. Therefore, on a conjoint reading of above three provisions, viz., (1) Section 1 (2), Section 2 and (3) Section 19 of the Hindu Marriages Act and applying the rule of Harmonious construction, this Court is of the considered view that the Family Court at Chennai, has jurisdiction to maintain the Original Petition filed by one of the parties to the Hindu Marriage Act, against the other. In a given case, where marriage is solemnised between Hindus and the wife stranded in a foreign country without financial or parental assistance, returns to India under fear of living in foreign country without any assistance, for such women, the Court should not remain as a mute spectator and dismiss the complaint/petition on the ground that the husband has acquired domicile in foreign country of his choice and therefore, no proceedings can be initiated against him under the Hindu Marriage Act for appropriate relief, which could be for judicial separation or divorce or for even alimony.

37. In the instant case, the petitioner is domicil of India by origin. The marriage was solemnized as per Hindu Vedic Rights and Customs and therefore, there is no doubt to this Court that the intention of the parties was to be governed by the personal law, viz., Hindu Marriage Act. Having chosen to accept the said Act as their personal law, one cannot abdicate the same on his free will and fancies and deny the other contracting party, the rights and obligations flowing from the statute. As observed by the Division Bench of the Bombay High Court in Sondur Rajini's case, it is unjust that a party to a marriage can change his entire system of personal law by his or unilateral decision and if that is allowed, it would make the position of the wife miserable". Again, as observed by the Supreme Court in Narasimha Rao's case, the parties contracting the marriage under the Hindu Marriage Act, knows their right and obligations when they solemnized their marriage and one of them cannot be allowed to bye-pass it by subterfuge. If that is to be allowed by the Courts, it would create chaos in applicability of the laws. The contention of the petitioner that he was an American National and therefore, the Hindu Marriage Act is not applicable, is not tenable, in view of the difference in the concepts that, Nationality represents the man's political status, by virtue of which, he owes allegiance to the country, whereas, Domicile indicates his civil status and it provides the law by which his personal rights and obligations are determined. Personal Law to which the party belongs, is not dependent on the nationality as both are conceptually different. Personal law is closely associated with the domicil of origin, his personal status and relationship, such as, marriage, divorce, legitimacy, succession, etc., which cannot be changed overnight by acquiring the domicile of his choice, unless the said person who claims change, places strong and acceptable legal evidence.

38. Hindu Marriage Act, only states that the parties to the lis must have domiciled in the territories to which the Act extends. It is not the case of the petitioner that he had never domiciled in the territories of India nor he is governed by the personal law of the country, which he has chosen as his domicile. As stated supra, for all purposes, like marriage divorce, succession, legitimacy, he is governed by the personal law of the domicile of origin, which is that form of origin, imposed by operation of law on every person at birth.

39. The domicile of origin continues to operate throughout his life and the Hindu Marriage Act merely states that it would be applicable to all Hindus domiciled in the territories to which the Act extends, even if they are outside the territory. Therefore, while adjudicating the dispute between the parties, it is necessary to lay emphasis in the form of Marriage and the intention of the parties to be governed by the personal law of domicile. Reading of the provisions of Section 2(c) of the Act contemplates extra territorial operation in the sense that the persons domiciled in other country to which the Hindu Marriage Act may extend, are governed by the Hindu Law and not any other personal law. Citizenship or nationality or domicile of the husband would not be an imperative qualification in adjudicating the dispute, as both the contracting parties are Hindus, whose marriage is admittedly solemnized as per Hindu Vedic Rites and Customs. It is should be noted that in Narasimha Rao' s case, the Supreme Court observed that the bondage of the tyrannical and servile rule that wife's domicile follows that of her husband is no more in existence.

40. Reading of the Act in entirety does not indicate that the provisions would be applicable only if the marriage is solemnized in the territories to which this Act extends, whereas the Act provides for extra territorial operation. Sub-Section 2 of Section 1 of the Act deals with two aspects, viz., (1) it deals with the territory to which the Hindu Marriage Act extends and (2) the persons to whom the Act is applicable. Therefore, in the light of the principle to be followed in construing the word `domicile' as laid down in Dulbnath Prasad's case, [(2002) 2 SCC 50], place of residence by itself would not estab- lish domicile of an individual, but it should be understood in the context of the Statute, viz., personal law applicable to the parties.

41. Interpretation of a Statutory provision should be to find out the intention of the legislature and that has to be understood with due regard that the object of the legislation also. The word employed in the Statute will acquire meaning and content depending upon the context in which they are used. The word should not be torn out by the context and by interpretation, it would make another provision Otiose/redundant and such interpretation should not be adopted. The interpretation to the words employed in Section 1(2) of the Hindu Marriage Act should be consistent with the working of the enactment, keeping in mind the object of the Act. Reference can be made to the decision in Marya Teresa Martin v. E.Martin, Madras reported in AIR 1994 Kerala 264.

42. In Anwar Hasan Khan v. Mohd. Shafi reported in 2001 (8) SCC 540, the Supreme Court, at Paragraph 8, held as follows: "For interpreting a particular provision of an Act, the import and effect of the meaning of the words and phrases used in the statute have to be gathered from the text, the nature of the subject-matter and the purpose and intention of the statute. It is a cardinal principle of construction of a statute that effort should be made in construing its provisions by avoiding a conflict and adopting a harmonious construction. The statute or rules made there under should be read as a whole and one provision should be construed with reference to the other provision to make the provision consistent with the object sought to be achieved. The well-known principle of harmonious construction is that effect should be given to all the provisions and a construction that reduces one of the provisions to a "dead letter" is not harmonious construction."

43. The marriage between the parties was solemnized on 17.04.2002 and after three months, it was said to be registered before the Marriage Officer. There are no details in the counter statement filed by the husband as to whether the marriage was solemnized before the Marriage Officer, in accordance with the procedure contemplated under the Foreign Marriage Act, in particular, Sections 4 to 6 of the Act. Excepting the

Marriage Certificate said to have been enclosed with the counter statement, there is nothing on record to prove that the parties have intended to adopt the law of that country or the Special Marriages Act. A marriage performed under the Hindu form of Marriage under the Hindu Marriage Act is different from the Civil Marriage under Foreign Marriage Act or the Special Marriage Act. A marriage solemnized as per Vedic Rites and Customs, personal law applicable to the parties has its own rights and obligations, and mere registration of the marriage for the purpose of recognition under the Foreign Marriage Act would not deprive the second respondent of her right to seek for matrimonial reliefs provided under Hindu Marriage Act. The case laws relied on by the learned counsel for the petitioner would not lend support to her contention in view of the subsequent pronouncements of the Supreme Court on the issue of domicile. The contentions opposing the jurisdiction of the Family Court to entertain the petition under the Hindu Marriage Act are not accepted.

44. It is the law of the land that Writ of Prohibition will be issued as soon as inferior court/tribunal proceeds to apply a wrong principle of law when deciding a fact on which jurisdiction depends. Prohibition is primarily and principally preventive rather than remedial remedy. The effect of the remedy is an injunction against the court or tribunal commanding it to cease from the exercise of jurisdiction to which it has no legal claim. Prohibition is not a writ of right granted exdebito justice. But one of sound judicial discretion to be granted or withheld according to the consideration of the particular case. When there is entire absence of jurisdiction over the subject matter of adjudication and this is apparent on the face of the proceedings, the granting of reliefs by prohibition is not a matter of discretion, but one of absolute right.

45. In the light of the decisions of the Courts dealing with matrimonial matters with reference to domicile of the parties, I am of the considered view, the Family Court or any other competent Court has got jurisdiction to adjudge any dispute between the contracting parties, one of whom is a foreign national, said to have acquired domicile of his choice.

46. For the forgoing reasons, the Writ Petition is dismissed. No costs. Consequently connected Miscellaneous Petition is also closed.

