"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."

Hon'ble Mr. Justice Ranjan Gogoi

in Gaytri Bajaj Appellant Versus Jiten Bhalla Respondent Civil Appeal Nos. 7232-7233 of 2012 Arising out of SLP (Civil) 35468-69 of 2009 Para-14) Decided on 5 October, 2012

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

"The principal thrust of the law in family matters is to make an attempt for reconciliation before processing the disputes in the legal framework".

Hon'ble Mr. Justice Kurian Joseph

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

YEAR OF PUBLICATION : 2018

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

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

SUPREME COURT OF INDIA

Dated : 11th September, 2017

Hon'ble the Chief Justice of India vide order dated 11th September, 2017 has been pleased to reconstitute the **'Committee for sensitization of Family Court Matters'**, comprising the following Hon'ble Judges :-

1. Hon'ble Mr. Justice Kurian Joseph,
   Judge, Supreme Court of India

2. Hon'ble Ms. Justice Indira Banerjee,
   Chief Justice, High Court of Judicature at Madras

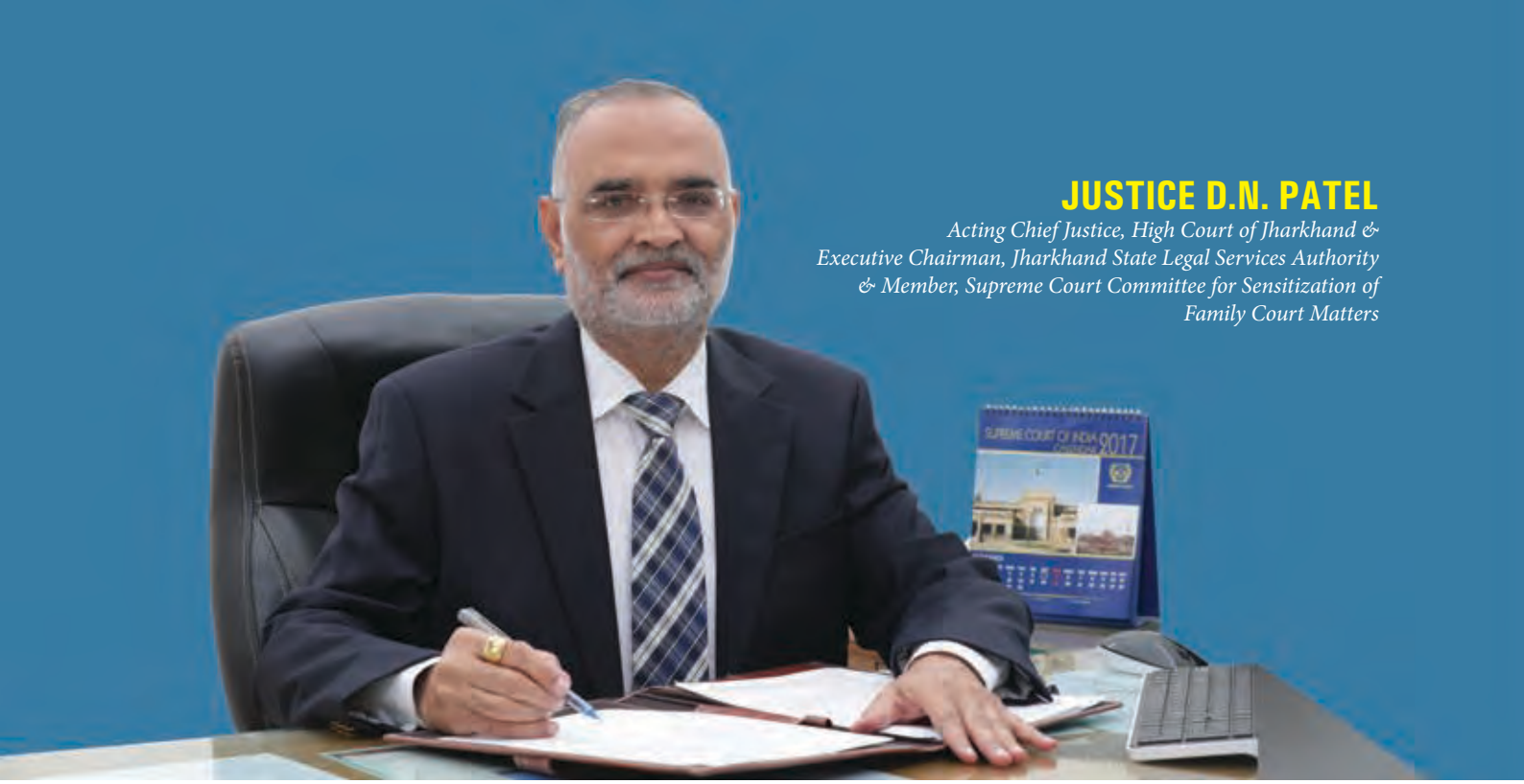
3. Hon'ble Mr. Justice D.N. Patel
   Acting Chief Justice, High Court of Jharkhand

The concerned PPS may apprise their Lordships about the reconsitution of the Committee.

Sd/-
[Ravindra Maithani]
Secretary General

(i) PPS to Hon'ble Ms. Justice Indira Banerjee,
Hon'ble Chief Justice, High Court of Judicature at Madras

(ii) PPS to Hon'ble Mr. Justice D.N. Patel
Acting Chief Justice, High Court of Jharkhand



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."***

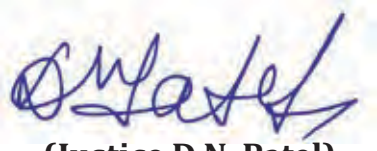
Hon'ble Mr Justice A.K.Sikri, Judge, Supreme Court of India has said in a matter relating to the custody of child that : ***"These minor children, for their proper upbringing, need the company of both the parents - mother as well as the father, for financial reasons, security reasons, psychological reasons,etc. 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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IN THE SUPREME COURT OF INDIA
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Bench: Hon'ble Mr. Justice P. Sathasivam, Hon'ble Mr. Justice Ranjan Gogoi & Hon'ble Mr. Justice Shiva Kirti Singh

Shabnam Hashmi ... Petitioner(S)
Versus
Union of India & Ors. ... Respondent (S)

WRIT PETITION (CIVIL) NO. 470 OF 2005

Recognition of the right to adopt and to be adopted as a fundamental right under Part-III of the Constitution is the vision scripted by the public spirited individual who has moved this Court under Article 32 of the Constitution.

There is an alternative prayer requesting the Court to lay down optional guidelines enabling adoption of children by persons irrespective of religion, caste, creed etc. and further for a direction to the respondent Union of India to enact an optional law the prime focus of which is the child with considerations like religion etc. taking a hind seat.

The decision of this Court in Lakshmi Kant Pandey (supra) is a high watermark in the development of the law relating to adoption. Dealing with inter-country adoptions, elaborate guidelines had been laid by this Court to protect and further the interest of the child. A regulatory body, i.e., Central Adoption Resource Agency (for short 'CARA') was recommended for creation and accordingly set up by the Government of India in the year 1989. Since then, the said body has been playing a pivotal role, laying down norms both substantive and procedural, in the matter of inter as well as in country adoptions. The said norms have received statutory recognition on being notified by the Central Govt. under Rule 33 (2) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 and are today in force throughout the country, having also been adopted and notified by several states under the Rules framed by the states in exercise of the Rule making power under Section 68 of the JJ Act, 2000.

The legislature which is better equipped to comprehend the mental preparedness of the entire citizenry to think unitedly on the issue has expressed its view, for the present, by the enactment of the JJ Act 2000 and the same must receive due respect. Conflicting view points prevailing between different communities, as on date, on the subject makes the vision contemplated by Article 44 of the Constitution i.e. a Uniform Civil Code a goal yet to be fully reached and the Court is reminded of the anxiety expressed by it earlier with regard to the necessity to maintain restraint. All these impel us to take the view that the present is not an appropriate time and stage where the right to adopt and the right to be adopted can be raised to the status of a fundamental right and/or to understand such a right to be encompassed by Article 21 of the Constitution

JUDGMENT

Hon'ble Mr. Justice Ranjan Gogoi :—

1. Recognition of the right to adopt and to be adopted as a fundamental right under Part-III of the Constitution is the vision scripted by the public spirited individual who has moved this Court under Article 32 of the Constitution. There is an alternative prayer requesting the Court to lay down optional guidelines enabling adoption of children by persons irrespective of religion, caste, creed etc. and further for a direction to the respondent Union of India to enact an optional law the prime focus of which is the child with considerations like religion etc. taking a hind seat.

2. The aforesaid alternative prayer made in the writ petition appears to have been substantially fructified by the march that has taken place in this sphere of law, gently nudged by the judicial verdict in Lakshmi Kant Pandey Vs. Union of India[1] and the supplemental, if not consequential, legislative innovations in the shape of the Juvenile Justice (Care And Protection of Children) Act, 2000 as amended in 2006 (hereinafter for short 'the JJ Act, 2000) as also The Juvenile Justice (Care and Protection of Children) Rules promulgated in the year 2007 (hereinafter for short 'the JJ Rules, 2007').

3. The alternative prayer made in the writ petition may be conveniently dealt with at the outset. The decision of this Court in Lakshmi Kant Pandey (supra) is a high watermark in the development of the law relating to adoption. Dealing with inter-country adoptions, elaborate guidelines had been laid by this Court to protect and further the interest of the child. A regulatory body, i.e., Central Adoption Resource Agency (for short 'CARA') was recommended for creation and accordingly set up by the Government of India in the year 1989. Since then, the said body has been playing a pivotal role, laying down norms both substantive and procedural, in the matter of inter as well as in country adoptions. The said norms have received statutory recognition on being notified by the Central Govt. under Rule 33 (2) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 and are today in force throughout the country, having also been adopted and notified by several states under the Rules framed by the states in exercise of the Rule making power under Section 68 of the JJ Act, 2000.

4. A brief outline of the statutory developments in the concerned sphere may now be sketched. In stark contrast to the provisions of the JJ Act, 2000 in force as on date, the Juvenile Justice Act, 1986 (hereinafter for short 'the JJ Act, 1986') dealt with only "neglected" and "delinquent juveniles". While the provisions of the 1986 Act dealing with delinquent juveniles are not relevant for the present, all that was contemplated for a 'neglected juvenile' is custody in a juvenile home or an order placing such a juvenile under the care of a parent, guardian or other person who was willing to ensure his good behaviour during the period of observation as fixed by the Juvenile Welfare Board. The JJ Act, 2000 introduced a separate chapter i.e. Chapter IV under the head 'Rehabilitation and Social Reintegration' for a child in need of care and protection. Such rehabilitation and social reintegration was to be carried out alternatively by adoption or foster care or sponsorship or by sending the child to an after-care organization. Section 41 contemplates adoption though it makes it clear that the primary responsibility for providing care and protection to a child is his immediate family. Sections 42, 43 and 44 of the JJ Act, 2000 deals with alternative methods of rehabilitation namely, foster care, sponsorship and being looked after by an after-care organisation.

1 (1984) 2 SCC 244

5. The JJ Act, 2000, however did not define 'adoption' and it is only by the amendment of 2006 that the meaning thereof came to be expressed in the following terms:

"2(aa)-"adoption" means the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship"

6. In fact, Section 41 of the JJ Act, 2000 was substantially amended in 2006 and for the first time the responsibility of giving in adoption was cast upon the Court which was defined by the JJ Rules, 2007 to mean a civil court having jurisdiction in matters of adoption and guardianship including the court of the district judge, family courts and the city civil court. [Rule 33 (5)] Substantial changes were made in the other sub-sections of Section 41 of the JJ Act, 2000. The CARA, as an institution, received statutory recognition and so did the guidelines framed by it and notified by the Central Govt. [Section 41(3)].

7. In exercise of the rule making power vested by Section 68 of the JJ Act, 2000, the JJ Rules, 2007 have been enacted. Chapter V of the said Rules deal with rehabilitation and social reintegration. Under Rule 33(2) guidelines issued by the CARA, as notified by the Central Government under Section 41 (3) of the JJ Act, 2000, were made applicable to all matters relating to adoption. It appears that pursuant to the JJ Rules, 2007 and in exercise of the rule making power vested by the JJ Act, 2000 most of the States have followed suit and adopted the guidelines issued by CARA making the same applicable in the matter of adoption within the territorial boundaries of the concerned State. Rules 33(3) and 33(4) of the JJ Rules, 2007 contain elaborate provisions regulating pre-adoption procedure i.e. for declaring a child legally free for adoption. The Rules also provide for foster care (including pre-adoption foster care) of such children who cannot be placed in adoption & lays down criteria for selection of families for foster care, for sponsorship and for being looked after by an aftercare organisation. Whatever the Rules do not provide for are supplemented by the CARA guidelines of 2011 which additionally provide measures for post adoption follow up and maintenance of data of adoptions.

8. It will now be relevant to take note of the stand of the Union of India. Way back on 15th May, 2006 the Union in its counter affidavit had informed the Court that prospective parents, irrespective of their religious background, are free to access the provisions of the Act for adoption of children after following the procedure prescribed. The progress on the ground as laid before the Court by the Union of India through the Ministry of Women and Child Development (respondent No. 3 herein) may also be noticed at this stage. The Union in its written submission before the Court has highlighted that at the end of the calendar year 2013 Child Welfare Committees (CWC) are presently functioning in a total of 619 districts of the country whereas State Adoption Resource Agencies (SARA) has been set up in 26 States/Union Territories; Adoption Recommendation Committees (ARCs) have been constituted in 18 States/Union Territories whereas the number of recognized adoption organisations in the country are 395. According to the Union the number of reported adoptions in the country from January, 2013 to September, 2013 was 19884 out of which 1712 cases are of inter-country adoption. The third respondent has also drawn the attention of the Court that notwithstanding the time schedule specified in the guidelines of 2011 as well as in the JJ Rules, 2007 there is undue delay in processing of adoption cases at the level of Child Welfare Committees (CWS), the Adoption Recommendation Committees (ARCs) as well as the concerned courts.

9. In the light of the aforesaid developments, the petitioner in his written submission before the Court, admits that the JJ Act, 2000 is a secular law enabling any person, irrespective of the religion he professes, to take a child in adoption. It is akin to the Special Marriage Act 1954, which enables any person living in India to get married under that Act, irrespective of the religion he follows. JJA 2000 with regard to adoption is an enabling optional gender-just law, it is submitted. In the written arguments filed on behalf of the petitioner it has also been stated that in view of the enactment of the JJ Act, 2000 and the Amending Act of 2006 the prayers made in the writ petition with regard to guidelines to enable and facilitate adoption of children by persons irrespective of religion, caste, creed etc. stands satisfactorily answered and that a direction be made by this Court to all States, Union Territories and authorities under the JJ Act, 2000 to implement the provisions of Section 41 of the Act and to follow the CARA guidelines as notified.

10. The All India Muslim Personal Law Board (hereinafter referred to as 'the Board') which has been allowed to intervene in the present proceeding has filed a detailed written submission wherein it has been contended that under the JJ Act, 2000 adoption is only one of the methods contemplated for taking care of a child in need of care and protection and that Section 41 explicitly recognizes foster care, sponsorship and being look after by after-care organizations as other/ alternative modes of taking care of an abandoned/surrendered child. It is contended that Islamic Law does not recognize an adopted child to be at par with a biological child. According to the Board, Islamic Law professes what is known as the "Kafala" system under which the child is placed under a 'Kafil' who provides for the well being of the child including financial support and thus is legally allowed to take care of the child though the child remains the true descendant of his biological parents and not that of the "adoptive" parents. The Board contends that the "Kafala" system which is recognized by the United Nation's Convention of the Rights of the Child under Article 20(3) is one of the alternate system of child care contemplated by the JJ Act, 2000 and therefore a direction should be issued to all the Child Welfare Committees to keep in mind and follow the principles of Islamic Law before declaring a muslim child available for adoption under Section 41(5) of the JJ Act, 2000.

11. The JJ Act, 2000, as amended, is an enabling legislation that gives a prospective parent the option of adopting an eligible child by following the procedure prescribed by the Act, Rules and the CARA guidelines, as notified under the Act. The Act does not mandate any compulsive action by any prospective parent leaving such person with the liberty of accessing the provisions of the Act, if he so desires. Such a person is always free to adopt or choose not to do so and, instead, follow what he comprehends to be the dictates of the personal law applicable to him. To us, the Act is a small step in reaching the goal enshrined by Article 44 of the Constitution. Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the provisions of an enabling statute. At the cost of repetition we would like to say that an optional legislation that does not contain an unavoidable imperative cannot be stultified by principles of personal law which, however, would always continue to govern any person who chooses to so submit himself until such time that the vision of a uniform Civil Code is achieved. The same can only happen by the collective decision of the generation(s) to come to sink conflicting faiths and beliefs that are still active as on date.

12. The writ petitioner has also prayed for a declaration that the right of a child to be adopted and that of the prospective parents to adopt be declared a fundamental right under Article 21

of the Constitution. Reliance is placed in this regard on the views of the Bombay and Kerala High Courts in In re: Manuel Theodore D'souza[2] and Philips Alfred Malvin Vs. Y.J.Gonsalvis & Ors.[3] respectively. The Board objects to such a declaration on the grounds already been noticed, namely, that Muslim Personal Law does not recognize adoption though it does not prohibit a childless couple from taking care and protecting a child with material and emotional support.

13. Even though no serious or substantial debate has been made on behalf of the petitioner on the issue, abundant literature including the holy scripts have been placed before the Court by the Board in support of its contention, noted above. Though enriched by the lengthy discourse laid before us, we do not think it necessary to go into any of the issues raised. The Fundamental Rights embodied in Part-III of the Constitution constitute the basic human rights which inhere in every person and such other rights which are fundamental to the dignity and well being of citizens. While it is correct that the dimensions and perspectives of the meaning and content of fundamental rights are in a process of constant evolution as is bound to happen in a vibrant democracy where the mind is always free, elevation of the right to adopt or to be adopted to the status of a Fundamental Right, in our considered view, will have to await a dissipation of the conflicting thought processes in this sphere of practices and belief prevailing in the country. The legislature which is better equipped to comprehend the mental preparedness of the entire citizenry to think unitedly on the issue has expressed its view, for the present, by the enactment of the JJ Act 2000 and the same must receive due respect. Conflicting view points prevailing between different communities, as on date, on the subject makes the vision contemplated by Article 44 of the Constitution i.e. a Uniform Civil Code a goal yet to be fully reached and the Court is reminded of the anxiety expressed by it earlier with regard to the necessity to maintain restraint. All these impel us to take the view that the present is not an appropriate time and stage where the right to adopt and the right to be adopted can be raised to the status of a fundamental right and/or to understand such a right to be encompassed by Article 21 of the Constitution. In this regard we would like to observe that the decisions of the Bombay High Court in Manuel Theodore D'souza (supra) and the Kerala High Court in Philips Alfred Malvin (supra) can be best understood to have been rendered in the facts of the respective cases. While the larger question i.e. qua Fundamental Rights was not directly in issue before the Kerala High Court, in Manuel Theodore D'souza (supra) the right to adopt was consistent with the canonical law applicable to the parties who were Christians by faith. We hardly need to reiterate the well settled principles of judicial restraint, the fundamental of which requires the Court not to deal with issues of Constitutional interpretation unless such an exercise is but unavoidable.

14. Consequently, the writ petition is disposed of in terms of our directions and observations made above.

[P. SATHASIVAM]
[RANJAN GOGOI]
[SHIVA KIRTI SINGH]

NEW DELHI,

FEBRUARY 19, 2014.

❑❑❑

2 (2000) 3 BomCR 244
3 AIR 1999 Kerala 187

STEPHANIE JOAN BECKER VERSUS STATE AND ORS.

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

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

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

CIVIL APPEAL No. 1053 of 2013

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

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

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

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

JUDGMENT

Hon'ble Mr. Justice Ranjan Gogoi :—

Leave granted.

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

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

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

5. The law with regard to inter-country adoption, indeed, was in a state of flux until the principles governing giving of Indian children in adoption to foreign parents and the procedure that should be followed in this regard to ensure absence of any abuse, maltreatment or trafficking of children came to be laid down by this Court in Lakshmi Kant Pandey v. Union of India[1]. The aforesaid proceedings were instituted by this Court on the basis of a letter addressed by one Lakshmi Kant Pandey, a practicing advocate of this Court with regard to alleged malpractices indulged in by social and voluntary organizations engaged in the work of offering Indian children in adoption to foreign parents. After an elaborate consideration of the various dimensions of the questions that arose/were raised before the Court and the information laid before it by the Indian Council of Social Welfare, Indian Council of Child Welfare, SOS Children's Villages of India (respondent No. 2 herein) and also certain voluntary organizations working in the foreign jurisdictions, this Court, after holding in favour of inter country adoption, offered elaborate suggestions to ensure that the process of such adoption is governed by strict norms, and a well laid down procedure to eliminate the possibility of abuse or misuse in offering Indian children for adoption by foreign parents is in place. This Court in Lakshmi Kant Pandey (supra) also laid down the approach that

1 (1984) 2 SCC 244

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

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

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

(1) Enlisted Foreign Adoption Agency (EFAA)

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

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

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

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

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

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

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

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

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

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

(6) Filing of Petition in the Court

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

(7) Passport and Visa

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

(8) Child travels to adoptive country

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

7. Even after the child leaves the country the Guidelines of 2006 contemplate a process of continuous monitoring of the welfare of the child through the foreign placement agency until the process of adoption in the country to which the child has been taken is completed, which process the Guidelines contemplate completion within two years. The monitoring of the welfare of the child after the process of adoption is complete and the steps that are to be taken in cases where the adoption does not materialize is also contemplated under the Guidelines of 2006. As the said aspects are not relevant for the purposes of the present adjudication the details in this regard are not being noticed. What, however, would require emphasis, at this stage, is that by and large the Guidelines of 2006 framed by the Ministry of Women and Child Development are in implementation of the decision of this Court in the case of Lakshmi Kant Pandey (supra).

8. Two significant developments in the law governing adoptions may now be taken note of. Section 41 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter for short the "JJ Act") was amended by Act 33 of 2006 by substituting sub-Sections 2, 3 and 4 by the present provisions contained in the aforesaid sub-Sections of Section 41. The aforesaid amendment which was made effective from 22.8.2006 is significant inasmuch as under sub-Section 3 power has been conferred in the Court to give a child in adoption upon satisfaction that the various guidelines issued from time to time, either by the State Government or the CARA and notified by the Central Government have been followed in the given case. The second significant development in this regard is the enactment of the Juvenile Justice (Care and Protection of Children) Rules 2007 by repeal of the 2001 Rules in force. Rule 33 (2) makes it clear that "for all matters relating to adoption, the guidelines issued by the Central Adoption Resource Agency and notified by the Central Government under sub-section (3) of Section 41 of the Act, shall apply." Rule 33 (3) in the various sub-clauses (a) to (g) lays down an elaborate procedure for certifying an abandoned child to be free for adoption. Similarly, sub-rule (4) of Rule 33 deals with the procedure to be adopted for declaring a surrendered child to be legally free for adoption. Once such a declaration is made, the various steps in the process of adoption spelt out by the Guidelines of 2006, details

of which have been extracted hereinabove, would apply finally leading to departure of the child from the country to his/her new home for completion of the process of adoption in accordance with the laws of the country to which the child had been taken. In this regard the order of the courts in the country under Section 41(3) of the JJ Act would be a step in facilitating the adoption of the child in the foreign country.

9. It will also be necessary at this stage to take note of the fact that the Guidelines of 2006 stand repealed by a fresh set of Guidelines published by Notification dated 24.6.2011 of the Ministry of Women and Child Development, Government of India under Section 41(3) of the JJ Act. The time gap between the coming into effect of the provisions of Section 41(3) of the JJ Act i.e. 22.08.2006 and the publication of the 2011 Guidelines by the Notification dated 24.6.2011 is on account of what appears to be various procedural steps that were undertaken including consultation with various bodies and the different State Governments. A reading of the Guidelines of 2011 squarely indicate that the procedural norms spelt out by the 2006 Guidelines have been more elaborately reiterated and the requirements of the pre-adoption process under Rules 33(3) and (4) have been incorporated in the said Guidelines of 2011. As a matter of fact, by virtue of the provisions of Rule 33(2) it is the Guidelines of 2011 notified under Section 41(3) of the JJ Act which will now govern all matters pertaining to inter-country adoptions virtually conferring on the said Guidelines a statutory flavour and sanction. Though the above may not have been the position on the date of the order of the learned trial court i.e. 17.9.2010, the full vigour of Section 41(3) of the JJ Act read with Rule 33 (2) of the Rules and the Guidelines of 2011 were in operation on the date of the High Court order i.e. 9.7.2012. The Notification dated 24.06.2011 promulgating the Guidelines of 2011 would apply to all situations except such things done or actions completed before the date of the Notification in question, i.e., 24.06.2011. The said significant fact apparently escaped the notice of the High Court. Hence the claim of the appellant along with consequential relief, if any, will have to be necessarily considered on the basis of the law as in force today, namely, the provisions of the JJ Act and the Rules framed thereunder and the Guidelines of 2011 notified on 24.6.2011. In other words, if the appellant is found to be so entitled, apart from declaring her to be natural guardian and grant of permission to take the child away from India a further order permitting the proposed adoption would also be called for. Whether the order relating to adoption of the child should be passed by this Court as the same was not dealt with in the erstwhile jurisdictions (trial court and the High Court) is an incidental aspect of the matter which would require consideration.

10. The facts of the present case, as evident from the pleadings of the parties and the documents brought on record, would go to show that the appellant's case for adoption has been sponsored by an agency (Journeys of the Heart, USA) rendering service in USA which is recognized by CARA. The Home Study Report of the family of the appellant indicates that the appellant apart from being gainfully employed and financially solvent is a person of amicable disposition who has developed affinity for Indian culture and Indian children. The appellant, though unmarried, has the support of her brother and other family members who have promised to look after the child in the event such a situation becomes necessary for any reason whatsoever. The Child Study Report alongwith medical examination Report prepared by the recognized agency in India has been read and considered by the appellant and it is only thereafter that she had indicated her willingness to adopt the child in question. Before permitting the present process of inter

country adoption to commence, all possibilities of adoption of the child by an Indian parent were explored which however did not prove successful.

The matter was considered by the No Objection Committee of the CARA and as stated in the affidavit of the said agency filed before this Court, the No Objection Certificate dated 03.02.2010 has been issued keeping in mind the various circumstances peculiar to the present case, details of which are as hereunder :

- Child Tina was an older female child (aged 7 years when the NOC was issued) and thus relaxation was permissible as per the guidelines.
- The Prospective parent was 54 years of age, which is within the age up to which adoption by foreign prospective parent is permissible after relaxation i.e. 55 years.
- The Prospective Adoptive Parent is otherwise also suitable as she is financially stable and there are three reference letters supporting adoption of the child by her. The Home study report of the prospective parent (Ms. Stephanie Becker) shows the child as kind, welcoming, caring and responsible individual with physical, mental emotional and financial capability to parent a female child up to age of seven years from India.
- Procedures such as declaration of the child as legally free for adoption by CWC Child Welfare Committee (CWC); ensuring efforts for domestic adoption and clearance of Adoption Coordinating Agency; and taking consent of older child had been followed.
- Follow-up of the welfare of the child was to be properly done through Journeys of the Hearts, USA, the authorized agency which had also given an undertaking to ensure the adoption of child Tina according to the laws in USA within a period not exceeding two years from the date of arrival of the child in her new home. The agency has also committed to send follow-up reports as required.
- The Biological brother of the prospective parent, Mr. Philip Becker Jr. and his wife Ms. Linda Becker have given an undertaking on behalf of the single female applicant to act as legal guardian of the child in case of any unforeseen event to the adoptive parent. This is another important safeguard.
- Article 5 from the Office of Children's Issues, US Department of State allowing child Tina to enter and reside permanently in the United States and declaring suitability of the prospective adoptive parent, was available.

11. In view of the facts as stated above which would go to show that each and every norm of the adoption process spelt out under the Guidelines of 2006, as well as the Guidelines of 2011, has been adhered to, we find that the apprehension raised by the intervener, though may have been founded on good reasons, have proved themselves wholly unsubstantiated in the present case. If the foreign adoptive parent is otherwise suitable and willing, and consent of the child had also been taken (as in the present case) and the expert bodies engaged in the field are of the view that in the present case the adoption process would end in a successful blending of the child in the family of the appellant in USA, we do not see as to how the appellant could be understood to be disqualified or disentitled to the relief(s) sought by her in the proceedings in question. It is our considered view that having regard to the totality of the facts of the case the proposed adoption would be beneficial to the child apart from being consistent with the legal entitlement of the foreign adoptive parent. If the above is the net result of the discussions that have preceded, the

Court must lean in favour of the proposed adoption. We, therefore, set aside the orders dated 17.09.2010 in Guardianship Case No. 2 of 2010 passed by the learned Trial Court and the order dated 09.07.2012 in FAO No. 425 of 2010 passed by the High Court of Delhi and appoint the appellant as the legal guardian of the minor female child Tina and grant permission to the appellant to take the child to USA.

In view of the provisions of Section 41(3) of the JJ Act and to avoid any further delay in the matter which would be caused if we were to remand the aforesaid aspect of the case to the learned Trial Court, only on the ground that the same did not receive consideration of the learned Court, we deem it appropriate to pass necessary orders giving the child Tina in adoption to the appellant. The CARA will now issue the necessary conformity certificate as contemplated under clause 34(4) of the Guidelines of 2011. The appeal consequently shall stand allowed in the above terms.

[P. SATHASIVAM]
[RANJAN GOGOI]
[V. GOPALA GOWDA]

New Delhi,

February 08, 2013.

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ST. THERESA'S TENDER LOVING CARE HOME & ORS. VERSUS STATE OF ANDHRA PRADESH

Bench: Hon'ble Dr. Justice Arijit Pasayat & Hon'ble Mr. Justice Arun Kumar

Petitioner: St. Theresa's Tender Loving Care Home & Ors.
Vs.
Respondent: State of Andhra Pradesh

Appeal (Civil) 6492 of 2005

(Arising out of S.L.P (C) No.9412 of 2003)
Date of Judgment: 24/10/2005

It is obvious that in a civilized society the importance of child welfare cannot be over-emphasized, because the welfare of the entire community, its growth and development, depends on the health and well-being of its children. Children are a "supremely important national asset" and the future well-being of the nation depends on how its children grow and develop.

The appellant no. 1 has been prosecution for offences punishable under various provisions of the Indian Penal Code, 1860 (in short'IPC'). The accusations relate to cheating, manipulation/ fabrication of documents. Some of the functionaries of the appellant no. 1 have already been convicted while permitting any organization to keep a child or give him or her in adoption its credentials are to be minutely scrutinized. It should be ensured that behind the mask of social service or upliftment and evil design of child trafficking is not lurking. It is the duty of the State to ensure a safe roof over an abandoned child. Keeping in view the welfare of the child all possible efforts should be made by the State Governments to explore e possibility of adoption under the supervision of the designated agency. Keeping in view the guidelines indicated by this Court in Lakshmi Kant Pandey case (supra) adoption by foreign parents may in appropriate cases be permitted.