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# R. SUKANYA VERSUS R. SRIDHAR & OTHERS

**Madras High Court**

*R. Sukanya*
*Versus*
*R. Sridhar & Others*

**Bench : Hon'ble Mr. Justice S. Manikumar**

**C.R.P.(PD) No.1695 of 2004**

**Decided on 18-08-2008**

**The revision petitioner has filed O.P. No. 569 of 2004 on the file of the Principal Family Court, Chennai for divorce. She filed an Application in I.A. No. 848 of 2004, in the above O.P., to restrain the respondents 2 to 5 in any manner, printing or publishing the proceedings relating to the institution of the Petition filed by her before the Family Court or carry any other recital as news item in the telecast or their respective publication and to punish them for any such violation. The Trial Court dismissed the said I.A., on the ground that the respondents have not contravened the provisions of**

**Section 22 of the Hindu Marriage Act and that they are not liable for any punishment under the provisions of the said Act and if they contravene the said provision, action has to be taken before the appropriate forum. Before this Court, the first respondent has agreed that the proceedings may be conducted "in camera" and that no publicity be given. On the other hand, the press had contended that the provisions of Section 11 of the Family Court will have an overriding effect on Section 20 of the Hindu Marriage Act.**

- **Right of privacy has been recognised by Indian Courts. In Gobind v. State of Madhya Pradesh and another, 1975(2) SCC 148, Their Lordships of the Supreme Court held as follows :**

  **"24. Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing. This catalogue approach to the question is obviously not as instructive as it does not give analytical picture of the distinctive characteristics of the right of privacy. Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty."**

- **"Right" is an interest recognised and protected by moral or legal rules. It is an interest the violation of which would be a legal wrong. Respect for such interest would be a legal duty. That is how Salmond has defined "right". In order, therefore, that an interest becomes the subject of a legal right, it has to have not merely legal protection but also legal recognition. The elements of a "legal right" are that the "right" is vested in a person and is available against a person who is under a corresponding obligation and duty to respect that right and has to act or forbear from acting in a manner so as to prevent the violation of the right. If, therefore, there is a legal right vested in a person, the latter can seek its protection against a person who is bound by a corresponding duty not to violate that right."**

- **Thus it is manifestly clear that the legislature has intended to guard the right of privacy in relation to matrimonial matters and it is a settled legal position that the real meaning and effect should be given to the words employed in the Statute. In the light of language employed in the Statute, the right of privacy is so fundamental to the individual excepting to the extent provided under the Marriage Acts. Of course, we should not forget the role of our independent press and media in coming out**

**with revelations of public interest, resulting in societal changes. As the freedom of the press is for the dissemination of information of public interest and public affairs, those which are not related to the above, but involving the marital relationships of the parties to a litigation should not be published or telecast, as it is prohibited under law. Publication of the proceedings meant to be in camera will affect the constitutional liberty guaranteed to the individual and it would be an invasion of his right of privacy. When Section 22(1) of the Act prohibits printing or publishing any matter in relation to any such proceeding arising under the Act, the Family Court or any other competent Court dealing with matrimonial matter, under the Hindu Marriage Act, has inherent jurisdiction to issue an order of injunction or any such direction to give full effect to the statutory provision. Therefore, the contention of the respondents 2 to 5 that they are not parties to the Original Petition and therefore, no injunction can be granted against them, cannot be countenanced.**

## Judgment

1. This Civil Revision Petition is directed against the order and decretal order dated 21.07.2004 made in I.A. No. 848 of 2004 in O.P. No. 569 of 2004, on the file of the Principal Family Court at Chennai.

2. Facts leading to the Civil Revision Petition are as follows:

   The revision petitioner has filed O.P. No. 569 of 2004 on the file of the Principal Family Court, Chennai for divorce. She filed an Application in I.A. No. 848 of 2004, in the above O.P., to restrain the respondents 2 to 5 in any manner, printing or publishing the proceedings relating to the institution of the Petition filed by her before the Family Court or carry any other recital as news item in the telecast or their respective publication and to punish them for any such violation. The Trial Court dismissed the said I.A., on the ground that the respondents have not contravened the provisions of Section 22 of the Hindu Marriage Act and that they are not liable for any punishment under the provisions of the said Act and if they contravene the said provision, action has to be taken before the appropriate forum. Before this Court, the first respondent has agreed that the proceedings may be conducted "in camera" and that no publicity be given. On the other hand, the press had contended that the provisions of Section 11 of the Family Court will have an overriding effect on Section 20 of the Hindu Marriage Act.

3. Even at the stage of Interim Application of stay, this Court after considering the scope and extent of Section 22(1) of the Hindu Marriage Act and the provisions of the Family Courts Act, 1984 at Paragraphs 12 to 16, has held as follows:

   "12. The Family Courts Act is only a procedural law and the substantive law relating to family matters may vary from person to person depending on the religion and the respective personal laws. When a Family Court deals with the matrimonial disputes of Hindu it has to only enforce the provisions of the Hindu Marriage Act and Section 22 of the said Act in this regard is mandatory. If other personal laws like Christian, Parsi or Mohamedan laws do not provide for in camera proceedings, whether there can be ban on publication or not will have to be decided on the basis of Section 11. The section confers a discretion on the Judge and also grants a right to the parties to have the proceedings held in camera. In fact Section 11 confers a special right on the party to demand in camera proceedings and there is no discretion vested with the Court when such a request is made by either party to the dispute. This only strengthens the arguments of the learned counsel for the petitioner that even under the Family Courts Act, there is no scope for any publication or printing or the proceedings under the said Act on the violation of the Press and other electronic media. Therefore, the contention of the learned counsel for the respondents 2 to 5 that the Family Courts Act, 1984 has got overriding effect on the Hindus Marriage Act, 1955 is not sustainable.

   13. Section 22 of the Hindu Marriage Act, 1955 recognizes the "right to privacy" between the parties in a proceedings conducted under the Hindu Marriage Act. It has been clearly mentioned in Section 22 of the said Act that the proceedings under the Act should be conducted in camera and shall not

be lawful for any person to print or publish any matter relatng to such proceedings and if any one contravenes such bar he is liable for punishment with a fine which may extend to one thousand rupees.

14. Right of privacy has been recognised by Indian Courts. In Gobind v. State of Madhya Pradesh and another, 1975(2) SCC 148, Their Lordships of the Supreme Court held as follows :

"24. Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing. This catalogue approach to the question is obviously not as instructive as it does not give analytical picture of the distinctive characteristics of the right of privacy. Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty."

15. As far as this case is concerned, it is divorce proceedings between the petitioner and the first respondent and the petitioner is a cine actress and the first respondent is an employee in United States of America. The first respondent is on leave to attend his case. He is unable to leave for America without the case being heard. Therefore, the interim stay of all further proceedings in the Original Petition ought to be vacated in the interest of justice. At the same time the interest of the petitioner also has to be taken note of as publication or telecast of the proceedings conducted in Court will harm her reputation and cause injury.

16. In the above circumstances, C.M.P. No. 16153 of 2004, taken out by the first respondent is allowed in part and the interim stay already granted by this Court on 29.09.2004 in C.M.P. No. 15875 of 2004 is vacated only with regard to conduct of further trial in the original petition. However, the respondents 2 to 5 are restrained from publishing or telecasting the matrimonial proceedings relating to the revision petition in any way in view of Section 22 of the Hindu Marriage Act, 1955."

4. The order of this Court restraining them from publishing or telecasting the matrimonial proceedings relating to the revision petitioner has not been challenged on Appeal. In addition to what is stated above, I would like to add few paragraphs on the issue of right of privacy, in relation to matrimonial matters between the litigating parties.

5. The Universal Declaration of Human Rights in Article 12 states that, "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

6. Freedom of speech and expression, includes right not only to speak, but includes right to print, publish, distribute, receive information. But whether this right is unrestricted, unlimited and the journalists and the media are given a total freehand to publish or telecast anything they desire ? Whether right of freedom of speech and expression guaranteed under Article 19(1) of the Constitution of India can simply be exercised to invade into the privacy of life, which is exclusively reserved to an individual ? Whatever transpires in between the litigants to a matrimonial dispute in a Court of law can it be made public ? The answer to all the queries would be that rights guaranteed under Article 19(1)(g) are subject to reasonable restrictions imposed in the Constitution of India and the laws framed thereunder.

7. A reader of a newspaper, magazine or a person who watches the television or internet would be too curious to know what's happening in other's life, but would he expect something to be flashed about his own matrimonial life in press or other form of media ? Information can be collected by the press or any other media, like photographs, videotapes, printed matter, etc., or it could be even information through interviews either from the parties to the marriage or from any body else.

8. Faced with a situation, whether the pressman/journalist would like to publish any matter pertaining his own matrimonial affair, without his consent or matter relating to any matrimonial litigation, affecting his

right of privacy ? The Supreme Court in Mr. X v. Hospital Z, 1998(8) SCC 296, at Paragraph 15, explained what is meant by 'right' in legal parlance and it is extracted :

"15. "Right" is an interest recognised and protected by moral or legal rules. It is an interest the violation of which would be a legal wrong. Respect for such interest would be a legal duty. That is how Salmond has defined "right". In order, therefore, that an interest becomes the subject of a legal right, it has to have not merely legal protection but also legal recognition. The elements of a "legal right" are that the "right" is vested in a person and is available against a person who is under a corresponding obligation and duty to respect that right and has to act or forbear from acting in a manner so as to prevent the violation of the right. If, therefore, there is a legal right vested in a person, the latter can seek its protection against a person who is bound by a corresponding duty not to violate that right."