While making the requisite and prescribed exercise it has to be kept in mind that child is a precious gift and merely because he or she for various reasons is abandoned by the parents that cannot be a reason for further neglect by the society. It is urged that some account of vehemence by learned counsel for the appellants that the children homes run by the State Governments are really no place when a child is to be placed. They suffer from neglect, proper care is a myth and a large number of children have lost their lives or are unable to bear the cruelties meted out. If the grievances are true, it is a matter of serious concern. The Central Government and the State Government would do well to look at these problems with the humanitarian approach and concern they deserve. It would be appropriate for them to keep the following lines from Longfellows "The Children's Hour" in mind. "Between the dark and the daylight, when the night is beginning to lower, comes a pause in the day's occupations, that is known as the Children's Hours"

JUDGMENT

Hon'ble Mr. Justice Arijit Pasayat :—

Leave granted.

The basic issue involved in this appeal is whether the appellant no.1 should be permitted to make arrangement for adoption of a child named Sahiti presently about five years by appellant nos. 2 and 3. Appellant no.1 claims to be an organization interested in the welfare of abandoned children and to secure a congenial atmosphere for their upbringing. Challenge in this appeal is to an order dated 23.12.2002 passed by the Andhra Pradesh High Court dismissing the appeal purported to have been filed under Section 19(1) of the Family Courts Act, 1984 (in short the 'Act') and Section 47 of the Guardians and Wards Act, 1890 (in short the 'Guardians Act'). The appeal before the Andhra Pradesh High Court was filed by the appellants questioning correctness of the order dated 8.7.2002 passed by the learned Judge, Family Court, Secunderabad, rejecting the prayer made by the appellants under Sections 7 to 10 of the Guardian Act. Stand of the appellants before the Family Court was that it is a society registered under the Andhra Pradesh (Telangana Area) Public Societies Registration Act, 1350 Fasli (in short 'Societies Act') purportedly for carrying social service activities. One of its main objectives is to provide shelter to abandoned children more particularly by unwed mothers, and as noted above to see them comfortably settled in adopted homes. The appellants 2 and 3 are residents of U.S.A. According to petition they were married on 19.10.1999. They had earlier adopted one son, but wanted to adopt a female child from India and for that purpose wanted to adopt the girl named Sahiti, born on 14.6.2000. The claim that they are well settled in life with decent income, would be eligible for adopting the child and also were sure to provide a happy home to the adopted child. The minor child Sahiti was stated to be daughter of an unmarried mother by name Esther, a native of Hyderabad and earning livelihood as a labourer. Due to social stigma she relinquished the child in favour of the appellant no.1 on 14.6.2000 and executed a Relinquishment Deed. The child suffered from various ailments and her adoption in India did not materialize. On that ground the Voluntary Coordination Agency(in short 'VCA') gave clearance for the minor to be given in adoption abroad. It was stated in the petition that inquiries made by appellant no.1 revealed that none of her relatives were ready and willing to take care of the minor. Since 14.6.2000 the child has been under the care and custody of appellant no.1. The State of Andhra Pradesh represented by the Director of Women Development and Child Welfare Department resisted the claim. Their stand was that it had come to the notice of the Government that some unscrupulous organizations in Andhra Pradesh were indulging in child trafficking. With a view to curb menaces, the Government had issued G.O.Ms. No.16 of 2001 banning relinquishment of a child. Since the claim of the appellant was based primarily on a Relinquishment Deed purported to have been executed by the mother of the child, inquiry was directed to be conducted by the Crime Branch of CID along with other cases. After inquiry, Crime Branch (CID) reported that the Relinquishment Deed was a fake and fabricated document and the witnesses to the Relinquishment Deed were employees of appellant no.1. Therefore, paper notification dated 4.6.2001 was made calling for claims by biological parents within 30 days in respect of child Sahiti and eight other cases. The Government of India had also addressed to the Central Adoption Resource Agency (in short 'CARA') about the false claim made by appellant no.1 and requested to initiate action against appellant no.1. The Family Court rejected the application holding that the VCA issued no objection certificate on the ground that Indian parents had refused to adopt the child on the ground that she was suffered from skin disease. The Family Court was of the view that the so called reasons did not merit acceptance. The child was also referred to child study report which indicated

that the child did not suffer from any ailment. It was noted that letters of rejection by Indian parents were not filed and the efforts of VCA for in county adoption were not established. It was noted that the effort was to be made in the light of decision of this Court in Lakshmi Kant Pandey v. Union of India (1984 (2) SCC 244).

It was noted that in term of G.O.Ms. No.16 of 2001 relinquishment of a child by biological parents on grounds of poverty, number of children or unwanted girl child could not be permitted. Accordingly the petition filed was rejected.

The view of the Family Court was affirmed by the High Court. High Court noticed that appellant no.1 based its claim on fabricated document and there was no genuine effort to see that the child was adopted by Indian parents.

In support of the appeal learned counsel for the appellants submitted that all possible efforts have been made to see that the child is adopted by Indian parents. It is not a fact that the child was not suffering from ailments. If the child is kept in the care and custody of the respondent no.1 and is sent to the children's home it would be traumatic for the child who has spent five years with the appellant no.1 quite happily. The State Government has accepted in public interest litigation that the children who have been transferred to Shishu Vihar run by the State Government are in a very pathetic condition. More than 100 children have lost their lives due to negligence on the part of the authority running the home and because of poor medical care, and even many of the children have ran away.

It is stated that all possible efforts have been made to find out Indian parents without success. The request of appellants 2 and 3 for adopting the child should have been accepted as they were willing to adopt the child. Because of prolonged litigation, they have shown some reluctance.

Therefore, permission should be given to appellant no.1 to arrange adoption by way of inter-country adoption. In Lakshmi Kant Pandey case (supra) the guidelines and the norms to be followed in the case of adoption by foreigners were indicated in detail.

It is obvious that in a civilized society the importance of child welfare cannot be over-emphasized, because the welfare of the entire community, its growth and development, depends on the health and well-being of its children. Children are a "supremely important national asset" and the future well-being of the nation depends on how its children grow and develop. The great poet Milton put it admirably when he said : "Child shows the man as morning shows the day" and the Study Team on Social Welfare said much to the same effect when it observed that "the physical and mental health of the nation is determined largely by the manner in which it is shaped in the early stages". The child is a soul with a being, a nature and capacities of its own, who must be helped to find them, to grow into their maturity into fullness of physical and vital energy and the utmost breath, depth and height of its emotional, intellectual and spiritual being; otherwise there cannot be a healthy growth of the nation. The child is father of the man, said Wordsworth in "My Heart Leaps up". Now, obviously children need special protection because of their tender age and physique, mental immaturity and incapacity to look after themselves. That is why there is a growing realisation in every part of the globe that children must be brought up in an atmosphere of love and affection and under the tender care and attention of parents so that they may be able to attain full emotional, intellectual and spiritual stability and maturity and acquire self-confidence and self-respect and a balanced view of life with full appreciation and realisation of the role which they have to play in the nation building process. Without that the nation cannot develop and attain real prosperity because a large segment of the society would then be left out of the developmental process. In India this consciousness is reflected in the provisions enacted

in the Constitution of India, 1950 (in short the 'Constitution'). Clause (3) of Article 15 enables the State to make special provision, inter-alia, for children and Article 24 provides that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

Clauses (e) and (f) of Article 39 provide that the State shall direct its policy towards securing inter-alia that the tender age of children is not abused, that citizens are not forced by economic necessity to enter avocations unsuited to their age an strength and that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. These constitutional provisions reflect the great anxiety of the constitution makers to protect and safeguard the interest and welfare of children in the country. As was observed by a learned Justice Children are innocent, vulnerable and dependent.

Abondoning children and encluding good foundation of life for them is a crime against humanity. Children cannot and should not be treated as chattels or saleable commodities or play things. For full and harmonious development of their personality, children should grow up in an atmosphere of happiness, love and understanding. In old Testament Proverbs , XXII it is said "Train up a child in the way he should go, and when he is old, he will not depart from it".

In "The Crescent Moon" Rabindranath Tagore said "I do not love him because he is good, but because he is my little child". The Government of India has also in pursuance of these constitutional provisions evolved a National Policy for the Welfare of Children. This Policy starts with a goaloriented perambulatory introduction:

The nation's children are a supremely important asset. Their nurture and solicitude are our responsibility. Children's programme should find a prominent part in out national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with the skills and motivations needed by society. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve out larger purpose of reducing inequality and ensuring social justice.

The measures are designed to protect children against neglect, cruelty and exploitation and to strengthen family ties "so that full potentialities of growth of children are realised within the normal family neighborhood and community environment". The National Policy also lays down priority in programme formation and it gives fairly high priority to maintenance, education and training of orphan and destitute children. There is also provision in the National Policy for constitution of a National Children's Board. It is the function of the National Children's Board to provide a focus for planning, review and proper coordination of the multiplicity of services striving to meet the needs of children and to ensure at different levels continuous planning, review and coordination of all the essential service.

The essence of the directions given in Lakshmi Kant Pandey case (supra) is as follows:

(1) Every effort must be made first to see if the child can be rehabilitated by adoption within the country and if that is not possible, then only adoption by foreign parents, or as it is some time called 'intercountry adoption' should be acceptable.

(2) Such inter-country adoption should be permitted after exhausting the possibility of adoption within the country by Indian parents.

(3) There is a great demand for adoption of children from India and consequently there is increasing danger of ill-equipped and sometimes even undesirable organisations or individuals activising themselves in the field of inter-county adoption with a view to trafficking in children.

(4) Following are the requirements which should be insisted upon so far as a foreigner wishing to take a child in adoption is concerned. In the first place, every application from a foreigner desiring to adopt a child must be sponsored by a social or child welfare agency recognised or licensed by the government of the country in which the foreigner is resident. No application by foreigner for taking a child in adoption should be entertained directly by any social or welfare agency in India working in the area of inter-country adoption or by any institution or centre or home to which children are committed by the juvenile court. This is essential primarily for three reasons.

Firstly, it will help to reduce, if not eliminate altogether, the possibility of profiteering and trafficking in children, because if a foreigner were allowed to contact directly agencies or individuals in India for the purpose of obtaining a child in adoption, he might, in his anxiety to secure a child for adoption, be induced or persuaded to pay any unconscionable or unreasonable amount which might be demanded by the agency or individual procuring the child.

Secondly it would be almost impossible for the court to satisfy itself that the foreigner who wishes to take the child in adoption would be suitable as a parent for the child and whether he would be able to provide a stable and secure family life to the child and would be able to handle trans-racial, transcultural and trans-national problems likely to arise from such adoption, because, where the application for adopting a child has not been sponsored by a social or child welfare agency in the country of the foreigner, there would be no proper and satisfactory home study report on which the court can rely.

Thirdly, in such a case, where the application of a foreigner for taking a child in adoption is made directly without the intervention of a social or child welfare agency, there would be no authority or agency in the country of the foreigner who could be made responsible for supervising the progress of the child and ensuring that the child is adopted at the earliest in accordance with law and grows up in an atmosphere of warmth and affection with moral and material security assured to it. The record shows that in every foreign country where children form India are taken in adoption, there are social and child welfare agency licensed or recognised by the government and it would not therefore use any difficulty, hardship or inconvenience if it is insisted that every application form a foreigner for taking a child in adoption must be sponsored by a social or child welfare agency licensed or recognised by the government of the county in which the foreigner resides. It is not necessary that there should be only one social or child welfare agency in the foreign country through which an application for adoption of a child may be routed; there may be more than one such social or child welfare agencies, but every such social or child welfare agency must be licensed or recognised by the government of the foreign country and the court should not make an order for appointment of the foreign country and the court should not make an rode for appointment of a foreigner as guardian unless it is satisfied that the application of the foreigner for adopting a child has been sponsored by such social or child welfare agency.

(5) The position in regard to biological parents of the child proposed to be taken in adoption has to be noted. What are the safeguards which are required to be provided insofar as biological parents are concerned? We may make it clear at the outset that when we talk about biological parents,

we mean both parents if they are together or the mother or the father if either is alone. Now it should be regarded as an elementary requirement that if the biological parents are known, they should be properly assisted in making a decision about relinquishing the child for adoption, by the institution or center 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 to 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.

(6) But in order to eliminate any possibility of mischief and to make sure that the child has in fact been surrendered by its biological parents, it is necessary that the institution or center 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 duty signed by the biological parents and attested by at least two responsible persons and such document of surrender should not only contain the names of the biological parents and their address but also information in regard to the brother of the child and its background, health and development.

But where the child is an orphan, destitute or abandoned child and its parents are not known, the institution or center or home for child card or hospital or social or child welfare agency in whose care the child has come, must try to trace the biological parents of the child and if the biological parents can be traced name it is found that they do not want to take back the child, then the same procedure as outlined above should as far as possible be followed. But if for any reason the biological parents cannot be traced, then there can be no question of taking their consent or consulting them. It may also be pointed out that the biological parents should not be induced or encouraged or even be permitted to take a decision in regard to giving of a child in adoption before the birth of the child or within a period of three months from the date of birth. This precaution is necessary because the biological parents must have reasonable time after the birth of the child to take a decision whether to rear up the child themselves or to relinquish it for adoption and moreover it may be necessary to allow some time to the child to overcome any health problems experienced after birth.

(7) Of course, it would be desirable if a Central Adoption Resource Agency is set up by the Government of India with regional branches at a few centers which are active in inter-country adoptions. Such Central Adoption Research Agency can act as a clearing house of information in regard to children available for inter-country adoption and all applications by foreigners for taking Indian children in adoption can then be forwarded by the social or child welfare agency in the foreign country to such Central Adoption Resource Agency and the latter can in its turn forward agencies in the courts. Every social or child welfare agency taking children under its care can then be required to sent to such Central Adoption Resource Agency the names and particulars of children under its care who are available for adoption and the names and particulars of such children can be entered in a register to be maintained by such Central Adoption Resource Agency."

In terms of this Court's decision in Lakshmi Kant Pandey case (supra), CARA was formed and it published "Guidelines for adoption". Under these guidelines every State has a VCA to co-ordinate and oversees inter-state adoptions.

It is pointed by Mr. Colin Gonsalves who was requested to assist in the matter though the intervention application filed by him on behalf of Parchuri Jamuna was rejected, that in some States the VCA is a non-governmental organization (in short 'NGO') and in some other States the Department of Women and Child Development. In the State of Andhra Pradesh, the said Department is VCA. Several guidelines have been issued from time to time. The Government of India, Ministry of Welfare has also issued directions. On the basis of Lakshmi Kant Pandey case (supra) the Government of India has issued certain guidelines vide its ResolutionNo.13-33/85-CH(AC) dated 4th July, 1989. Subsequently, some clarifictory orders were passed by this Court on 19th September, 1989, 14th August, 1991, 29th October, 1991, 14th November, 1991 and 20th November, 1991. A Task Force was constituted on 12th August, 1992 under chairmanship of retired Chief Justice of this Court. Report was submitted by the Task Force on 28.8.1993. On the basis of the recommendations made certain guidelines were also issued by the Ministry of Welfare Resolution dated 29th May, 1995.

In the background of what has been noticed by the Family Court and the High Court it is crystal clear that the orders passed do not suffer from any infirmity to warrant interference. It has been printed out by learned counsel for the State and Mr. Gonsalves, that the appellant no. 1 has been prosecution for offences punishable under various provisions of the Indian Penal Code, 1860 (in short'IPC'). The accusations relate to cheating, manipulation/fabrication of documents. Some of the functionaries of the appellant no. 1 have already been convicted while permitting any organization to keep a child or give him or her in adoption its credentials are to be minutely scrutinized. It should be ensured that behind the mask of social service or upliftment and evil design of child trafficking is not lurking. It is the duty of the State to ensure a safe roof over an abandoned child. Keeping in view the welfare of the child all possible efforts should be made by the State Governments to explore e possibility of adoption under the supervision of the designated agency. Keeping in view the guidelines indicated by this Court in Lakshmi Kant Pandey case (supra) adoption by foreign parents may in appropriate cases be permitted.

While making the requisite and prescribed exercise it has to be kept in mind that child is a precious gift and merely because he or she for various reasons is abandoned by the parents that cannot be a reason for further neglect by the society. It is urged that some account of vehemence by learned counsel for the appellants that the children homes run by the State Governments are really no place when a child is to be placed. They suffer from neglect, proper care is a myth and a large number of children have lost their lives or are unable to bear the cruelties meted out.

If the grievances are true, it is a matter of serious concern. The Central Government and the State Government would do well to look at these problems with the humanitarian approach and concern they deserve. It would be appropriate for them to keep the following lines from Longfellows "The Children's Hour" in mind. "Between the dark and the daylight, when the night is beginning to lower, comes a pause in the day's occupations, that is known as the Children's Hours" With the aforesaid observations the appeal is dismissed with no orders as to costs.

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LAKSHMI KANT PANDEY VERSUS UNION OF INDIA

Supreme Court of India

Bench: Hon'ble Mr. Justice P.N. Bhagwati, Hon'ble Mr. Justice R.S. Pathak & Hon'ble Mr. Justice Amarendra Nath Sen

Lakshmi Kant Pandey
vs
Union Of India

1984 SCR (2) 795

1984 AIR 469
Decided on 6 February, 1984

CITATION:

1984 AIR 469 1984 SCR (2) 795

1984 SCC (2) 244 1984 SCALE (1)159

The essence of the directions given in Lakshmi Kant Pandey case (supra) is as follows:

(1) Every effort must be made first to see if the child can be rehabilitated by adoption within the country and if that is not possible, then only adoption by foreign parents, or as it is some time called 'inter- country adoption' should be acceptable.

(2) Such inter-country adoption should be permitted after exhausting the possibility of adoption within the country by Indian parents.

(3) There is a great demand for adoption of children from India and consequently there is increasing danger of ill-equipped and sometimes even undesirable organisations or individuals activising themselves in the field of inter-county adoption with a view to trafficking in children.

(4) Following are the requirements which should be insisted upon so far as a foreigner wishing to take a child in adoption is concerned. In the first place, every application from a foreigner desiring to adopt a child must be sponsored by a social or child welfare agency recognised or licensed by the government of the country in which the foreigner is resident. No application by foreigner for taking a child in adoption should be entertained directly by any social or welfare agency in India working in the area of inter-country adoption or by any institution or centre or home to which children are committed by the juvenile court.

Adoption of Children by foreigner-International adoptions-Normative and Procedural safeguards to be insisted upon so far as a foreigner wishing to take a child in adoption.

The petitioner, an advocate of the Supreme Court addressed a letter in public interest to the Court, complaining of malpractices indulged in by social organisation and voluntary agencies engaged

in the work of offering Indian Children in adoption to foreign parents, the petitioner alleged that not only Indian Children of tender age are under the guise of adoption "exposed to the long horrendous journey to distant foreign countries at great risk to their lives but in cases where they survive and where these children are not placed in the shelter and Relief Houses, they in course of time become beggars or prostitutes for want of proper care from their alleged foster parents." The petitioner, accordingly, sought relief restraining Indian based private agencies "from carrying out further activity of routing children for adoption abroad" and directing the Government of India, the Indian Council of Child Welfare and the Indian Council of Social Welfare to carry out their obligations in the matter of adoption of Indian Children by Foreign parents. Being a public interest litigation, the letter was treated as a writ petition.

Disposing of the Writ Petition, after indicating the principles and norms to be observed in giving a Child in adoption to foreign parents, the Court

HELD: 1: 1. Every child has a right to love and be loved and to grow up in an atmosphere of love and affection and of moral and material security and this is possible only if the child is brought up in a family. The most congenial environment would, of course, be that of the family of his biological parents. But if for any reason it is not possible for the biological parents or other near relative to look after the child or the child is abandoned and it is either not possible to trace the parents or the parents are not willing to take care of the child, the next best alternative would be to find adoptive parents for the child so that the child can grow up under the loving care and attention of the adoptive parents. The adoptive parents would be the next best substitute for the biological parents.

1:2. When the parents of a child want to give it away in adoption or the child is abandoned and it is considered necessary in the interest of the child to give it in adoption, every effort must be made first to find adoptive parents for it within the country, because such adoption would steer clear of any problems of assimilation of the child in the family of the adoptive parents which might arise on account of cultural, racial or linguistic differences in case of adoption of the child by foreign parents. If it is not possible to find suitable adoptive parents for the child within the country, it may become necessary to give the child in adoption to foreign parents rather than allow the child to grow up in an orphanage or an institution where it will have no family life and no love and affection of parents and quite often, in the socioeconomic conditions prevailing in the country, it might have to lead the life of a destitute, half clad, half-hungry and suffering from malnutrition and illness.

2:1. The primary object of giving the child in adoption should be the welfare of the child. Great care has to be exercised in permitting the child to be given in adoption to foreign parents, lest the child may be neglected or abandoned by the adoptive parents in the foreign country or the adoptive parents may not be able to provide to the child a life or moral or material security or the child may be subjected to moral or sexual abuse or forced labour or experimentation for medial or other research and may be placed in a worse situation than that in his own country.

2:2. Since there is no statutory enactment in our country providing for adoption of a child by foreign parents or laying down the procedure which must be followed in such a case, resort is had to the provisions of the Guardians and Wards Act 1890 for the purpose of facilitating such adoption.

2:3. The High Courts of Bombay, Delhi and Gujarat have laid down by Rules and Instructions certain procedure when a foreigner makes an application for adoption under the Guardian and Wards Act including issuing of a notice to the Indian Council of Social Welfare and other officially recognised social welfare agencies with a view to assist the court in properly and carefully scrutinising the applications of the foreign parents for determining whether it will be in the interest of the child and promotive of its welfare, to be adopted by the foreign parents making the application or in other words, whether such adoption will provide moral and material security to the child with an opportunity to grow into the full stature of its personality in an atmosphere of love and affection and warmth of a family health and home. This Procedure is eminently desirable and it can help considerably to reduce, if notice imitate, the possibility of the child being adopted by unsuitable or undesirable parents or being placed in a family where it may be neglected, maltreated or exploited by the adoptive parents.

3:1. The requirements which should be insisted upon so far as a foreigner wishing to take a child in adoption and the procedure that should be followed for the purpose of ensuring that such inter-country adoptions do not lead to abuse maltreatment or exploitation of children and secure to them a healthy, decent family life are as under:

(1) Every application from a foreigner desiring to adopt a child must be sponsored by a social or child welfare agency recognised or licensed by the government of the country in which the foreigner is resident. No application by a foreigner for taking a child in adoption should be entertained directly by any social or welfare agency of India working in the area of inter-country adoption or by any institution or centre or home to which children are committed by the juvenile court. This is essential primarily for three reasons.

Firstly, it will help to reduce, if not eliminate altogether, the possibility of profiteering and trafficking in children, because if a foreigner were allowed to contact directly agencies or individuals in India for the purpose of obtaining a child in adoption, he might, in his anxiety to secure a child for adoption, be induced or persuaded to pay any unconscionable or unreasonable amount which might be demanded by the agency to individual procuring the child.

Secondly it would be almost impossible for the court to satisfy itself that the foreigner who wishes to take the child in adoption would be suitable as a parent for the child and whether he would be able to provide a stable and secure family life to the child and would be able to handler trans-racial, trans-cultural and trans-national problems likely to arise from such adoption, because where the application for adopting a child has not been sponsored by a social or child welfare agency in the country of the foreigner, there would be no proper and satisfactory home study report on which the court can rely. Thirdly, in such a case, where the application of a foreigner for taking a child in adoption is made directly without the intervention of a social or child welfare agency, there would be no authority or agency in the country of the foreigner who could be made responsible for supervising the progress of the child and ensuring that the child is adopted at the earliest in accordance with law and grows up in an atmosphere of warmth and affection with moral and material security assured to it.

Every application of a foreigner for taking a child in adoption must be accompanied by a home study report and the social or child welfare agency sponsor in such application should also send along with it a recent photograph of the family, a marriage certificate of the foreigner and his or her spouse as also a declaration concerning their health together with a certificate regarding their medical fitness duly certified by a medical doctor, a declaration regarding their financial status alongwith supporting documents including employer's certificate where applicable, income tax assessment orders, bank references and particulars concerning the properties owned by them, and also a declaration stating that they are willing to be appointed guardian of the child and an undertaking that they would adopt the child according to the law of their country within a period of not more than two years from time of arrival of the child in their country and give intimation of such adoption to the court appointing them as guardian as also to the social or child welfare agency in India process. sing their case, and that they would maintain the child and provide it necessary education and up-bringing according to their status and they would also send to the court as also to the social or child welfare agency in India reports relating to the progress of the child alongwith its recent photograph, the frequency of such progress reports being quarterly during the first two years and half yearly for the next three years. The application of the foreigner must also be accompanied by a Power of Attorney in favour of an officer of the social or child welfare agency in India which is requested to process the case and such Power of Attorney should authorize the Attorney to handle the case on behalf of the foreigner in case the foreigner is not in a position to come to India. The social or child welfare agency sponsoring the application of the foreigner must also certify that the foreigner seeking to adopt a child is permitted to do so according to the law of his country. These certificates, declarations and documents must accompany the application of the foreigner for taking child in adoption, should be duly notarised by a Notary Public whose signature should be duly attested either by an officer of the Ministry of External Affairs or Justice or Social Welfare of the country of the foreigner or by an officer of the Indian Embassy or High Commission or Consulate in that country. The social or child welfare agency sponsoring the application of the forefingers must also undertake while forwarding the application to the social or child welfare agency in India, that it will ensure adoption of the child by the foreigner according to the law of his country within a period not exceeding two years and as soon as the adoption is affected, it will send two certified copies of the adoption order to the social or child welfare agency in India through which the application for guardianship is processed, so that one copy can be filed in court and the other can remain with the social or child welfare agency in India. The social or child welfare agency sponsoring the application must also agree to send to the concerned social or child welfare agency in India progress reports in regard to the child, quarterly during the first year and half yearly for the subsequent year or years until the adoption is effected, and it must also undertake that in case of disruption of the family of the foreigner before adoption can be effected, it will take care of the child and find a suitable alternative placement for it with the approval of the concerned social or child welfare agency in India and report such alternative placement to the court handling the guardianship proceedings and such information

shall be passed on both by the court as also by the concerned social or child welfare agency in India to the Secretary, Ministry of Social Welfare, Government of India.

3:2. The Government of India shall prepare a list of social or child welfare agencies licensed or recognised for inter-country adoption by the Government of each foreign country where children from India are taken in adoption and this list shall be prepared after getting the necessary information from the government of each such foreign country and the Indian Diplomatic Mission in that foreign country. Such lists shall be supplied by the Government of India to the various High Courts in India as also to the social or child welfare agencies operation in India in the area of inter-country adoption under licence or recognition from the Government of India.

3:3. If the biological parents are known, they should be helped to understand all the implications of adoption including the possibility of adoption by a foreigner and they should be told specifically that in case the child is adopted, it would not be possible for them to have any further contact with the child The biological parents should not be subjected to any duress in making a decision about relinquishment and even after they have taken a decision to relinquish the child for giving in adoption, a further period of about three months should be allowed to them to reconsider their decision. But once the decision is taken and not reconsidered within such further time as may be allowed to them, it must be regarded as irrevocable and the procedure for giving the child in adoption to a foreigner can then be initiated without any further reference to the biological parents by filling an application for appointment of the foreigner as guardian of the child. Thereafter there can be no question of once again consulting the biological parents whether they wish to give the child in adoption or they want to take it back. But in order to eliminate any possibility of mischief and to make sure that the child has in fact surrendered by its biological parents, it is necessary that the Institution or Centre or home for Child Care or social or Child Welfare Agency to which the child is surrendered by the biological parents, should take from the biological parents a document of surrender duly signed by the biological parents and attested by at least two responsible persons and such document of surrender should not only contain the names of the biological parents and their address but also information in regard to the birth of the child and its background, health and development. If the biological parents state a preference for the religious upbringing of the child, their wish should as far as possible be respected, but ultimately the interest of the child alone should be the sole guiding factor and the biological parents should be informed that the child may be given in adoption even to a foreigner who professes a religion different from that of the biological parents. The biological parents should not be induced or encouraged or even be permitted to take a decision in regard to giving of a child in adoption before the birth of a child or within a period of three months from the date of birth. This precaution is necessary because the biological parents must have reasonable time after the birth of the child to take a decision whether to rear up the child themselves or to relinquish it for adoption and moreover it may be necessary to allow some time to the child to overcome any health problems experienced after birth.

3:4. It should not be open to any and every agency or individual to process an application from a foreigner for taking a child in adoption and such application should be processed only through a social or child welfare agency licensed or recognised by the Government of India

or the Government of the State in which it is operating. Since an application for appointment as guardian can be processed only by a recognised social or child welfare agency and none else, any unrecognised institution, centre or agency which has a child under its care would have to approach a recognised social or child welfare agency if it desires such child to be given in inter country adoption, and in that event it must send without any undue delay the name and must send without any undue delay the name and particulars of such child to the recognised social or child welfare agency through which such child is proposed to be given in intercountry adoption. The Indian Council of Social Welfare and the Indian Council for Child Welfare are clearly two social or child welfare agencies operating at the national level and recognised by the Government of India. But apart from these two recognised social or child welfare agencies functioning at the national level, there are other social or child welfare agencies engaged in child care and welfare and if they have good standing and reputation and are doing commendable work in the are of child care and welfare they should also be recognised by the Government of India or the Government of the State for the purpose of inter-country adoptions. But before taking a decision to recognise any particular social or child welfare agency for the purpose of inter country adoptions the Government of India or the Government of a State would do well to examine whether the social or child welfare agency has proper staff with professional social work experience, because otherwise it may not be possible for the social or child welfare agency to carry out satisfactorily the highly responsible task of ensuring proper placement of a child with a foreign adoptive family. The Government of India or the Government of a State recognising any social or child welfare agency for inter-country adoptions must insist as a condition of recognition that the social or child welfare agency shall maintain proper accounts which shall be audited by a chartered accountant at the end of every year and it shall not charge to the foreigner wishing to adopt a child any amount in excess of that actually in cured by way of legal or other expenses in connection with the application for appointment of guardian including such reasonable remuneration or honorarium for the work done and trouble taken in processing, filing and pursuing the application as may be fixed by the Court.

3:5. Every recognised social or child welfare agency must maintain a register in which the names and particulars of all children proposed to be given in inter-country adoption through it must be entered and in regard to each such child, the recognised social or child welfare agency must prepare a child study report through a professional social worker giving all relevant information in regard to the child so as to help the foreigner to come to a decision whether or not to adopt the child and to understand the child, if he decides to adopt it as also to assist the court in coming to a decision whether it will be for the welfare of the child to be given in adoption to the foreigner wishing to adopt it. The child study report should contain as far as possible information in regard to the following matters:-

(1) Identifying information, supported where possible by documents.