9. While dealing with the right of privacy vis-a-vis the right of the press, the Supreme Court in R. Rajagopal v. State of T.N., 1995(1) R.R.R. 352 : 1994(6) SCC 632, has held as follows :

"26. (1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a 'right to be let alone'. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy."

10. 'Privacy' has been defined as "the rightful claim of an individual to determine to which he wishes to share himself with others and control over the time, place and circumstances to communicate with others". It means the individual's right to control dissemination of information about himself. It is his own personal possession. It is well accepted that one person's right to know and be informed may violate another's right of privacy. In other words, disclosure of certain facts, events, actions, photographs, videotapes, in any form of media, print or celluloid, internet would cause embarrassment, agony emotional stress, to a person of reasonable sensitiveness. 'Right of Privacy' in other words can be said "to be let alone". What is an information to others according to a journalist, could be a personal and sensitive information to an individual in a litigation relating to a matrimonial dispute. The boundary between freedom of press and privacy of individual is the "Lakshman Rekha" and if the media crosses the line of boundary, the invasion starts. To strike a balance between these two competing interests is difficult. Right of privacy, vis-a-vis right of information to be furnished to the general public, in other words, the right of the media, should be with reference to the kind of information which the law permits. We all know that Constitution does not guarantee absolute freedom or absolute protection to the media. Provisions of certain enactments would amply demonstrate the inherent restrictions on freedom of speech and expression, like the one prescribed under Article 19(1)(g) of the Constitution of India. Reasonable restrictions imposed in certain statutes as follows :

11. Section 337 of the Criminal Procedure Code deals with Court to be open and it reads as follows:

"(1) The place in which any Criminal Courts held for the purpose of inquiring or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them :

Provided that the Presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

(2) Notwithstanding anything contained in sub-section (1), the inquiry into and trial of rape or an offence under Section 376, Section 376-A, Section 376-13, Section 376-C or Section 376D of the Indian Penal Code (45 of 1860) shall be conducted in camera :

Provided that the Presiding Judge may, if he things fit, or on an Application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the Court.

(3) Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any proceedings, except with the previous permission of the Court."

12. Sections 3 and 4 of the Indecent Representation of Women (Prohibition Act), 1980, reads as follows :

"3. Prohibition of advertisements containing indecent representation of woman. - No person shall publish, or cause to be published, or arrange or take part in the publication or exhibition of, any advertisement which contains indecent representation of women in any form.

4. Prohibition of Publication or sending by post of books, pamphlets, etc., containing indecent representation of women. - No person shall produce or cause to be produced, sell, let to hire, distribute, circulate or send by post any book, pamphlet, slide, film, writing, drawing, painting, photograph, representation or figure which contains indecent representation of women in any form :

Provided that nothing in this Section shall apply to-

(a) any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure -

(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure is in the interest of science, literature, art, or learning or other object of general concern; or

(ii) which is kept or used bona fide for religious purposes;

(b) any representation sculptured, engraved, painted or otherwise represented on or in, -

(i) any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958), or

(ii) any temple, or on any car used for the conveyance of idols, or kept or used for any religious purposes;

(c) any film in respect of which the provisions of Part II of the Cinematograph Act, 1952 (37 of 1952), will be applicable."

13. Section 7(1)(c) of the Medical Termination of PRegulation ncy Act (34 of 1971) is extracted hereunder:

"(c) Prohibit the disclosure, except to such persons and for such purposes as may be specified in such regulations, of intimations given or information furnished in pursuance of such regulations."

14. Section 22 of the Hindu Marriage Act deals with the proceedings to be held in camera and they shall not be printed and published and it reads as follows :

"(1) Every proceeding under this Act shall be conducted in camera and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except a judgment of the High Court or of the Supreme Court printed or published with the previous permission of the Court.

(2) If any person prints or publishes any matter in contravention of the provisions contained in sub-section (1), he shall be punishable with fine which may extend to one thousand rupees."

15. Section 33 of the Special Marriage Act (43 of 1954) deals with the proceedings to be in camera and may not be printed or published and it is extracted below :

"(1) Every proceeding under this Act shall be conducted in camera and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except a judgment of the High Court or of the Supreme Court printed or published with the previous permission of the Court.

(2) If any person prints or publishes any matter in contravention of the provisions contained in sub-section (1), he shall be punishable with fine which may extend to one thousand rupees."

16. Section 36 of the Children Act, 1960 deals with the Prohibition or publications of names, etc., of children involved in any proceeding under the Act and it reads as follows :

"(1) No report in any newspaper, magazine or news sheet of any inquiry regarding a child under this Act shall disclose the name, address or school or any other particulars calculated to lead to the identification of the child, nor shall any picture of any such child be published :

Provided that for reasons to be recorded in writing the authority holding the inquiry may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

(2) Any person contravening the provisions of sub-section (1) shall be punishable with fine which may extend to one thousand rupees."

17. Visualising the adverse effect on the women and children and exploitation of the vulnerable Section of the society, the legislators have imposed reasonable restriction on the freedom of the media and press. Reading of these provisions makes it clear that the intention of the legislation is to maintain secrecy in respect of certain proceedings or inquiry and protect women and children from invasion of their right of privacy. These statutory restrictions are to protect their basic human right to lead life without hindrance from anyone in such of those enumerated matters and the media should not impinge upon the right of privacy, in otherwords, they should be allowed "to be let alone". "Right of Privacy" is now recognised as a right which flows from right to life and liberty under Article 21 of the Constitution of India.

18. Media attention should be towards exposing corruption, nepotism, law breaking, abuse or arbitrary exercise of power, law and order, economy, health, science and technology, etc., which are matters of public interest. The "Lakshman Rekha" or the "line of control", should be that the publication of comments/information should not invade into the privacy of an individual, unless outweighed by bona fide and genuine public interest. Right of information is a facet of freedom of speech and expression, enshrined in Article 19(1)(a) of the Constitution of India. Right of Information has been recognised as a Fundamental Right and the Right of Press to furnish the information or facts or opinion should be only to foster public interest and not to encroach upon the privacy of an individual. The public at large has no fundamental or legal right to get any information or intrude into the personal life of the other individual. Statutes empower the authorities to examine the parties, under exceptional circumstances, contained therein. When the public at large has no legal right to impinge upon the marital privacy, the press or any other media cannot claim a better right to publish in newspaper, magazine or any other form of media, in exercise of freedom of speech and expression.

19. Shroud's Judicial Dictionary, Vol. 4 (IV Edition), defines "Public Interest" as "A matter of public or general interest, does not mean that which is a interesting as gratifying curiosity or a love of information or amusement but that in which a class of community have a pecuniary interest, or some interest by which their legal rights or liability are affected."

20. In Black's Law Dictionary (Sixth Edition), 'Public Interest', is defined as follows :

"Public Interest - Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interest of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local State or national Government....."

21. Section 22(1) of the Hindu Marriage Act states that every proceeding under this Act shall be conducted "in camera" and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except a judgment of the High Court or of the Supreme Court, printed or published with the previous permission of the Court. The Supreme Court in Babu Lal v. Hazari Lal Krishori Lal, 1982(1) SCC 525, held that the word "proceeding" is a very comprehensive term and generally speaking means a prescribed cause of action for enforcing a legal right. It is not a technical expression with a definite meaning attached to it, but one the ambit of whose meaning will be governed by the statute. Again in P.L. Kantha Rao v. State of A.P., 1995(3) S.C.T. 44 : 1995(2) SCC 471, the Apex Court held that the word, "proceeding" would depend upon the scope of the enactment wherein the expression is used to a particular context to which it occurs. It means a course of action for enforcing a legal right.

22. The expression "any matter in relation to any such proceeding" should be given the widest import and it has to be given full effect to, when it is read in conjunction with the words "every proceeding" occurring in the beginning of the Section. Considering the scope of the Act, i.e., Hindu Marriage Act, which governs marriage between the Hindus, relief of divorce and Judicial separation, alimony, temporary or permanent, the lis being purely inter se, reading of the Section in its entirety in its context, reflect the intention of the legislation, primarily sought to be achieved. The language employed in Section is plain and unambiguous and it covers every proceeding under the Act.