(2) Information about original parents, including their health and details of the mother's pregnancy and birth.

(3) Physical, intellectual and emotional development.

(4) Health report prepared by a registered medical practitioner preferably by a paediatrician.

(5) Recent photograph.

(6) Present environment-category of care (Own home, foster home, institution etc.) relationships routines and habits.

(7) Social worker's assessment and reasons for suggesting inter-country adoption. [838G-H; 839AE]

3:6. The recognised social or child welfare agency must insist upon approval of a specific known child and once that approval is obtained the recognised social or child welfare agency should immediately without any undue delay proceed to make an application for appointment of the foreigner as guardian of the child. Such application would have to be made in the court within whose jurisdiction the child ordinarily resides and it must be accompanied by copies of the home study report, the child study report and other certificates and documents forwarded by the social or child welfare agency sponsoring the application of the foreigner for taking the child in adoption. It is also necessary that the recognised social or child welfare agency through which an application of a foreigner for taking a child in adoption is routed must before offering a child in adoption, make sure that the child is free to be adopted. The recognised social or child welfare agency must place sufficient material before the court to satisfy it that the child is legally available for adoption. It is also necessary that the recognised social or child welfare agency must satisfy itself, firstly, that there is no impediment in the way of the child entering the country of the prospective adoptive parent; secondly, that the travel documents for the child can be obtained at the appropriate time and lastly, that the law of the country of the prospective adoptive parent permits legal adoption of the child and that on such legal adoption being concluded, the child would acquire the same legal status and rights of inheritance as a natural born child and would be granted citizenship in the country of adoption and it should file alongwith the application for guardianship, a certificate reciting such satisfaction.

3:7. In cases where a child relinquished by its biological parents or an orphan or destitute or abandoned child is brought by an agency or individual from one State to another, there should be no objection to a social or child welfare agency taking the child to another State, even if the object be to give it in adoption, provided there are sufficient safeguards to ensure that such social or child welfare agency does not indulge in any malpractice. There should also be no difficulty to apply for guardianship of the child in the court of the latter State. because the child not having any permanent place of residence would then be ordinarily resident in the place where it is in the care and custody of such agency or individual.

Section 11 of the Guardians and Wards Act, 1890 provides for notice of the application to be issued to various persons including the parents of the child if they are residing in any State to which the Act extends. But, no notice under this section should be issued to the biological parents of the child, since it would create considerable amount of embarrassment and hardship if the biological parents were then to come forward and oppose the application of the prospective adoptive parent for guardianship of the child. Moreover, the biological parents would then come to know who is the person taking the child in adoption and with this knowledge they would at any time be able to trace the whereabouts of the child and they may try to contact the child resulting in emotional and psychological disturbance for the child which might affect his future happiness. For the same reasons, notice of the application

for guardianship should also not be published in any newspaper. If the court is satisfied, after giving notice of the application to the Indian Council of Child Welfare or the Indian Council for Social Welfare or any of its branches for scrutiny of the application, that it will be for the welfare of the child to be give in adoption to the foreigner making the application for guardianship, it will only then make an order appointing the foreigner as guardian of the child and permitting him to remove the child to his own country with a view to eventual adoption. The Court will introduce the following conditions in the order, namely:

(i) That the foreigner who is appointed guardian shall make proper provision by way of deposit or bond or otherwise to enable the child to be repatriated to India should it become necessary for any reason.

(ii) That the foreigner who is appointed guardian shall submit to the court as also to the Social or Child Welfare Agency processing the application for guardianship, progress reports of the child alone with a recent photograph quarterly during the first two years and half yearly for the next three years.

(iii) The order appointing guardian shall carry, attached to it, a photograph of the child duly counter-signed by an officer of the court.

Where an order appointing guardian of a child is made by the court, immediate intimation of the same shall be given to the Ministry of Social Welfare, Government of India as also to the Ministry of Social Welfare of the Government of the State in which the court is situate and copies of such order shall also be forwarded to the two respective Ministries of Social Welfare. The Ministry of Social Welfare, Government of India shall maintain a register containing names and other particulars of the children in respect of whom orders for appointment of guardian have been made as also names, addresses and other particulars of the prospective adoptive parents who have been appointed such guardians and who have been permitted to take away the children for the purpose of adoption. The Govt. of India will also sent to the Indian Embassy or High Commission in the country of the prospective adoptive parents from time to time the names, addresses and other particulars of such prospective adoptive parents together with particulars of the children taken by them and requesting the Embassy or High Commission to maintain and unobtrusive watch over the welfare and progress of such children in order to safeguard against any possible maltreatment exploitation or use for ulterior purposes and to immediately report and instance of maltreatment, negligence or exploitation to the Government of India for suitable action.

3:8. The social or child welfare agency which is looking after the child selected by a prospective adoptive parent, may legitimately receive from such prospective adoptive parent maintenance expenses at a rate of not exceeding Rs. 60 per day (this outer limit being subjective to revision by the Ministry of Social Welfare, Government of India from time to time) from the date of selection of the child by him until the date the child leaves for going to is new home as also medical expenses including hospitalization charges, any, actually incurred by such social or child welfare agency for the child. But the claim for payment of such maintenance charges and medical expenses shall be submitted to the prospective adoptive parent.

3:9. If a child is to be given in inter-country adoption, it would be desirable that it is given in such adoption as far as possible before it completes the age of 3 years. The reason is that if a child is adopted before it attains the age of understanding, it is always easier for it to

get assimilated and integrated in the new environment in which it may find itself on being adopted by a foreign parent. Children above the age of 3 years may also be given in inter-country adoption. There can be no hard and fast rule in this connection. Even children between the ages of 3 to 7 years may be able to assimilate themselves in the new surroundings without any difficulty. Even children above the age of seven years may be given in inter-country adoption but their wishes may be ascertained if they are in a position to indicate any preference.

3:10. The proceedings on the Application for guardianship should be held by the Court in camera and they should be regarded as confidential and as soon as an order is made on the application for guardianship the entire proceedings including the papers and documents should be sealed.

3:11. The social or child welfare agency which is looking after the child selected by a prospective adoptive parent, may legitimately receive from such prospective adoptive parent maintenance expenses at a rate of not exceeding Rs. 60 per day (this outer limit being subject to revision by the Ministry of Social Welfare, Government of India from time to time) from the date of selection of the child by him until the date the child leaves for going to its new home as also medical expenses including hospitalisation charges, if any, actually incurred by such social or child welfare agency for the child. But the claim for payment of such maintenance charges and medical expenses shall be submitted to the prospective adoptive parent through the recognised social or child welfare agency which has processed the application for guardianship and payment in respect of such claim shall not be received directly by the social or child welfare agency making the claim but shall be paid only through the recognised social or child welfare agency. However, a foreigner may make voluntary donation to any social or child welfare agency but no such donation from a prospective adoptive parents shall be received until after the child has reached the country of its prospective adoptive parent.

JUDGMENT

ORIGINAL JURISDICTION: Writ Petition (CRL) No. 1171 of 1982.

Under article 32 of the Constitution of India. Petitioner in person.

FOR THE RESPONDENTS:

Miss A. Subhashini for Union of India and Ministry of Social Welfare.

Miss Kamini Jaiswal for Indian Council of Social Welfare.

J.B. Dadachanji & Co. for Indian Council of Child Welfare and Swedish Embassy.

Dr. N.M. Ghatate for all God's Children Inc. Arizone, U.S.A.

P.H. Parekh for Maharashtra State Women's Council of Child Welfare, Bombay and for Enfants de-L'espoir.

P.K. Chakeravorty for Legal Aid Service, West Bengal. Mrs. Manik Karanjawala for Indian Associations for Promotion of Adoption.

Mrs Urmila Kapur for SOS Children's Village of India. Kailash Vasdev for Missionary of Charity, Calcutta. Baldev Raj Respondent in person.

G.M. Coelho Bar at Law for Enfant's du Mande (France) Miss Rani Jethamalani for Kuanyin Charitable Trust. B.M. Bageria for Terre Des Hommes (India) Society. Sukumar Ghose for Mission of Hope (India) Society, Calcutta.

S.K. Mehta for Netherlands Inter Country Child Welfare Oraganisation.

Parijot Sinha for society for International Child Welfare.

Kailash Vasdev for Bhavishys.

The Judgment of the Court was delivered by

Hon'ble Mr. Justice P.N. Bhagwati :—

This writ petition has been initiated on the basis of a letter addressed by one Laxmi Kant Pandey, an advocate practising in this Court, complaining of malpractices indulged in by social organisations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents. The letter referred to a press report based on "empirical investigation carried out by the staff of a reputed foreign magazine" called "The Mail" and alleged that not only Indian children of tender age are under the guise of adoption "exposed to the long horrendous journey to distant foreign countries at great risk to their lives but in cases where they survive and where these children are not placed in the Shelter and Relief Homes, they in course of time become beggars or prostitutes for want of proper care from their alleged foreign foster parents." The petitioner accordingly sought relief restraining Indian based private agencies "from carrying out further activity of routing children for adoption abroad" and directing the Government of India, the Indian Council of Child Welfare and the Indian Council of Social Welfare to carry out their obligations in the matter of adoption of Indian children by foreign parents. This letter was treated as a writ petition and by an Order dated 1st September, 1982 the Court issued notice to the Union of India the Indian Council of Child Welfare and the Indian Council of Social Welfare to appear in answer to the writ petition and assist the Court in laying down principles and norms which should be followed in determining whether a child should be allowed to be adopted by foreign parents and if so, the procedure to be followed for that purpose, with the object of ensuring the welfare of the child.

The Indian Council of Social Welfare was the first to file its written submissions in response to the notice issued by the Court and its written submission filed on 30th September, 1982 not only carried considerable useful material bearing on the question of adoption of Indian children by foreign parents but also contained various suggestions and recommendations for consideration by the Court in formulating principles and norms for permitting such adoptions and laying down the procedure for that purpose. We shall have occasion to refer to this large material placed before us as also to discuss the various suggestions and recommendations made in the written submission by the Indian Council of Social Welfare when we take up for consideration the various issues arising in the writ petition. Suffice it to state for the present that the written submission of the Indian Council of Social Welfare is a well thought out document dealing comprehensively with various aspects of the problem in its manifold dimensions. When the writ petition reached hearing before the Court on 12th October, 1982 the only written submission filed was that the Indian Council of Social Welfare and neither the Union of India nor the Indian Council of Child Welfare had made any response to the notice issued by the Court. But there was a telegram received from a Swedish Organisation called `Barnen Framfoer Allt Adoptioner" intimating to the Court that this Organisation desired to participate in the hearing of the writ petition and to present proper material before the Court. S.O.S, Children's Villages of India also appeared

through their counsel Mrs. Urmila Kapoor and applied for being allowed to intervene at the hearing of the writ petition so that they could made their submissions on the question of adoption of Indian Children by foreign parents. Since S.O.S, Children's Villages of India is admittedly an organisation concerned with welfare of children, the Court, by an Order dated 12th October, 1982, allowed them to intervene and to make their submissions before the Court. The Court also by the same Order directed that the Registry may address a communication to Barnen Framfoer Allt Adoptioner informing them about the adjourned date of hearing of the writ petition and stating that if they wished to present any material and make their submissions, they could do so by filing an affidavit before the adjourned date of hearing. The Court also directed the Union of India to furnish before the next hearing of the writ petition the names of "any Indian Institutions or Organisations other than the Indian Council of Social Welfare and the Indian Council of Child Welfare, which are engaged or involved in offering Indian children for adoption by foreign parents" and observed that if the Union of India does not have this information, they should gather the requisite information so far as it is possible for them to do so and to make it available to the Court. The Court also issued a similar direction to the Indian Council of Child Welfare, Indian Council of Social Welfare and S.O.S. Children's Villages of India. There was also a further direction given in the same Order to the Union of India, the Indian Council of Child Welfare, the Indian Council of Social Welfare and the S.O.S. Children's Villages of India "to supply to the Court information in regard to the names and particulars of any foreign agencies which are engaged in the work of finding Indian children for adoption for foreign parents". The writ petition was adjourned to 9th November, 1982 for enabling the parties to carry out these directions.

It appears that the Indian Council of Social Welfare thereafter in compliance with the directions given by the Court, filed copies of the Adoption of Children Bill, 1972 and the adoption of Children Bill, 1980. The adoption of Children Bill, 1972 was introduced in the Rajya Sabha sometime in 1972 but it was subsequently dropped, presumably because of the opposition of the Muslims stemming from the fact that it was intended to provide for a uniform law of adoption applicable to all communities including the Muslims. It is a little difficult to appreciate why the Muslims should have opposed this Bill which merely empowered a Muslim to adopt if he so wished; it had no compulsive force requiring a Muslim to act contrary to his religious tenets: it was merely an enabling legislation and if a Muslim felt that it was contrary to his religion to adopt, he was free not to adopt. But in view of the rather strong sentiments expressed by the members of the Muslim Community and with a view not to offend their religious susceptibilities, the Adoption of Children Bill, 1980 which was introduced in the Lok Sabha eight years later on 16th December, 1980, contained an express provision that it shall not be applicable to Muslims. Apart from this change in its coverage the Adoption of Children Bill, 1980 was substantially in the same terms as the Adoption of Children Bill, 1972. The Adoption of Children Bill 1980 has unfortunately not yet been enacted into law but it would be useful to notice some of the relevant provisions of this Bill in so far as they indicate what principles and norms the Central Government regarded as necessary to be observed for securing the welfare of children sought to be given in adoption to foreign parents and what procedural safeguards the Central Government thought, were essential for securing this end. Clauses 23 and 24 of the Adoption of Children Bill, 1980 dealt with the problem of adoption of Indian children by parents domiciled abroad and, in so far as material, they provided as follows:

> *"23 (1) Except under the authority of an order under section 24, it shall not be lawful for any person to take or send out of India a child who is a citizen of India to any place outside India with a view to the adoption of the child by any person."*

(2) Any person who takes or sends a child out of India to any place outside India in contravention of sub-section (1) or makes or takes part in any arrangements for transferring the care and custody of a child to any person for that purpose shall be punishable with imprisonment for a term which may extend to six months or with fine, or with both. (24) (1) If upon an application made by a person who is not domiciled in India, the district court is satisfied that the applicant intends to adopt a child under the law of or within the country in which he is domiciled, and for that purpose desires to remove the child from India either immediately or after an interval, the court may make an order (in this section referred to as a provisional adoption order) authorising the applicant to remove the child for the purpose aforesaid and giving to the applicant the care and custody of the child pending his adoption as aforesaid:

Provided that no application shall be entertained unless it is accompanied by a certificate by the Central Government to the effect that- (i) the applicant is in its opinion a fit person to adopt the child; (ii) the welfare and interests of the child shall be safeguarded under the law of the country of domicile of the applicant; (iii) the applicant has made proper provision by way of deposit or bond or otherwise in accordance with the rules made under this Act to enable the child to be repatriated to India, should it become necessary for any reason.

(2) The provisions of this Act relating to an adoption order shall, as far as may be apply in relation to a provisional adoption order made under this section. The other clauses of the Adoption of Children Bill, 1980 were sought to be made applicable in relation to a provisional adoption order by reason of sub-clause (3) of clause 24. The net effect of this provision, if the Bill were enacted into law, would be that in view of clause 17 no institution or organisation can make any arrangement for the adoption of an Indian child by foreign parents unless such institution or organisation is licensed as a social welfare institution and under Clause 21, it would be unlawful to make or to give to any person any payment or reward for or in consideration of the grant by that person of any consent required in connection with the adoption of a child or the transfer by that person of the care and custody of such child with a view to its adoption or the making by that person of any arrangements for such adoption. Moreover, in view of Clause 8, no provisional adoption order can be made in respect of an Indian child except with the consent of the parent or guardian of such child and if such child is in the care of an institution, except with the consent of the institution given on its behalf by all the persons entrusted with or in charge of its management, but the District Court can dispense with such consent if it is satisfied that the person whose consent is to be dispensed with has abandoned, neglected or persistently ill-treated the child or has persistently failed without reasonable cause to discharge his obligation as parent or guardian or can not be found or is incapable of giving consent or is withholding consent unreasonably. When a provisional adoption order is made by the District Court on the application of a person domiciled abroad, such person would be entitled to obtain the care and custody of the child in respect of which the order is made and to remove such child for the purpose of adopting it under the law or within the country in which he is domiciled. These provisions in the Adoption of Children Bill, 1980 will have to be borne in mind when we formulate the guidelines which must be observed in permitting an Indian child to be given in adoption to foreign parents. Besides filing copies of the Adoption of Children Bill, 1972 and the Adoption of Children Bill, 1980 the Indian Council of Social Welfare also filed two lists, one list giving names and particulars of recognised agencies in foreign countries engaged in facilitating procurement of children from other countries for adoption in their own respective countries and the other list containing names and particulars of institutions and organisations in India engaged in the work of offering and placing Indian children for adoption by foreign parents.

The Writ Petition thereafter came up for hearing on 9th November, 1982 when several applications were made by various institutions and organisations for intervention at the hearing of the writ petition. Since the questions arising in the writ petition were of national importance, the Court thought that it would be desirable to have assistance from whatever legitimate source it might come and accordingly, by an order dated 9th November, 1982, the Court granted permission to eight specified institutions or organisations to file affidavits or statements placing relevant material before the Court in regard to the question of adoption of Indian children by foreign parents and directed that such affidavits or statements should be filed on or before 27th November, 1982. The Court also issued notice of the writ petition to the State of West Bengal directing it to file its affidavit or statement on or before the same date. The Court also directed the Superintendent of Tees Hazari courts to produce at the next hearing of the writ petition quarterly reports in regard to the orders made under the Guardian and Wards Act, 1890 entrusting care and custody of Indian children to foreign parents during the period of five years immediately prior to 1st October, 1982. Since the Union of India had not yet filed its affidavit or statement setting out what was the attitude adopted by it in regard to this question, the Court directed the Union of India to file its affidavit or statement within the same time as the others. The Court then adjourned the hearing of the writ petition to 1st December 1982 in order that the record may be completed by that time. Pursuant to these directions given by the Court, various affidavits and statements were filed on behalf of the Indian Council of Social Welfare, Enfants Du Monde, Missionaries of Charity, Enfants De L's Espoir, Indian Association for promotion of Adoption Kuan-yin Charitable Trust, Terre Des Homes (India) Society, Maharashtra State Women's Council, Legal Aid Services West Bengal, SOS Children's Villages of India, Bhavishya International Union for Child Welfare and the Union of India. These affidavits and statements placed before the Court a wealth of material bearing upon the question of adoption of Indian children by foreign parents and made valuable suggestions and recommendations for the consideration of the Court. These affidavits and statements were supplemented by elaborate oral arguments which explored every facet of the question, involving not only legal but also sociological considerations. We are indeed grateful to the various participants in this inquiry and to their counsel for the very able assistance rendered by them in helping us to formulate principles and norms which should be observed in giving Indian children in adoption to foreign parents and the procedure that should be followed for the purpose of ensuring that such inter-country adoptions do not lead to abuse maltreatment or exploitation of children and secure to them a healthy, decent family life.

It is obvious that in a civilized society the importance of child welfare cannot be over-emphasized, because the welfare of the entire community, its growth and development, depend on the health and well-being of its children. Children are a "supremely important national asset" and the future well being of the nation depends on how its children grow and develop. The great poet Milton put it admirably when he said: "Child shows the man as morning shows the day" and the Study Team on Social Welfare said much to the same effect when it observed that "the physical and mental health of the nation is determined largely by the manner in which it is shaped in the early stages". The child is a soul with a being, a nature and capacities of its own, who must be helped to find them, to grow into their maturity, into fulness of physical and vital energy and the utmost breadth, depth and height of its emotional, intellectual and spiritual being; otherwise there cannot be a healthy growth of the nation. Now obviously children need special protection because of their tender age and physique mental immaturity and incapacity to look-after themselves. That is why there is a growing realisation in every part of the globe that children must be brought up in an atmosphere of love and affection and under the tender care and attention of parents so that they may be able to attain full emotional, intellectual

and spiritual stability and maturity and acquire self-confidence and self-respect and a balanced view of life with full appreciation and realisation of the role which they ave to play in the nation building process without which the nation cannot develop and attain real prosperity because a large segment of the society would then be left out of the developmental process. In India this consciousness is reflected in the provisions enacted in the Constitution. Clause (3) of Article 15 enables the State to make special provisions inter alia for children and Article 24 provides that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment. Clauses (e) and (f) of Article 39 provide that the State shall direct its policy towards securing inter alia that the tender age of children is not abused, that citizens are not forced by economic necessity to enter avocations unsuited to their age and strength and that children are given facility to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. These constitutional provisions reflect the great anxiety of the constitution makers to protect and safeguard the interest and welfare of children in the country. The Government of India has also in pursuance of these constitutional provisions evolved a National Policy for the Welfare of Children. This Policy starts with a goal-oriented perambulatory introduction:

"The nation's children are a supremely important asset. Their nurture and solicitude are our responsibility. Children's programme should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with the skills and motivations needed by society. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve our larger purpose of reducing inequality and ensuring social justice."

The National Policy sets out the measures which the Government of India proposes to adopt towards attainment of the objectives set out in the perambulatory introduction and they include measures designed to protect children against neglect, cruelty and exploitation and to strengthen family ties "so that full potentialities of growth of children are realised within the normal family neighbourhood and community environment." The National Policy also lays down priority in programme formation and it gives fairly high priority to maintenance, education and training of orphan and destitute children. There is also provision made in the National Policy for constitution of a National Children's Board and pursuant to this provision, the Government of India has Constituted the National Children's Board with the Prime Minister as the chair person. It is the function of the National Children's Board to provide a focus for planning and review and proper coordination of the multiplicity of services striving to meet the needs of children and to ensure at different levels continuous planning, review and coordination of all the essential services. The National Policy also stresses the vital role which the voluntary organisations have to play in the field of education, health recreation and social welfare services for children and declares that it shall be the endeavour of State to encourage and strengthen such voluntary organisations.

There has been equally great concern for the welfare of children at the international level culminating in the Declaration of the Rights of the Child adopted by the General Assembly of the United Nations on 20th November, 1959. The Declaration in its Preamble points out that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth", and that "mankind owes to the child the best it has to give" and proceeds to formulate several Principles of which the following are material for our present purpose:

"PRINCIPLE 2: The child shall enjoy special protection and shall be given opportunities and facilities by law and by other means, to enable him to develop physically mentally morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose the best interests of the child shall be the paramount consideration."

PRINCIPLE 3: The child shall be entitled from his birth to a name and a nationality.

PRINCIPLE 6: The Child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and in any case in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.

PRINCIPLE 9: The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form.

PRINCIPLE 10: The child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance friendship among peoples, peace and universal brotherhood and in full consciousness that his energy and talents should be devoted to the service of his fellow men."

Every child has a right to love and be loved and to grow up in an atmosphere of love and affection and of moral and material security and this is possible only if the child is brought up in a family. The most congenial environment would, of course, be that of the family of his biological parents. But if for any reason it is not possible for the biological parents or other near relative to look after the child or the child is abandoned and it is either not possible to trace the parents or the parents are not willing to take care of the child, the next best alternative would be to find adoptive parents for the child so that the child can grow up under the loving care and attention of the adoptive parents. The adoptive parents would be the next best substitute for the biological parents. The practice of adoption has been prevalent in Hindu Society for centuries and it is recognised by Hindu Law, but in a large number of other countries it is of comparatively recent origin while in the muslim countries it is totally unknown. Amongst Hindus, it is not merely ancient Hindu Law which recognises the practice of adoption but it has also been legislatively recognised in the Hindu Adoption and Maintenance Act, 1956. The Adoption of Children Bill 1972 sought to provide for a uniform law of adoption applicable to all communities including the muslims but, as pointed out above, it was dropped owing to the strong opposition of the muslim community. The Adoption of Children Bill, 1980 is now pending in Parliament and if enacted, it will provide a uniform law of adoption applicable to all communities in India excluding the muslim community. Now when the parents of a child want to give it away in adoption or the child is abandoned and it is considered necessary in the interest of the child to give it in adoption, every effort must be made first to find adoptive parents for it within the country, because such adoption would steer clear of any problems of assimilation of the child in the family of the adoptive parents which might arise on account of cultural, racial or linguistic differences in case of adoption of the child by foreign parents. If it is not possible to find suitable adoptive parents for the child within the country, it may become necessary to give the child in adoption to foreign parents rather than allow the child to grow up in an orphanage or an institution where it will have no family life and no love and affection of parents and quite often, in the socioeconomic conditions prevailing in the country, it might have to lead the

life of a destitute, half clad, half-hungry and suffering from malnutrition and illness. Paul Harrison a free-lance journalist working for several U.N. Agencies including the International Year of the Child Secretariat points out that most third world children suffer "because of their country's lack of resources for development as well as pronounced inequalities in the way available resources are distributed" and they face a situation of absolute material deprivation. He proceeds to say that for quite a large number of children in the rural areas, "poverty and lack of education of their parents, combined with little or no access to essential services of health, sanitation and education, prevent the realisation of their full human potential making them more likely to grow up uneducated, unskilled and unproductive" and their life is blighted by malnutrition, lack of health care and disease and illness caused by starvation, impure water and poor sanitation. What Paul Harrison has said about children of the third world applies to children in India and if it is not possible to provide to them in India decent family life where they can grow up under the loving care and attention of parents and enjoy the basic necessities of life such as nutritive food, health care and education and lead a life of basic human dignity with stability and security, moral as well as material, there is no reason why such children should not be allowed to be given in adoption to foreign parents. Such adoption would be quite consistent with our National Policy on Children because it would provide an opportunity to children, otherwise destitute, neglected or abandoned, to lead a healthy decent life, without privation and suffering arising from poverty, ignorance, malnutrition and lack of sanitation and free from neglect and exploitation, where they would be able to realise "full potential of growth". But of course as we said above, every effort must be made first to see if the child can be rehabilitated by adoption within the country and if that is not possible, then only adoption by foreign parents, or as it is some time called 'inter country adoption' should be acceptable. This principle stems from the fact that inter country adoption may involve trans-racial, trans-cultural and trans-national aspects which would not arise in case of adoption' within the country and the first alternative should therefore always be to find adoptive parents for the child within the country. In fact, the Draft Guidelines of Procedures Concerning Inter-Country Adoption formulated at the International Council of Social Welfare Regional Conference of Asia and Western Pacific held in Bombay in 1981 and approved at the Workshop on Inter Country Adoption held in Brighten, U.K. on 4th September, 1982, recognise the validity of this principle in clause 3.1 which provides: "Before any plans are considered for a child to be adopted by a foreigner, the appropriate authority or agency shall consider all alternatives for permanent family care within the child's own country". Where, however, it is not possible to find placement for the child in an adoptive family within the country, we do not see anything wrong if: a home is provided to the child with an adoptive family in a foreign country. The Government of India also in the affidavit filed on its behalf by Miss B. Sennapati Programme Officer in the Ministry of Social Welfare seems to approve of inter-country adoption for Indian children and the proceedings of the Workshop on Inter Country Adoption held in Brighten, U.K. on 4th September, 1982 clearly show that the Joint Secretary, Ministry of Social Welfare who represented the Government of India at the Workshop "affirmed support of the Indian Government to the efforts of the international organisations in promoting measures to protect welfare and interests of children who are adopted aboard."

But while supporting inter-country adoption, it is necessary to bear in mind that the primary object of giving the child in adoption being the welfare of the child, great care has to be exercised in permitting the child to be given in adoption to foreign parents, lest the child may be neglected or abandoned by the adoptive parents in the foreign country or the adoptive parents may not be able to provide to the child a life of moral or material security or the child may be subjected to moral or sexual abuse or forced labour or experimentation for medical or other research and may be placed in a worse situation

than that in his own country. The Economic and Social Council as also the Commission for Social Development have therefore tried to evolve social and legal principles for the protection and welfare of children given in inter-country adoption. The Economic and Social Council by its Resolution 1925 LVIII requested the Secretary General of the United Nations to convene a group of Experts with relevant experts with relevant experience of family and child welfare with the following mandate:

> *"(a) To prepare a draft declaration of social and legal principles relating to adoption and foster placement of children nationally and internationally, and to review and appraise the recommendations and guidelines incorporated in the report of the Secretary General and the relevant material submitted by Governments already available to the Secretary General and the regional commissions.*
>
> *(b) To draft guidelines for the use of Governments in the implementation of the above principles, as well as suggestions for improving procedures within the context of their social development-including family and child welfare-programmes."*

Pursuant to this mandate an expert Group meeting was convened in Geneva in December, 1978 and this Expert Group adopted a "Draft declaration on social and legal principles relating to the protection and welfare of children with special reference of foster placement and adoption, nationally and internationally". The Commission for Social Development considered the draft Declaration at its 26th Session and expressed agreement with its contents and the Economic and Social Council approved the draft Declaration and requested the General Assembly to consider it in a suitable manner. None of the parties appearing could give us information whether any action has been taken by the General Assembly. But the draft Declaration is a very important document in as much it lays down certain social and legal principles which must be observed in case of inter-country adoption. Some of the relevant principles set out in the draft Declaration may be referred to with advantage:

"Art. 2. It is recognised that the best child welfare is good family welfare.

4. When biological family care is unavailable or in appropriate, substitute family care should be considered.

7. Every child has a right to a family. Children who cannot remain in their biological family should be placed in foster family or adoption in preference to institutions, unless the child's particular needs can best be met in a specialized facility.

8. Children for whom institutional care was formerly regarded as the only option should be placed with families, both foster and adoptive.

12. The primary purpose of adoption is to provide a permanent family for a child who cannot be cared for by his/her biological family.

14. In considering possible adoption placements, those responsible for the child should select the most appropriate environment for the particular child concerned.

15. Sufficient time and adequate counselling should be given to the biological parents to enable them to reach a decision on their child's future, recognizing that it is in the child's best interest to reach this decision as early as possible.

16. Legislation and services should ensure that the child becomes an integral part of the adoptive family.

17. The need of adult adoptees to know about their background should be recognized.

19. Governments should determine the adequacy of their national services for children, and recognize those children whose needs are not being met by existing services. For some of these children, inter-country adoption may be considered as a suitable means of providing them with a oily.

21. In each country, placements should be made through authorized agencies competent to deal with inter country adoption services and providing the same safeguards and standards as are applied in national adoptions.

22. Proxy adoptions are not acceptable, in consideration of the child's legal and social safety.

23. No adoption plan should be considered before it has been established that the child is legally free for adoption and the pertinent documents necessary to complete the adoption are available. All necessary consents must be in a form which is legally valid in both countries. It must be definitely established that the child will be able to immigrate into the country of the prospective adopters and can subsequently obtain their nationality.