23. The right of privacy created by the statute has to be preserved. The very inception of the provision, Section 22 in the Hindu Marriage Act makes it clear that matters pertaining to matrimonial affairs are intended to be conducted 'in camera' and not intended to be divulged to others, except publication of the judgment with the leave of the Court. Right of privacy in matrimonial matters between the parties in a litigation under Marriage Acts is personal to the litigating parties. Thus it is manifestly clear that the legislature has intended to guard the right of privacy in relation to matrimonial matters and it is a settled legal position that the real meaning and effect should be given to the words employed in the Statute. In the light of language employed in the Statute, the right of privacy is so fundamental to the individual excepting to the extent provided under the Marriage Acts. Of course, we should not forget the role of our independent press and media in coming out with revelations of public interest, resulting in societal changes. As the freedom of the press is for the dissemination of information of public interest and public affairs, those which are not related to the above, but involving the marital relationships of the parties to a litigation should not be published or telecast, as it is prohibited under law. Publication of the proceedings meant to be in camera will affect the constitutional liberty guaranteed to the individual and it would be an invasion of his right of privacy. When Section 22(1) of the Act prohibits printing or publishing any matter in relation to any such proceeding arising under the Act, the Family Court or any other competent Court dealing with matrimonial matter, under the Hindu Marriage Act, has inherent jurisdiction to issue an order of injunction or any such direction to give full effect to the statutory provision. Therefore, the contention of the respondents 2 to 5 that they are not parties to the Original Petition and therefore, no injunction can be granted against them, cannot be countenanced.

24. In view of the above discussion, the Civil Revision Petition is allowed. No costs. Consequently, connected Miscellaneous Petition is also dismissed.

Petition allowed.

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# LANDMARK JUDGMENTS

## OF HON'BLE MR. JUSTICE KURIAN JOSEPH
## ON FAMILY MATTERS

# CHOLAMARAKKAR VERSUS PATHUMMAMMA @ PATHUMMA

**Kerala High Court**

**Bench : Hon'ble Mr. Justice Kurian Joseph & Hon'ble Mr. Justice Harun-Ul-Rashid**

*Cholamarakkar*
*Versus*
*Pathummamma @ Pathumma*

**MFA.No. 985 of 2002(E)**

**Decided on 12 August, 2008**

**One of the main questions arising for consideration is whether legitimate or illegitimate child who has attained majority is entitled to maintenance. There cannot be any dispute that the said question can be tackled only under Section 125 of the Code of Criminal Procedure, 1973.**

**The provision makes no difference as to whether the child is legitimate or illegitimate, since what is sought to be prevented is vagrancy of children and whether legitimate or illegitimate, the child is a human being. However, if such a child is a married daughter, there is no obligation on the father, as such situation under law is expected to be handled by the husband.**

**The provision in contradistinction to Section 125(1)(b) makes no difference as whether the child is minor or major, again because no person who is physically or mentally challenged or injured and thus unable to maintain himself or herself shall not suffer on account of the neglect or refusal on the part of the father. The only precondition under Section 125(1)(c) is that the major and unmarried child, excluding a married daughter, is unable to maintain himself or herself owing to any physical or mental abnormality or injury.**

**Unless it is pleaded and established before the court that on account of such mental injury, the child is unable to maintain itself, she cannot maintain a valid claim before the court for maintenance. Since the Family Court has not addressed the issues in the proper perspective, we set aside the order in M.C.No.413/2002 and remit the matter to the Family Court for fresh consideration, in accordance with law. We make it clear that it will be open to the parties to amend the pleadings and adduce fresh evidence.**

## JUDGMENT

**Hon'ble Mr. Justice Kurian Joseph**

Vagrancy is the fruit of a sin and the sin is capital where the root is the parent. It is this painful thought that lingers in the background while analysing the facts of these cases.

2. One of the main questions arising for consideration is whether legitimate or illegitimate child who has attained majority is entitled to maintenance. There cannot be any dispute that the said question can be tackled only under Section 125 of the Code of Criminal Procedure, 1973.

   To the extent relevant, the provision reads as follows: Section 125: Order for maintenance of wives, children and parents.- (1) if any person having sufficient means neglects or refuses to maintain -

   (a) his wife, unable to maintain herself, or

   (b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means

Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this subsection, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses for proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person Explanation - For the purposes of this Chapter,-

(a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875) is deemed not to have attained his majority;

(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

[(2) Any such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.]

3. In the factual background of the instant case, it is Section 125(1)(c) that is relevant. The provision makes no difference as to whether the child is legitimate or illegitimate, since what is sought to be prevented is vagrancy of children and whether legitimate or illegitimate, the child is a human being. However, if such a child is a married daughter, there is no obligation on the father, as such situation under law is expected to be handled by the husband.

4. The provision in contradistinction to Section 125(1)(b) makes no difference as whether the child is minor or major, again because no person who is physically or mentally challenged or injured and thus unable to maintain himself or herself shall not suffer on account of the neglect or refusal on the part of the father. The only precondition under Section 125(1)(c) is that the major and unmarried child, excluding a married daughter, is unable to maintain himself or herself owing to any physical or mental abnormality or injury. There may not be much of a dispute or lack of clarity regarding physical or mental abnormality or physical injury. But what exactly is the scope and ambit of mental injury is yet a grey area under law in the matter of entitlement for maintenance. For analyzing the above position, we have to refer to the facts.

5. Pathumma is the first petitioner in O.P.No.188/2000 and the second petitioner is her daughter. The respondent is Cholamarakkar who, according to the first petitioner, is her husband and the father of the second petitioner. Parties are described as above. The said original petition was filed for a declaration that a legally valid marriage as per muslim religious rites was performed on 07.02.1974 between the first petitioner and the respondent and for a further declaration that the respondent is the father of the

second petitioner. There is also a consequential prayer for maintenance to both. It is not in dispute that Pathumma was the wife of elder brother of Cholamarakkar and that she has two children born out of that wedlock. After the divorce, she was married to one Kunhalan Haji. According to Pathumma, since Cholamarakkar wanted her to live with him, he forced her to divorce Kunhalan Haji and marry him. Pathumma agreeing to the persuasion, married Cholamarakkar on the strength of a vakkalath executed by Cholamarakkar as he could not be expected to be personally present on that day. The allegations were totally denied by the respondent. We shall first tackle the question of maintenance of the child.

6. The word 'injury' is defined under Section 44 of the Indian Penal Code, which reads as follows: "Section 44: "Injury".- The word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property".

'Injury' has been defined in the Blacks Law Dictionary (5th Edition) as "any wrong or damage done to another, either in his person, rights, reputation or property; the invasion of any legally protected interest of another". It is the case of the petitioners that dispute on the paternity of the second petitioner by the respondent has affected the reputation of the child and hence she could not get any marriage alliance and she is still remains unmarried. It is also indirectly pleaded that the child is hence unable to maintain herself. Placing heavy reliance on the observations in Noor Saba Khatoon vs. Mohammed Quasim (AIR 1997 SC 3280), it is submitted that under Section 125 Cr.P.C, an unmarried female child is entitled to get maintenance. The observation referred to above appears in paragraph 11 of the judgment of the Supreme Court and the same is extracted below.

"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 S.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 divorcee wife's right to claim maintenance for maintaining the infant child/children in her custody for a period of two years from the date of birth of the child concerned under S.3 (1)(b) of the 1986 Act. In other words S.3(1)(b) of the 1986 does not in any away affect the rights of the minor children of divorced Muslim parents to claim maintenance from their father under S.125 Cr.P.C. till they attain majority or are able to maintain themselves or in the case of females, till they are married". (emphasis placed by counsel on the words underlined).

7. There cannot be any dispute that a legitimate or illegitimate child, who is not a married daughter, who is suffering from any physical or mental abnormality or injury and thus unable to maintain itself, is entitled to maintenance from the parent, in case the parent is having sufficient means. The loss of reputation is mental injury causing adverse impact on the capacity of a child to maintain itself. But the further question is even without any such mental injury, whether the daughter who is unable to maintain itself and who remains unmarried is entitled to claim maintenance based on the observation of the Supreme Court in Noor Saba Khatoon's case. In order to analyze the above position, it will be fruitful to refer to the position regarding maintenance in the old Code as appearing under Section 488. To the extent relevant, Section 488(1) Cr.P.C. reads as follows:

"If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs".

Whether legitimate or illegitimate, if a child is unable to maintain itself it was entitled to get maintenance in case the parent is having sufficient means, under the 1898 Code. In Nanak Chand vs. Chandra Kishore Aggarwal and others (AIR 1970 SC 446) it has been held that the 'child' under Section 488 of the old Code does not mean a minor son or daughter. It is used in conjunction with parentage and the expression

is not to be understood in terms of the age. Hence the children even after attaining majority, if unable to maintain themselves, were entitled to claim maintenance. When the Code was amended in 1973, the statute itself took note of the fate of children who are unable to maintain themselves even after attaining majority and introduced a provision in express terms under Section 125(1)(c). However, the entitlement under the 1973 Code is subject to certain restrictions in the case of those who attained majority: (1) the child is not a married daughter; (2) the child is unable to maintain itself on account of physical or mental abnormality or injury. Thus the physical or mental abnormality or injury leading to the inability to maintain itself is a precondition for a child who has attained majority and also in the case of an unmarried daughter to claim maintenance from the parents.

8. In Noor Saba Khatoon's case, the Supreme Court considered the liability of a Muslim father to pay maintenance to his children under Section 3(1)(b) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 vis-a-vis the entitlement to claim maintenance under Section 125 Cr.P.C. The contention was that liability of a Muslim father was only to provide maintenance for a period of two years from the birth of the children. It is in that context, the Supreme Court held that beyond the age of two years also, the children born to Muslim parents who are unable to maintain themselves are entitled to claim maintenance under Section 125 Cr.P.C. The issue as to the right to claim maintenance after attaining majority but before marriage of female children did not arise before the court and hence not considered also. We find that the question was considered by a Single Bench of this Court in Muhammed vs. Kunhayisha (2003(3)KLT 106) wherein it has been rightly held as follows:

"The language of S.125, according to me, does not at all permit a construction that the status of a major daughter as an unmarried person can by itself be construed as "physical or mental abnormality or injury" sufficient to bring her case within the sweep of S.125(c). Whatever be the religion of the parties, the language of the Statute does not permit an unmarried major daughter to be brought within the purview of S.125(c) on that sole reason/ground of her being an unmarried daughter. She has to prove further that she is unable to maintain herself and such inability to maintain herself is attributable to physical or mental abnormality or injury, if any, which she is afflicted with. If the intention of the Legislature were to grant maintenance to unmarried female children, solely on the ground that they are unmarried female children, nothing prevented the Legislature from making express provisions imposing liability on the parents to provide maintenance to their female children till they are married. Their disability - if that be one, of remaining unmarried alone was definitely not reckoned by the Legislature as sufficient to entitle them claim maintenance under S.125 Cr.P.C. That evidently is the reason why the Parliament which must be presumed to have been conscious of the rights of the unmarried daughters under the Hindu and Mohammedan personal law (statutory and customary) to claim maintenance from their parents till they are married, did not choose to confer such right on them under S.125 Cr.P.C. Under S.125 Cr.P.C a major unmarried daughter is not entitled to claim maintenance from her parents unless her inability to maintain herself is attributable to her physical or mental abnormality or injury and that her mere status as an unmarried daughter- whatever be her religion- does not entitle her to claim maintenance under S.125 Cr.P.C."

However, the said decision does not deal with the evolution of Section 125. As we have already discussed above, placing reliance on Nanak Chand's case, while enacting 1973 Cr.P.C, a deviation is consciously made by the Parliament from 1898 Code. Coming to 1973 Code, unless the child satisfies the precondition of the inability being on account of any physical or mental abnormality or injury, the child who has attained majority and an unmarried daughter are not entitled to get maintenance. The married daughter has been expressly excluded also from the claim for maintenance from parents; it is the husband who is to maintain her. Therefore, the observation in Noor Saba Khatoon's case regarding the entitlement for maintenance to unmarried daughters of a Muslim parent will not help the petitioners. That observation regarding entitlement of the females for maintenance till they are married can only be read and understood as entitlement for maintenance in the case of female children till they are married,

in case they are unable to maintain themselves on account of any physical or mental abnormality or injury.

9. Learned counsel appearing for the respondent inviting attention to Article 141 of the Constitution of India submits that law declared by the Supreme Court is binding on all courts. We have no quarrel with the proposition and we cannot have also. But the question is whether the Supreme Court has declared the law with regard to entitlement of unmarried daughters to claim maintenance for the only reason that they are not married.

10. As we have already held above, Section 125 Cr.P.C gives an unambiguous picture regarding entitlement of unmarried daughters restricting the scope of inability to maintain themselves on account only of mental or physical abnormality or injury. Placing reliance on the decision of the Supreme Court in Lt. Col. P.R.Chaudhary vs. Municipal Corporation of Delhi [(2000) 4 SCC 577], it is further contended that interpretation of law even by way of any obiter by the Supreme Court cannot be brushed aside on the mere assertion that it does not confirm to statutory provisions. The observation of the Supreme Court in Noor Saba Khatoon's case regarding entitlement for maintenance to unmarried daughters is not an interpretation of law by the Supreme Court on the scope and ambit of Section 125 Cr.P.C. The Supreme Court only considered the entitlement of Muslim children who are unable to maintain themselves beyond the age of two years. In that context, laying down the law that the liability to pay maintenance under the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 is not limited to two years of age, the Supreme Court held that in the case of children, they are entitled to claim maintenance till they attain majority in case they are unable to maintain themselves and in the case of females, till they are married meaning thereby that in the case of those married daughters, the liability is only of their husbands and in the case of those unmarried, the parents are liable till they are married if such unmarried children are unable to maintain themselves on account of any physical or mental abnormality or injury. The observation made by the Apex Court is thus not the interpretation of law by the Supreme Court on the point. Any observation made by the Supreme Court interpreting the legal provision and laying down the legal position is certainly binding on all courts in India. But a general observation made without reference to the statutory provision has no binding value. It will be profitable to refer to the decision of the Supreme Court itself on such observations, in Director of Settlements A.P. and Others vs. M.R. Apparao and another [(2002)4 SCC 638]. The relevant portion as appearing at paragraph 7 of the judgment reads as follows:

"A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. An "obiter dictum" as distinguished from a ratio decidendi is an observation by the Court on a legal question suggested in a case before it but not arising in such manner as to require a decision. Such an obiter may not have a binding precedent as the observation was unnecessary for the decision pronounced, but even though an obiter may not have a binding effect as a precedent, but it cannot be denied that it is of considerable weight. The law which will be binding under Article 141 would, therefore, extend to all observations of points raised and decided by the Court in a given case".

In the instant case, the entitlement of an unmarried daughter after attaining the age of majority and belonging to Muslim community was not an issue either raised or decided by the court and hence the observation under reference has no authority as a binding precedent.

11. The next question to be analyzed, in the facts as pleaded in the claim for maintenance, is whether the second petitioner is entitled to claim maintenance. As we have already stated above, unless it is established that the inability to maintain herself is on account of the physical or mental abnormality or injury, she will not be entitled to claim maintenance. From the pleadings, we find that more stress is given to the mental injury leading to the situation of the child remaining unmarried, on account of the dispute on paternity. That is not the requirement. Unless it is pleaded and established before the court that on account of such mental injury, the child is unable to maintain itself, she cannot maintain a valid claim before the court for maintenance.

Since the Family Court has not addressed the issues in the proper perspective, we set aside the order in M.C.No.413/2002 and remit the matter to the Family Court for fresh consideration, in accordance with law. We make it clear that it will be open to the parties to amend the pleadings and adduce fresh evidence.

12. As far as the declaration regarding paternity is concerned, the main contention is that D.N.A test conducted as ordered by the Family Court is not foolproof. When the matter was before us, on 23.01.2008 we passed the following order:

"The appellant in M.F.A.No.985/2002 is not satisfied with the D.N.A. test already conducted. The 1st respondent in M.F.A.No.985/2002 has no objection even for undergoing another D.N.A. test; if the expenses are met by the appellant. In the nature of the disputes raised by the appellant we are of the view that a fresh test can be conducted at Hyderabad under the supervision of an Advocate Commissioner deputed from this Court. An amount of Rs.50,000/- will be the approximate expenses, including travel and boarding of the parties. Accordingly we direct Sri.Cholamarakkar to deposit an amount of Rs.50,000/- towards such expenses within two weeks from today".

Thereafter, it was submitted before us that the first respondent is not interested in going for another test. In this context, it is also to be noted that Exhibit A2 birth certificate still contains the name of Cholamarakkar as the father. The birth was registered on 07.12.1977, three days after the birth of the child. In such circumstances, we have no hesitation in confirming the declaration granted by the Family Court on the paternity of the second petitioner.