24. In inter-country adoptions, legal validation of the adoption should be assured in the countries involved.

25. The child should at all times have a name, nationality and legal guardian."

Thereafter at the Regional Conference of Asia and Western Pacific held by the International Council on Social Welfare in Bombay in 1981, draft guidelines of procedure concerning inter-country adoption were formulated and, as pointed out above, they were approved at the Workshop held in Brighton, U.K. on 4th September, 1982. These guidelines were based on the Draft Declaration and they are extremely relevant as they reflect the almost unanimous thinking of participants from various countries who took part in the Regional Conference in Bombay and in the Workshop in Brighton, U.K. There are quite a few of these guidelines which are important and which deserve serious consideration by us:

"1.4. In all inter-country adoption arrangements, the welfare of the child shall be prime consideration. Biological Parents:

2.2. When the biological parents are known they shall be offered social work services by professionally qualified workers (or experienced personnel who are supervised by such qualified workers) before and after the birth of the child.

2.3. These services shall assist the parents to consider all the alternatives for the child's future. Parents shall not be subject to any duress in making a decision about adoption. No commitment to an adoption plan shall be permitted before the birth of the child. After allowing parents a reasonable time to reconsider any decision to relinquish a child for adoption, the decision should become irrevocable.

2.5. If the parents decide to relinquish the child for adoption, they shall be helped to understand all the implications, including the possibility of adoption by foreigners and of no further contact with the child. 2.6. Parents should be encouraged, where possible, to provide information about the child's background and development, and their own health.

2.8. It is the responsibility of the appropriate authority or agency to ensure that when the parents relinquish a child for adoption all of the legal requirements are met.

2.9. If the parents state a preference for the religious up-bringing of the child, these wishes shall be respected as far as possible, but the best interest of the child will be the paramount consideration. 2.10.

If the parents are not known, the appropriate authority or agency, in whose care the child has been placed, shall endeavour to trace the parents and ensure that the above services are provided, before taking any action in relation to adoption of the child.

The Child:

3.1. Before any plans are considered for a child to be adopted by foreigners, the appropriate authority or agency shall consider all alternatives for permanent family care within the child's own country.

3.2. A child-study report shall be prepared by professional workers (or experienced personnel who are supervised by such qualified workers) of an appropriate authority or agency, to provide information which will form a basis for the selection of prospective adopters for the child, assist with the child's need to know about his original family at the appropriate time, and help the adoptive parents understand the child and have relevant information about him/her.

3.3 As far as possible, the child-study report shall include the following:

3.3.1. Identifying information, supported where possible by documents.

3.3.2. Information about original parents, including their health and details of the mother's pregnancy and the birth.

3.3.3. Physical, intellectual and emotional development.

3.3.4. Health report.

3.3.5. Recent photograph.

3.3.6. Present environment-category of care (Own home, foster home, institution, etc.) relationships, routines and habits.

3.3.7. Social Worker's assessment and reasons for suggesting inter-country adoption.

3.4. Brothers and sisters and other children who have been cared for as siblings should not be separated by adoption placement except for special reasons.

3.5. When a decision about an adoption placement is finalised, adequate time and effort shall be given to preparation of the child in a manner appropriate to his/her age and level of development. Information about the child's new country and new home, and counselling shall be provided by a skilled worker. 3.5. (a) Before any adoption placement is finalized the child concerned shall be consulted in a manner appropriate to his/her age and level of development.

3.6. When older children are placed for adoption, the adoptive parents should be encouraged to come to the child's country of origin, to meet him/her there, learn personally about his/her first environment and escort the child to its new home.

Adoptive Parents:

4.3. In addition to the usual capacity for adoptive, parenthood applicants need to have the capacity to handle the trans-racial, trans-cultural and trans-national aspects of inter-country adoptions.

4.4. A family study report shall be prepared by professional worker (or experienced personnel who are supervised by such qualified workers) to indicate the basis on which the applicants were accepted as prospective adopters. It should include an assessment of the parents' capacity to

parent a particular type of child and provide relevant in formation for other authorities such as Courts.

4.5. The report on the family study which must be made in the community where the applicants are residing, shall include details of the following:

4.5.1. Identifying information about parents and other members of the family, including any necessary documentation.

4.5.2. Emotional and intellectual capacities of prospective adopters, and their motivation to adoption. 4.5.3. Relationship (material, family, relatives, friends, community)

4.5.4. Health.

4.5.5. Accommodation and financial position. 4.5.6. Employment and other interests.

4.5.7. Religious affiliations and/or attitude. 4.5.8. Capacity for adoptive parenthood, and details of child preferred (age, sex, degree of disability).

4.5.9. Support available from relatives, friends, community.

4.5.10. Social worker's assessment and details of adoption authority's approval.

4,5.11. Recent photograph of family. Adoption Authorities and Agencies:

5.1. Inter-country adoption arrangements should be made only through Government adoption authorities (or agencies recognised by them) in both sending and receiving countries. They shall use experienced staff with professional social work education or experienced personnel supervised by such qualified workers.

5.2. The appropriate authority or agency in the child's country should be informed of all proposed inter-country adoptions and have the opportunity to satisfy itself that all alternatives in the country have been considered, and that inter-country adoption is the optimal choice of care for the child. 5.3. Before any inter-country adoption plan is considered, the appropriate authority or agency in the child's country should be responsible for establishing that the child is legally free for adoption, and that the necessary documentation is legally valid in both countries.

5.4. Approval of inter-country adoption applicants is a responsibility of the appropriate authorities or agencies in both sending and receiving countries. An application to adopt a child shall not be considered by a sending country unless it is forwarded through the appropriate authority or agency in the receiving country.

5.5. The appropriate authority or agency in both countries shall monitor the reimbursement of costs involved in inter-country adoption to prevent profiteering and traffic king in children.

5.6. XX XX XX XX

5.7. When a child goes to another country to be adopted, the appropriate authority or agency of the receiving country shall accept responsibility for supervision of the placement, and for the provision of progress reports for the adoption authority or agency in the sending country for the period agreed upon.

5.8. In cases where the adoption is not to be finalised in the sending country, the adoption authority in the receiving country shall ensure that an adoption order is sought as soon as possible but not later than 2 years after placement. It is the responsibility of the appropriate authority or agency

in the receiving country to inform the appropriate authority or agency in the sending country of the details of the adoption order when it is granted.

5.8.1. In cases where the adoption is to be finalised in the sending country after placement, it is the responsibility of the appropriate authority or agency in both the sending and receiving country to ensure that the adoption is finalised as soon as possible.

5.9. If the placement is disrupted before the adoption is finalised, the adoption authority in the receiving country shall be responsible for ensuring, with the agreement of the adoption authority in the sending country that a satisfactory alternative placement is made with prospective adoptive parents who are approved by the adoption authorities of both countries.

Adoption Services and Communities:

6.1. Appropriate authorities or agencies in receiving countries shall ensure that there is adequate feedback to the appropriate authorities or agencies in sending countries, both in relation to inter-country adoption generally and to individual children where required.

6.2. XX XX XX XX

6.3. The appropriate authorities and agencies in both sending and receiving countries have a responsibility for public education in relation to inter-country adoption, to ensure that when such adoption is appropriate for children, public attitudes support this. Where public attitude is known to be discriminatory or likely to be hostile on grounds of race or colour, the appropriate authority or agency in the sending country should not consider placement of the child.

Status of the Child:

7.1. Family:

It is essential that in inter-country adoption child is given the same legal status and rights of inheritance, as if she/he had been born to the adoptive parents in marriage.

7.2. Name:

When the legal adoption process is concluded the child shall have the equivalent of a birth registration certificate.

7.3. Nationality:

When the legal adoption is concluded, the child shall be granted appropriate citizenship.

7.4. XX XX XX XX

7.5. Immigration:

Before an inter-country adoption placement with particular prospective adopters is proposed, the appropriate authority or agency in the child's country shall ensure that there is no hindrance, to the child entering the prospective adopters' country, and that travel documents can be obtained at the appropriate time. We shall examine these provisions of the Draft Declaration and the draft guidelines of procedure when we proceed to consider and lay down the principles and norms which should be followed in intercountry adoption.

Now it would be convenient at this stage to set out the procedure which is at present being followed for giving a child in adoption to foreign parents. Since there is no statutory enactment

in our country providing for adoption of a child by foreign parents or laying down the procedure which must be followed in such a case, resort is had to the provisions of the Guardians & Wards Act 1890 for the purpose of facilitating such adoption. This Act is an old statute enacted for the purpose of providing for appointment of guardian of the person or property of a minor. Section 4 sub-section (5) clause (a) defines the "court" to mean the district court having jurisdiction to entertain an application under the Act for an order appointing or declaring a person to be a guardian and the expression "district court" is defined in sub-section (4) of section 4 to have the same meaning as assigned to it in the Code of Civil Procedure and includes a High Court in the exercise of its ordinary original civil jurisdiction. Section 7 sub-section (1) provides that where the court is satisfied that it is for the welfare of a minor that an order should be made appointing a guardian of his person or property or both or declaring a person to be such a guardian, the court may make an order accordingly and, according to section 8, such an order shall not be made except on the application of one of four categories of persons specified in clauses (a) to (d), one of them being "the person desirous of being the guardian of the minor" and the other being "any relative or friend of the minor". Sub section (1) of section 9 declares that if the 'application' is with respect to the guardianship of the person of the minor-and that is the kind of application which is availed of for the purpose of intercountry adoption-it shall be made to the district court having jurisdiction in the place where the minor ordinarily resides. Then follows section 11, sub- section (1) which prescribes that if the court is satisfied that there is ground for proceeding on the application, it shall fix a date for the hearing thereof and cause notice of the application and of the date fixed for the hearing to be served on the parents of the minor if they are residing in any State to which the Act extends, the person if any named in the petition as having the custody or possession of the person of the minor, the person proposed in the application to be appointed guardian and any other person to whom, in the opinion of the court, special notice of the application should be given. Section 17 provides that in appointing guardian of a minor, the court shall be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor and in considering what will be for the welfare of the minor, the court shall have regard to the age sex, and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent and any existing or previous relations of the proposed guardian with the minor or his property. The last material section is section 26 which provides that a guardian of the person of a minor appointed by the court shall not, without the leave of the court by which he was appointed, remove the ward from the limits of its jurisdiction, except for such purposes as may be prescribed and the leave to be granted by the court may be special or general.

These are the relevant provisions of the Guardians and Wards Act 1890 which have a bearing on the procedure which is at present being followed for the purpose of carrying through inter-country adoption. The foreign parent makes an application to the court for being appointed guardian of the person of the child whom he wishes to take in adoption and for leave of the court to take the child with him to his country on being appointed such guardian. The procedure to be followed by the court in disposing of such application is laid down by three High Courts in the country with a view to protecting the interest and safeguarding the welfare of the child, but so far as the rest of the High Courts are concerned, they do not seem to have taken any steps so far in that direction. Since most of the applications by foreign parents wishing to take a child in adoption in the State of Maharashtra are made on the original side of the High Court of Bombay that High Court has issued a notification dated 10th May 1972 incorporating Rule 361-B in

Chapter XX of the Rules of the High Court of Bombay (Original Side) 1957 an this newly added Rule provides inter alia as follows:

> *"When a foreigner makes an application for being appointed as the guardian of the person or property of a minor, the Prothonotary and Senior Master shall address a letter to the Secretary of the Indian Council of Social Welfare, informing him of the presentation of the application and the date fixed for the hearing thereof-he shall also inform him that any representation which the Indian Council of Social Welfare may make in the matter would be considered by the Court before passing the order on the application. A copy of the application shall be forwarded to the Secretary of the Indian Council of Social Welfare along with the letter of Prothonotary and Senior Master."*

The High Court of Delhi has also issued instructions on the same lines to the Courts subordinate to it and these instructions read as follows:

(i) A foreigner desirous of being appointed guardian or the person of a minor and praying for leave to remove the minor to a foreign country, shall make an application for the purpose in the prescribed form under the Guardians and Wards Act, attaching with it three copies of passport size photographs of the minor, duly attested by the person having custody of the minor at the time;

(ii) If the court is satisfied that there is no ground for proceedings on the application, it shall fix a day for the hearing there of and cause notice of the application and of the date fixed for the hearing on the person and in the manner mentioned in Section 11, Guardians and Wards Act, 1890 as also to the general public and the Secretary of the Indian Council of child Welfare and consider their representation;

(iii) Every person appointed guardian of the person of a minor shall execute a bond with or without a surety or sureties as the court may think fit to direct and in such sum as the court may fix, having regard to the welfare of the minor and to ensure his production in the court if and when so required by the court;

(iv) On the court making an order for the appointment of a foreigner guardian of the person of an Indian minor, a copy of the minor's photograph shall be counter-signed by the Court and issued to the guardian or joint guardian, as the case may be, appointed by the court alongwith the certificate or guardianship."

The High Court of Gujarat has not framed any specific rule for this purpose like the High Courts of Bombay and Delhi but in a judgment delivered in 1982 in the case of Rasiklal Chaganlal Mehta,(1) the High Court of Gujarat has made the following observations:

> *"In order that the Courts can satisfactorily decide an intercountry adoption case against the aforesaid background and in the light of the above referred guidelines, we consider it necessary to give certain directions. In all such cases, the Court should issue notice to the Indian Council of Social Welfare (175, Dadabhai Naroji Road, Bombay-400001) and seek its assistance. If the Indian Council of Social Welfare so desires it should be made a party to the proceedings. If the Indian Council of Social Welfare does not appear, or if it is unable, for some reason, to render assistance, the Court should issue notice to an independent, reputed and publicly/officially recognised*

social welfare agency working in the field and in that area and request it to render assistance in the matter."