13. As far as the declaration regarding marriage is concerned, we find that the first petitioner has miserably failed in establishing her case before the court. She has no consistent case regarding the factum of the alleged marriage. In 1981 she maintained the position that the marriage took place in 1976. But before the Family Court, according to her, the marriage took place on 07.02.1974. The person in whose favour the written authorization was executed for entering the contract of marriage namely, Kollencheri Alikutty, being the most competent person to speak of the marriage, was not examined. Before the Family Court, there was no evidence for the authorization given to Alikutty. Exhibit A1 marriage certificate was issued on the basis of the entry in Exhibit X1 register. However, according to Abdul Khader Musliar, Khasi of Juma Masjid, Karinkappara, there was no practice of maintaining marriage register in the Masjid. Exhibit X1 register only shows the amount received at the time of marriage for payment to the khasi and other employees of the Masjid. When those details are given, the name of the bridegroom and bride is also entered in the register. That register contains other accounts also. The Family Court further found that the register itself was not kept properly. There is no chronological order for the entries and the disputed entry itself is suspected to be mutilated by spreading ink. Going thus through the evidence, there is every reason to sustain the finding of the Family Court that the entry in Exhibit X1 is not genuine. All that apart, the only person available on the side of the first petitioner at the time of the alleged marriage, admittedly, is one Aboobacker and he too was not examined.

14. In view of the above factual matrix, we are of the view that the Family Court is justified in entering the finding that there is no valid marriage between the first petitioner and the respondent. Therefore, we confirm the said finding.

In the result, M.F.A.985/2002 filed by Cholamarakkar is dismissed. M.F.A.No.1114/2002 filed by Pathumma and Bushra is partly allowed to the extent of declaration that Cholamarakkar is the father of the second petitioner-Bushra. The order in M.C.No.413/2002 on the file of the Family Court, Manjeri, impugned in R.P.(FC)No.99/2003, is set aside and the case is remitted to the said court with a direction to dispose of the same, expeditiously. The parties will appear before the court on 29.09.2008.

**KURIAN JOSEPH JUDGE**

**HARUN-UL-RASHID JUDGE**

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# MILKA JOSE VERSUS C.O.FRANCIS

**Kerala High Court**

**Bench : Hon'ble Mr. Justice Kurian Joseph & Hon'ble Mr. Justice Harun-Ul-Rashid**

*Milka Jose*
*Versus*
*C.O.Francis*

**WP(C).No. 33348 of 2007(S)**

**Decided on 3 September, 2008**

**During the pendency of this Writ Petition, we directed the parties to appear before us. We had several rounds of mediation, conciliation and talks with the assistance of various counsel practicing before this Court. Both of us tried our best to purchase peace between the parties. Unfortunately, the ego of the parents apparently does not help the Court to arrive at any solution. Two unfortunate children are torn between their W.P.(C)NO.33348/2007 parents. Both the parents think that they love the children and out of love they fight. But the fact is otherwise. It is their imprudent selfishness which has lead to this litigation. They are not bothered about the welfare of the children, they are bothered only about their litigation. Apparently, they want to win the case even if they lose the children.**

**Until O.P. No.1285 of 2007 is disposed of by the Family Court, the elder child Rose shall be entrusted with the respondent/father at 8 a.m. on all Sundays. The respondent Sri. Francis will collect the child from the house of the petitioner. In case there is any resistance or difficulty, it will be open to him to report the matter to Thrissur Town East Police Station and the Station House Officer shall render necessary police assistance and protection to Sri. Francis to get custody of the elder child. Sri. Francis shall return the child to the residence of the petitioner before 8 p.m. iii.The respondent/father is also permitted to interact with the younger child Ruth for about one hour at the residence of the petitioner when he goes there to pick up the elder child for which also, if necessary, the Station House Officer will render assistance.**

## JUDGMENT

**Hon'ble Mr. Justice Kurian Joseph**

O.P. No.1285 of 2007 filed by the petitioner seeking custody of her children is pending before the Family Court, Thrissur. The petitioner has two children in the respondent. The elder child is around seven years and the younger one is now aged two years. Learned counsel appearing for the respondent submits that the elder child was with the father and the mother got custody of the child only in November, 2007 and that though it was only on a temporary basis, the child was never returned to the father.

2. During the pendency of this Writ Petition, we directed the parties to appear before us. We had several rounds of mediation, conciliation and talks with the assistance of various counsel practicing before this Court. Both of us tried our best to purchase peace between the parties. Unfortunately, the ego of the parents apparently does not help the Court to arrive at any solution. Two unfortunate children are torn between their W.P.(C)NO.33348/2007 parents. Both the parents think that they love the children and out of love they fight. But the fact is otherwise. It is their imprudent selfishness which has lead to this litigation. They are not bothered about the welfare of the children, they are bothered only about their litigation. Apparently, they want to win the case even if they lose the children.

3. In the above factual situation, we do not think that this Court should any more keep this Writ Petition pending. Even when an interim order was passed regarding custody of the children during weekends, the petitioner has come up with I.A. Nos. 10175 of 2008 and 11272 of 2008 with unfortunate, painful and unfounded allegations. Instead of teaching and encouraging the children to love both parents despite the fight between husband and wife, what the children are now being taught is to hate the parents. The grand parents are also parties to such unfortunate, disturbing and painful situation. Having regard to the entire facts and circumstances of the case, we dispose of the Writ Petition and the Review Petition with the following directions:

   i. There will be a direction to the Family Court, Thrissur to dispose of O.P. No.1285 of 2007 in accordance with law in the normal course, needless to say, untrammelled by any of the W.P.(C) NO.33348/2007 observations contained in this judgment since that petition will have to be considered taking note of the circumstances at the time when the case is taken up for trial.

   ii. Until O.P. No.1285 of 2007 is disposed of by the Family Court, the elder child Rose shall be entrusted with the respondent/father at 8 a.m. on all Sundays. The respondent Sri. Francis will collect the child from the house of the petitioner. In case there is any resistance or difficulty, it will be open to him to report the matter to Thrissur Town East Police Station and the Station House Officer shall render necessary police assistance and protection to Sri. Francis to get custody of the elder child. Sri. Francis shall return the child to the residence of the petitioner before 8 p.m. iii.The respondent/father is also permitted to interact with the younger child Ruth for about one hour at the residence of the petitioner when he goes there to pick up the elder child for which also, if necessary, the Station House Officer will render assistance.

   iv. There will also be a direction to the Headmistress, St. Johns L.P. School, Parappur to issue the Transfer Certificate of Rose as and when requested by her mother.

   v. It is also made clear that in case Sri. Francis requests for the custody of the child at day time during school holidays, the same shall be granted in the manner indicated above. It is further made clear that when the father collects the child from the house of the petitioner, he shall be with the child and he shall not entrust the child with others.

   W.P.(C)NO.33348/2007 In that view of the matter nothing survives in the Writ Petition and the Review Petition. The Writ Petition and the Review Petition are disposed of as above.

**(KURIAN JOSEPH, JUDGE)**

**(HARUN-UL-RASHID, JUDGE)**

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# T.VINEED VERSUS MANJU S.NAIR

**Kerala High Court**

**Bench : Hon'ble Mr. Justice Kurian Joseph & Hon'ble Mr. Justice Harun-Ul-Rashid**

*T.Vineed*
*Versus*
*Manju S.Nair*

**WP(C) No. 36610 of 2007(S)**

**Decided on 29 January, 2008**

**Motivated and inspired, we have also realized that by settling one case in this court, quite a few litigations between the parties and their families before various other courts or forums can also be either closed or settled.**

**One case settled is ten cases avoided because in settlement, peace is purchased and both parties part as friends. Attempt for alternate redressal is hence not only the statutory obligation of the court under Section 89 of the Civil Procedure Code, but it is their duty to the public also; since being judicial officers they have the expertise in peace making.**

## JUDGMENT

**Hon'ble Mr. Justice Kurian Joseph**

"My joy was boundless. I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby - not even money, certainly not my soul." [M.K.Gandhi-An Autobiography or The story of My Experiments with Truth (page 133)].

Motivated and inspired, we have also realized that by settling one case in this court, quite a few litigations between the parties and their families before various other courts or forums can also be either closed or settled. The recent litigation trend in matrimonial disputes indicates that a matrimonial dispute between the parties could generate at least half-a-dozen cases. Access to justice shall not be a handle to multiplication of litigations by taking recourse to all possible legal remedies before all available forums. Easy access to the remedies shall not be permitted to be used as a weapon for harassing the other party. The attempt and effort should be to avoid a possible litigation. But unfortunately, the trend seems to be as to how to multiply the litigation between the parties. The case we are dealing with is a classic example for the same. Within one year, there were eleven litigations before various forums. Unless we had arrested that unhealthy competition, at this pace and by this time they would have been parties to at least another eleven cases. We have also realized that one case settled is ten cases avoided because in settlement, peace is purchased and both parties part as friends. Attempt for alternate redressal is hence not only the statutory obligation of the court under Section 89 of the Civil Procedure Code, but it is their duty to the public also; since being judicial officers they have the expertise in peace making. Once the parties to litigations are objectively able to realize the strength and weakness of their cases, get a fairly realistic picture of the legal position, and when they also realize that what is morally wrong cannot be legally right, they would normally opt for settlement. In the process, as Mahatmaji said, ..."....both sides are happy and they rise in the public estimation".

2. The petitioner married the respondent on 20.6.1995. It was a love marriage against the stiff opposition of the parents. A child was born to them on 14.5.1999. The parties continued their studies and sought employment in different places. The initial infatuation, it appears, slowly faded and the relationship got strained, leading to O.P.642/07 filed by the respondent before the Family Court, Nedumangad seeking permanent custody of the child Adithya. The respondent also filed O.P.641/07 before the said court for dissolution of marriage alleging matrimonial cruelty. She filed a criminal complaint before Judicial First Class Magistrate Court-II, Thiruvananthapuram under Section 23 of the Protection of Women from Domestic Violence Act, as M.C.26/07. Yet another complaint was filed before the police alleging offence under Section 498A of the Indian Penal Code. Thereafter, the petitioner filed O.P.744/07 before the Family Court, Nedumangad for declaring him as permanent guardian and custodian of the child Aditya V.Nair born to the petitioner in the respondent. The respondent filed O.P.799/07 before the Family Court, Nedumangad for recovery of gold ornaments, cash etc. She also filed O.P.1071/07 before the Family Court, Nedumangad for permanent prohibitory injunction. In turn, the petitioner filed O.P.1126/07 before the Family Court praying for recovery of money and articles. At the instance of both parties, the following complaints were registered by the police : (1) FIR 258/07 of Peroorkkada police station, (2) FIR 355/07 of Peroorkkada police station, (3) FIR 555/07 of Peroorkkada Police Station, (4) FIR 603/07 of Medical college police station and (5) FIR 553/07 of Peroorkkada police station. The mother of the petitioner filed a complaint before the Kerala Women's Commmission. The mother of the respondent also filed a complaint before the same Commission.

3. It is in the above mentioned litigating mood of the parties, the petitioner approached this court aggrieved by an order passed by the Family Court, Nedumangad. As per the said order, the custody of the child was given to the petitioner/father for two hours on all Saturdays except second Saturdays. In the interim application, the prayer was for custody of the minor at least for 8 hours on Saturdays or Sundays. On going through the pleadings, we felt that instead of treating the symptoms, we should catch at the root cause. We issued a direction to the parties to be present before this court on 17.12.2007. On that day, we appointed Adv.Smt.Prabha R.Menon as conciliator. After an initial round of talk with the conciliator and after elaborate discussions with the parties, we felt that the entire litigations between the parties are to be and can be put an end to. The case was again posted on 21.1.2008, 22.1.2008, 23.1.2008 and finally to this day. In the light of the discussions the court and the conciliator had between the parties and thanks to the cooperation extended by the learned counsel appearing on both sides, it is heartening to note that peace could be purchased not only between the parties to the marriage, but also between the families of both parties. True, they have agreed to disagree. But we could convince them that on disagreement also, the parties to the marriage can still be friends. For the only reason that the matrimonial bond is terminated and the marriage is dissolved, the parties to the marriage need not be strangers and enemies; they can still continue to be friends, and they have to continue as good friends in this case for the additional reason that they have a child. The husband loses the wife and wife, the husband in a dissolution. But the child does not lose either father or mother. He has only one father and one mother, and he is entitled to have love, care and protection of both parents. The parents in such situation should educate the child that difference of opinion and the inevitable parting between the parties to the marriage shall not in any way affect the status of the child. The child should be taught and trained to acknowledge, respect and love both the father and mother.

4. We are happy to note that both parties have mutually agreed to settle the disputes with regard to the custody of the child also. After several rounds of discussions, we directed the parties to reduce the terms of compromise to writing and file a compromise petition. Accordingly, they have filed I.A.1215/08 incorporating the terms of compromise. We have recorded the terms of compromise. In terms of the compromise, O.P.Nos.641/07, 642/07, 799/07, 1071/07, 744/07 and 1126/07 are struck off from the files of the Family Court, Nedumangad. FIR Nos.258/07, 355/07, 555/07 & 553/07 of Peroorkkada police station are also quashed. Since peace has been purchased between the parties, we are of the view that

for securing the ends and in the interests of justice, the proceedings in FIR 603/07 of Medical College Police Station, Thiruvananthapuram and the proceedings in M.C.No.26/07 before the JFCM Court-II, Thiruvananthapuram are to be quashed. Ordered accordingly.

5. As part of the settlement, the parties have filed a petition under Section 28 of the Special Marriage Act, 1954. We are convinced that the said interlocutory application satisfies all the ingredients of Section 28 of the Special Marriage Act, 1954. In the background of the long pending disputes between the parties we are of the considered opinion that a further lie over period is not necessary or required in this case. Therefore, we allow I.A.1216/08 and the marriage between the petitioner and the respondent is dissolved by a decree of divorce on mutual consent. I.A.Nos.1215 and 1216 of 2008 will form part of this judgment. Registry is directed to communicate a copy of this judgment to the Family Court, Nedumangad and also to the Peroorkada and Medical College Police Stations, Thiruvananthapuram and JFCM-II, Thiruvananthapuram.

6. Before we part, we would like to mention that, advocates have a great role and a vital role too in the process of settlement of the cases. But for the sincere cooperation of the advocates on both sides, we could not have succeeded in settling these cases. To a great extent, it is for them to convince their parties that it is in their better interest to go for a settlement and give a quietus to the litigations. In the process they are in fact conciliators and mediators. By settling a case they do not lose anything. They gain the goodwill and appreciation also of the opposite side, since both sides go with the satisfaction that they have not lost but won their case. We also record our appreciation for the earnest efforts taken by Smt. Prabha R.Menon as conciliator in this case.

**KURIAN JOSEPH, JUDGE.**

**HARUN-UL-RASHID, JUDGE**

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# V.GEETHA VERSUS O.K.RADHAKRISHNAN

**Kerala High Court**

**Bench : Hon'ble Mr. Justice Kurian Joseph & Hon'ble Mr. Justice Harun-Ul-Rashid**

*V.Geetha*
*Versus*
*O.K.Radhakrishnan*

**Mat Appeal No. 386 of 2006()**

**Decided on 19 March, 2008**

- **Petition filed under Section 13(1)(ia)and (ib) of the Hindu Marriage Act, 1955 (hereinafter referred to as "the Act") for dissolution of the marriage between the petitioner and the respondent on the grounds of desertion and cruelty. The above grounds canvassed for a decree of divorce were negatived by the Family Court. Hence, this appeal.**
- **The marriage between the parties was solemnised on 29.8.1993. The petitioner lived with her husband only for two to three months and she became pregnant during the said period.**
- **The fact that the parties are living separately for the last 14 years and the fact that the respondent was not performing the duties of a husband as well as father are sufficient to establish animus deserendi for granting divorce in favour of the appellant.**
- **Desertion is an act which implies abandonment against the wish of the person charging it.**
- **Fourteen years have elapsed since the petitioner and respondent have been separated. We find that there is no possibility of the parties resuming normal marital life. There has been an irretrievable breakdown of marriage between the husband and the wife. A workable solution is certainly not possible.**

## JUDGMENT

**Hon'ble Mr. Justice Harun-ul-Rashid**

The petitioner in O.P. No.108 of 2004 on the file of the Family Court, Kannur is the appellant. O.P. No.108 of 2004 was filed under Section 13(1)(ia)and (ib) of the Hindu Marriage Act, 1955 (hereinafter referred to as "the Act") for dissolution of the marriage between the petitioner and the respondent on the grounds of desertion and cruelty. The above grounds canvassed for a decree of divorce were negatived by the Family Court. Hence, this appeal.

2. The parties herein are referred to as the petitioner and respondent as in the Original Petition. The brief facts pleaded in the petition for divorce are as follows:

The marriage between the parties was solemnised on 29.8.1993. They lived together as husband and wife for 2-3 months. During this time, the petitioner begot a child and immediately, the respondent took her to her parental house and left her there. The petitioner gave birth to a female child on 25.9.1994 and after five months of the delivery, the respondent took the petitioner and the child to his house. Her stay in the matrimonial home for the second time lasted only for a few days and she was again taken to her parental home. It is the case of the petitioner that for the last ten years, she is living separately. According to the petitioner, her stay in the matrimonial home was tense and that her husband and his relatives behaved very badly and rudely towards her. It is her further case that the respondent/husband did not

take care of her and the child and that it was her father who used to attend to her needs. The respondent turned a blind eye to her needs and evaded his duties and responsibilities as a husband and father. It is further alleged by the petitioner that the respondent is residing in his own house for the last ten years without discharging his obligations and that he has deserted her. According to her, there is no meaning in continuing the marital relationship and, therefore, filed the application for divorce under Section 13(1) (ia)and (ib) of the Act.

3. The respondent denied the allegations of the petitioner/wife inter alia contending that the petitioner wanted to reside along with her parents and since he was not agreeable to this, she started residing separately on her own accord. According to the respondent, for over two months, he had to suffer the adamant attitude of the petitioner and finally he had to prevail upon his mother to get permission to take the petitioner to her house. The respondent further contended that after the petitioner started residing separately, he used to visit her twice a week and used to take her to the doctor whenever the need arose. The petitioner has been residing in her family house for the past ten years and the respondent was making his weekly visits till recently. He denied the allegation that he had no love or affection towards the petitioner or that he was unconcerned about her welfare. The respondent also denied the allegation that he was not providing her maintenance. He further contended that he intents to continue the marital relationship with the petitioner and that no valid grounds are made out by the petitioner for seeking divorce.

4. The petitioner and the respondent were examined as AW.1 and RW.1 respectively in support of their respective contentions and Exts.B1 and B2 were marked on the side of the respondent. The Family Court found that the petitioner failed to establish the grounds of desertion and cruelty. The Family Court further found that there is no proper pleadings and evidence on the part of the petitioner to substantiate the ground of cruelty. The Family Court also noticed that the facts spoken to by the petitioner are only touching the wear of a normal marital life. On the basis of the above findings, the Family Court held that the petitioner was not entitled to get a decree of divorce.

5. The marriage between the parties was solemnised on 29.8.1993. The petitioner lived with her husband only for two to three months and she became pregnant during the said period. The petitioner as AW.1 testified that the doctor had advised her to take bed rest and prolonged treatment and that on coming to know about the advice given by the doctor, the respondent/husband took her to her house. According to the petitioner, the respondent was not prepared to attend to her during the period she was advised to take bed rest and that was the reason for taking her to her house. The respondent, according to the petitioner, was not dutiful in attending her and that it was her father who used to take her to the hospital. She also deposed that her daughter is physically disabled due to an abnormal growth of bone and that the child also requires continuous and permanent medical treatment. She further deposed that the respondent is not maintaining her and the child and that she and her child are under the care and protection of her father and their expenses are also met by her parents for the past several years. The petitioner also spoke about her mental tension and cruelty of her husband during the period of three months that they resided together. According to her, the mother of the respondent and other family members were bent upon making quarrels and that they abused her many times using filthy language. She also stated that her life in her matrimonial home was full of misery. She further testified that she was unable to get along with the atmosphere in her matrimonial home due to the bad behaviour of her husband and the other family members. She explained several instances of mental cruelty meted out to her. According to her, she developed a feeling that her husband is not able to protect her and their child. Therefore, after marriage she continued her studies and passed B.A., M.A., B.Ed and M.Phil. courses. She also testified that the respondent had not given her any amount towards her education or other expenses. Since the said state of affairs continued for about ten years, according to her, she was constrained to send a lawyer's notice for ending the marital life. She also deposed that on coming to know about the filing of the petition for divorce, the respondent/husband filed O.P. No.539 of 2004 seeking custody of the child.

The petitioner has stated that her daughter is suffering from a peculiar disease of abnormal growth of bone which requires regular treatment. She has been continuously attending to her child who is suffering from excrutiating pain. She has dedicated her life for attending and protecting her child. The Original Petition filed by the respondent for custody of the child after ten years itself is a cruel conduct.

6. The fact that the parties are living separately for the last 14 years and the fact that the respondent was not performing the duties of a husband as well as father are sufficient to establish animus deserendi for granting divorce in favour of the appellant. During the period of separation,the respondent/husband never attempted or offered to have a joint living as husband and wife. This Court made every effort for a reconciliation. The appellant and her daughter attended the Lok Adalat on 20.2.2007 as directed by this Court and the Lok Adalat after conciliaton on 20.2.2007 and 5.3.2007reported that there is no possibility for settlement. This Court, therefore, directed the parties to be present on 1.6.2007. This Court found that reunion was not possible due to the attitude of the parties. For the last 14 years, the parties are living separately. The facts and circumstances of the case conclusively prove that the parties are living separately with the intention to end the marital life. The conduct of the parties and the facts and circumstances of the case reveal that the parties have made up their mind to put an end to the marital relation and co-habitation permanently.

7. Desertion is an act which implies abandonment against the wish of the person charging it. In this case, the respondent left the matrimonial home and started residing separately. The question raised is will the conduct amount to desertion on the part of the respondent. The Supreme Court in the decision reported in Bipinchandra Jaisingbhai Shah v. Prabhavati, AIR 1957 SC 176 held that where the wife is forcibly turned out of her marital home by the husband, the husband is guilty of constructive desertion. The test is not who left the matrimonial home first. If one spouse by his words and conduct compels the other spouse to leave the marital home, the former would be guilty of desertion, though it is the latter who is physically separated from the other and has been made to leave the marital home. There is no evidence in this case to find that the wife was forcefully turned out of her matrimonial home by the husband. The available evidence discussed above shows that the respondent/wife had put an end to the marital relationship and co-habitation.

8. Fourteen years have elapsed since the petitioner and respondent have been separated. We find that there is no possibility of the parties resuming normal marital life. There has been an irretrievable breakdown of marriage between the husband and the wife. A workable solution is certainly not possible. The parties cannot in the background of their disputes at this stage reconcile themselves and live together forgetting their past. Because of the irretrievable breakdown of the marriage, the marriage between the parties has been rendered a dead wood. Learned counsel appearing for the appellant submitted before us that no purpose will be served by keeping such a marriage alive on paper which would only aggravate the agony of the parties.

9. Irretrievable breakdown of marriage is not a ground by itself for divorce. But, while scrutinising the evidence on record to determine whether the grounds alleged are made out and in determining the relief to be granted, the said circumstance can certainly be borne in mind, as held by the Supreme Court in the decision reported in Durga Prasanna Tripathy v. Arundhati Tripathy (2005) 7 SCC 353. The Supreme Court in the above decision, on finding that 14 years have elapsed since the husband and wife had separated, held that there has been irretrievable breakdown of marriage between the parties and that reunion was impossible and that the parties cannot at this stage reconcile themselves and live together forgetting their past. The Supreme Court, therefore, held that there is no other option except to allow the appeal and set aside the judgment of the High Court and affirm the order of the Family Court granting decree of divorce.

10. We are convinced that no useful purpose will be served by keeping such a marriage alive on paper, it would only aggravate the agony of the parties. In Anjana Kishore Vs. Puneet Kishore( 2002 (10) SCC

194) and in Swati Verma Vs. Rajan Verma (2004 (1) SCC123 ) the Supreme court held that the marriage between the parties has irretrievably broken down and has been rendered a dead wood. Exigency of the situation demands the dissolution of such a marriage by a decree of divorce to put an end to the agony and bitterness of the parties.

11. The Supreme Court observed that once the parties are separated and the separation has continued for sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has been broken down beyond repair. It would be unrealistic for the law not to take notice of that fact and it would also be harmful to the society and injurious to the interests of the parties.

In the result, the appeal is allowed. The marriage between the petitioner and the respondent is dissolved with effect from today. There will be no order as to costs.

**(KURIAN JOSEPH, JUDGE)**

**(HARUN-UL-RASHID, JUDGE)**

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**Reconciliation is not always the restoration of status quo ante; it can as well be a solution as acceptable to both parties.**

**Hon'ble Mr. Justice Kurian Joseph**

*Transfer Petition (Civil) No. 1278 of 2016 Santhini vs. Vijaya Venketesh*

**High Court of Delhi**

**High Court of Judicature at Hyderabad**
**For the State of Telangana and the State of Andhra Pradesh**

**Madras High Court**

**High Court of Karnataka**

**High Court of Kerala**

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