The object of giving notice to the Indian Council of Social Welfare or the Indian Council for Child Welfare or any other independent, reputed and publicly or officially recognised social welfare agency is obviously to ensure that the application of foreign parents for guardianship of the child with a view to its eventual adoption is properly and carefully scrutinised and evaluated by an expert body having experience in the area of child welfare with a view to assisting the Court in coming to the conclusion whether it will be in the interest of the child, promotive of its welfare, to be adopted by the foreign parents making the application or in other words, whether such adoption will provide moral and material security to the child with an opportunity to grow into the full stature of its personality in an atmosphere of love and affection and warmth of a family hearth and home. This procedure which has been evolved by the High Courts of Bombay, Delhi and Gujarat is, in our opinion, eminently desirable and it can help considerably to reduce, if not eliminate, the possibility of the child being adopted by unsuitable or undesirable parents or being placed in a family where it may be neglected, maltreated or exploited by the adoptive parents. We would strongly commend this procedure for acceptance by every court in the country which has to deal with an application by a foreign parent for appointment of himself as guardian of a child with a view to its eventual adoption We shall discuss this matter a little more in detail when we proceed to consider what principles and norms should be laid down for inter-country adoption, but, in the meanwhile, proceeding further with the narration of the procedure followed by the courts in Bombay, Delhi and Gujarat, we may point out that when notice is issued by the court, the Indian Council of Social Welfare or the Indian Council for Child Welfare or any other recognised social welfare agency to which notice is issued, prepares what may conveniently be described as a child study report and submits it to the Court for its consideration. What are the different aspects relating to the child in respect of which the child study report should give information is a matter which we shall presently discuss, but suffice it to state for the time being that the child study report should contain legal and social data in regard to the child as also an assessment of its behavioural pattern and its intellectual, emotional and physical development. The Indian Council of Social Welfare has evolved a standardised form of the child study report and it has been annexed as Ex. 'C' to the reply filed in answer to the notice issued by the Court. Ordinarily an adoption proposal from a foreign parent is sponsored by a social or child welfare agency recognised or licensed by the Government of the country in which the foreign parents resides and the application of the foreign parent for appointment as guardian of the child is accompanied by a home study report prepared by such social or child welfare agency. The home study report contains an assessment of the fitness and suitability of the foreign parent for taking the child in adoption based on his antecedents, family background, financial condition, psychological and emotional adaptability and the capacity to look after the child after adoption despite racial, national and cultural differences. The Indian Council of Social Welfare has set out in annexure 'B' to the reply filed by it, guidelines for the preparation of the home study report in regard to the foreign parent wishing to take a child in adoption, and it is obvious from these guidlines which we shall discuss a little later, that the home study report is intended to provide social and legal facts in regard to the foreign parent with a view to assisting the court in arriving at a proper determination of the question whether it will be in the interest of the child to be given in adoption to such foreign parent. The court thus has in most cases where an application is made by a foreign parent for being appointed guardian of a child in the courts in Bombay,

Delhi and Gujarat, the child study report as well as the home study report together with other relevant material in order to enable it to decide whether it will be for the welfare of the child to be allowed to be adopted by the foreign parents and if on a consideration of these reports and material, the court comes to the conclusion that it will be for the welfare of the child, the court makes an order appointing the foreign parent as guardian of the child with liberty to him to take the child to his own country with a view to its eventual adoption. Since adoption in a foreign country is bound to take some time and till then the child would continue to be under the guardianship of the foreign parent by virtue of the order made by the court, the foreign parent as guardian would continue to be accountable to the court for the welfare of the child and the court therefore takes a bond from him with or without surety or sureties in such sum as may be thought for ensuring its production if and when required by the court. The foreign parent then takes the child to his own country either personally or through an escort and the child is then adopted by the foreign parent according to the law of his country and on such adoption, the child acquires the same status as a natural born child with the same rights of inheritance and succession as also the same nationality as the foreign parent adopting it. This is broadly the procedure which is followed in the courts in Bombay, Delhi and Gujarat and there can be no doubt that, by and large, this procedure tends to ensure the welfare of the child, but even so, there are several aspects of procedure and detail which need to be considered in order to make sure that the child is placed in the right family where it will be able to grow into full maturity of its personality with moral and material security and in an atmosphere of love and warmth and it would not be subjected to neglect, maltreatment or exploitation. Now one thing is certain that in the absence of a law providing for adoption of an Indian child by a foreign parent, the only way in which such adoption can be effectuated is by making it in accordance with the law of the country in which the foreign parent resides. But in order to enable such adoption to be made in the country of the foreign parent, it would be necessary for the foreign parent to take the child to his own country where the procedure for making the adoption in accordance with the law of that country can be followed. However, the child which is an Indian national cannot be allowed to be removed out of India by the foreign parent unless the foreign parent is appointed guardian of the person of the child by the Court and is permitted by the Court to take the child to his own country under the provisions of the Guardians and Wards Act 1890. Today, therefore, as the law stands, the only way in which a foreign parents can take an Indian child in adoption is by making an application to the Court in which the child ordinarily resides for being appointed guardian of the person of the child with leave to remove the child out of India and take it to his own country for the purpose of adopting it in accordance with the law of his country. We are definitely of the view that such inter-country adoption should be permitted after exhausting the possibility of adoption within the country by Indian parents. It has been the experience of a large number of social welfare agencies working in the area of adoption that, by and large, Indian parents are not enthusiastic about taking a stranger child in adoption and even if they decide to take such child in adoption, they prefer to adopt a boy rather than a girl and they are wholly averse to adopting a handicapped child, with the result that the majority of abandoned, destitute or orphan girls and handicapped children have very little possibility of finding adoptive parents within the country and their future lies only in adoption by foreign parents. But at the same time it is necessary to bear in mind that by reason of the unavailability of children in the developed countries for adoption, there is a great demand for adoption of children from India and consequently there is increasing danger of ill-equipped and sometimes even undesirable

organisations or individuals activising themselves in the field of inter- country adoption with a view to trafficking in children and sometimes it may also happen that the immediate prospect of transporting the child from neglect and abandonment to material comfort and security by placing it with a foreigner may lead to other relevant factors such as the intangible needs of the child, its emotional and psychological requirements and possible difficulty of its assimilation and integration in a foreign family with a different racial and cultural background, being under-emphasized, if not ignored. It is therefore necessary to evolve normative and procedural safeguards for ensuring that the child goes into the right family which would provide it warmth and affection of family life and help it to grow and develop physically, emotionally, intellectually and spiritually. These safeguards we now proceed to examine.

We may make it clear at the outset that we are not concerned here with cases of adoption of children living with their biological parents, for in such class of cases, the biological parents would be the best persons to decide whether to give their child in adoption to foreign parents. It is only in those cases where the children sought to be taken in adoption are destitute or abandoned and are living in social or child welfare centres that it is necessary to consider what normative and procedural safeguards should be forged for protecting their interest and promoting their welfare. Let us first consider what are the requirements which should be insisted upon so far ar a foreigner whishing to take a child in adoption is concerned In the first place, every application from a foreigner desiring to adopt a child must be sponsored by a social or child welfare agency recognised or licensed by the government of the country in which the foreigner is resident. No application by a foreigner for taking a child in adoption should be entertained directly by any social or welfare agency in India working in the area of inter-country adoption or by any institution or centre or home to which children are committed by the juvenile court. This is essential primarily for three reasons.

Firstly, it will help to reduce, if not eliminate altogether the possibility of profiteering and trafficking in children, because if a foreigner were allowed to contact directly agencies or individuals in India for the purpose of obtaining a child in adoption, he might in his anxiety to secure a child for adoption, be induced or persuaded to pay any unconscionable or unreasonable amount which might be demanded by the agency or individual procuring the child.

Secondly it would be almost impossible for the court to satisfy itself that the foreigner who wishes to take the child in adoption would be suitable as a parent for the child and whether he would be able to provide a stable and secure family life to the child and would be able to handle trans-racial, trans-cultural and trans-national problems likely to arise from such adoption, because, where the application for adopting a child has not been sponsored by a social or child welfare agency in the country of the foreigner, there would be no proper and satisfactory home study report on which the court can rely.

Thirdly, in such a case, where the application of a foreigner for taking a child in adoption is made directly without the intervention of a social or child welfare agency, there would be no authority or agency in the country of the foreigner who could be made responsible for supervising the progress of the child and ensuring that the child is adopted at the earliest in accordance with law and grows up in an atmosphere of warmth and affection with moral and material security assured to it. The record shows that in every foreign country where children from India are taken in adoption, there are social and child welfare agencies licensed or recognised by the government and it would not therefore cause any difficulty hardship or inconvenience if it is

insisted that every application from a foreigner for taking a child in adoption must be sponsored by a social or child welfare agency licensed or recognised or recognised by the government of the country in which the foreigner resides. It is not necessary that there should be only one social or child welfare agency in the foreign country through which an application for adoption of a child may be routed; there may be more than one such social or child welfare agencies, but every such social or child welfare agency must be licensed or recognised by the government of the foreign country and the court should not make an order for appointment of a foreigner as guardian unless it is satisfied that the application of the foreigner for adopting a child has been sponsored by such social or child welfare agency. The social or child welfare agency which sponsors the application for taking a child in adoption must get a home study report prepared by a professional worker indicating the basis on which the application of the foreigner for adopting a child has been sponsored by it. The home study report should broadly include information in regard to the various matters set out in Annexure 'A' to this judgment though it need not strictly adhere to the requirements of that Annexure and it should also contain an assessment by the social or child welfare agency as to whether the foreigner wishing to take a child in adoption is fit and suitable and has the capacity to parent a child coming from a different racial and cultural milieu and whether the child will be able to fit into the environment of the adoptive family and the community in which it lives. Every application of a foreigner for taking a child in adoption must be accompanied by a home study report and the social or child welfare agency sponsoring such application should also send along with it a recent photograph of the family, a marriage certificate of the foreigner and his or her spouse as also a declaration concerning their health together with a certificate regarding their medical fitness duly certificate by a medical doctor, a declaration regarding their financial status alongwith supporting documents including employer's certificate where applicable, income tax assessment orders, bank references and particulars concerning the properties owned by them, and also a declaration stating that they are willing to be appointed guardian of the child and undertaking that they would adopt the child according to the law of their country within a period of not more than two years from the time of arrival of the child in their country and give intimation of such adoption to the court appointing them as guardian as also to the social or child welfare agency in India processing their case, they would maintain the child and provide it necessary education and up-bringing according to their status and they would also send to the court as also to the social or child welfare agency in India reports relating to the progress of the child alongwith its recent photograph, the frequency of such progress reports being quarterly during the first two years and half yearly for the next three years. The application of the foreigner must also be accompanied by a Power of Attorney in favour of an Officer of the social or child welfare agency in India which is requested to process the case and such Power of Attorney should authorise the Attorney to handle the case on behalf of the foreigner in case the foreigner is not in a position to come to India. The social or child welfare agency sponsoring the application of the foreigner must also certify that the foreigner seeking to adopt a child is permitted to do so according to the law of his country. These certificates, declarations and documents which must accompany the application of the foreigner for taking a child in adoption, should be duly notarised by a Notary Public whose signature should be duly attested either by an Officer of the Ministry of External Affairs or Justice or Social Welfare of the country of the foreigner or by an Officer of the Indian Embassy or High Commission or Consulate in that country. The social or child welfare agency sponsoring the application of the foreigner must also undertake while forwarding the application

to the social or child welfare agency in India, that it will ensure adoption of the child by the foreigner according to the law of his country within a period not exceeding two years and as soon as the adoption is effected, it will send two certified copies of the adoption order to the social or child welfare agency in India through which the application for guardianship is processed, so that one copy can be filed in court and the other can remain with the social or child welfare agency in India. The social or child welfare agency sponsoring the application must also agree to send to the concerned social or child welfare agency in India progress reports in regard to the child, quarterly during the first year and half yearly for the subsequent year or years until the adoption is effected, and it must also undertake that in case of disruption of the family of the foreigner before adoption can be effected, it will take care of the child and find a suitable alternative placement for it with the approval of the concerned social or child welfare agency in India and report such alternative placement to the court handling the guardianship proceedings and such information shall be passed on both by the court as also by the concerned social or child welfare agency in India to the Secretary, Ministry of Social Welfare, Government of India. The Government of India shall prepare a list of social or child welfare agencies licensed or recognised for inter- country adoption by the government of each foreign country where children from India are taken in adoption and this list shall be prepared after getting the necessary information from the government of each such foreign country and the Indian Diplomatic Mission in that foreign country. We may point out that the Swedish Embassy has in Annexure II to the affidavit filed on its behalf by Ulf Waltre, given names of seven Swedish organisations or agencies which are authorised by the National Board for Inter-Country Adoption functioning under the Swedish Ministry of Social Affairs to "mediate" applications for adoption by Swedish nationals and the Indian Council of Social Welfare has also in the reply filed by it in answer to the writ petition given a list of government recognised organisations or agencies dealing in inter-country adoption in foreign countries. It should not therefore be difficult for the Government of India to prepare a list of social or child welfare agencies licensed or recognised for intercountry adoption by the Government in various foreign countries. We direct the Government of India to prepare such list within six months from today and copies of such list shall be supplied by the Government of India to the various High Courts in India as also to the social or child welfare agencies operating in India in the area of inter-country adoption under licence or recognition from the Government of India. We may of course make it clear that application of foreigners for appointment of themselves as guardians of children in India with a view to their eventual adoption shall not be held up until such list is prepared by the Government of India but they shall be processed and disposed of in the light of the principles and norms laid down in this judgment.

We then proceed to consider the position in regard to biological parents of the child proposed to be taken in adoption. What are the safeguards which are required to be provided in so far as biological parents are concerned ? We may make it clear at the outset that when we talk about biological parents, we mean both parents if they are together of the mother or the father if either is alone. Now it should be regarded as an elementary requirement that if the biological parents are known, they should be properly assisted in making a decision about relinquishing the child for adoption, by the Institution or centre or Home for Child Care or social or child welfare agency to which the child is being surrendered. Before a decision is taken by the biological parents to surrender the child for adoption, they should be helped to understand all the implications of adoptions including the possibility of adoption by a foreigner and they should be told specifically

that in case the child is adopted, it would not be possible for them to have any further contact with the child. The biological parents should not be subjected to any duress in making a decision about relinquishment and even after they have taken a decision to relinquish the child for giving in adoption, a further period of about three months should be allowed to them to reconsider their decision. But once the decision is taken and not reconsidered within such further time as may be allowed to them, it must be regarded as irrevocable and the procedure for giving the child in adoption to a foreigner can then be initiated without any further reference to the biological parents by filing an application for appointment of the foreigner as guardian of the child. Thereafter there can be no question of once again consulting the biological parents whether they wish to give the child in adoption or they want to take it back. It would be most unfair if after a child is approved by a foreigner and expenses are incurred by him for the purpose of maintenance of the child and some times on medical assistance and even hospitalisation for the child, the biological parents were once again to be consulted for giving them a locus penitential to reconsider their decision. But in order to eliminate any possibility of mischief and to make sure that the child has in fact been surrendered by its biological parents, it is necessary that the Institution or Centre or Home for Child Care or social or child welfare agency to which the child is surrendered by the biological parents, should take from the biological parents a document of surrender duly signed by the biological parents and attested by at least two responsible persons and such document of surrender should not only contain the names of the biological parents and their address but also information in regard to the birth of the child and its background, health and development. If the biological parents state a preference for the religious upbringing of the child, their wish should as far as possible be respected, but ultimately the interest of the child alone should be the sole guiding factor and the biological parents should be informed that the child may be given in adoption even to a foreigner who professes a religion different from that of the biological parents. This procedure can and must be followed where the biological parents are known and they relinquish the child for adoption to an Institution or Centre or Home for Child Care or hospital or social or child welfare agency. But where the child is an orphan, destitute or abandoned child and its parents are not known, the Institution or Centre or Home for Child Care or hospital or social or child welfare agency in whose care the child has come, must try to trace the biological parents of the child and if the biological parents can be traced and it is found that they do not want to take back the child, then the same procedure as outlined above should as far as possible be followed. But if for any reason the biological parents cannot be traced, then there can be no question of taking their consent or consulting them. It may also be pointed out that the biological parents should not be induced or encouraged or even be permitted to take a decision in regard to giving of a child in adoption before the birth of the child of within a period of three months from the date of birth. This precaution is necessary because the biological parents must have reasonable time after the birth of the child to take a decision whether to rear up the child themselves or to relinquish it for adoption and moreover it may be necessary to allow some time to the child to overcome any health problems experienced after birth.

We may now turn to consider the safeguards which should be observed in so far as the child proposed to be taken in adoption is concerned. It was generally agreed by all parties appearing before the Court, whether as interveners or otherwise, that it should not be open to any and every agency or individual to process an application from a foreigner for taking a child in adoption and such application should be processed only through a social or child welfare agency

licensed or recognised by the Government of India or the Government of the State in which it is operating, or to put it differently in the language used by the Indian Council of Social Welfare in the reply filed by it in answer to the writ petition, "all private adoptions conducted by unauthorised individuals or agencies should be stopped". The Indian Council of Social Welfare and the Indian Council for Child Welfare are clearly two social or child welfare agencies operating at the national level and recognised by the Government of India, as appears clearly from the letter dated 23rd August, 1980 addressed by the Deputy Secretary to the Government of India to the Secretary, Government of Kerela, Law Department, Annexure 'F' to the submissions filed by the Indian Council for Child Welfare in response to the writ petition. But apart from these two recognised social or child welfare agencies functioning at the national level, there are other social or child welfare agencies engaged in child care and welfare and if they have good standing and reputation and are doing commendable work in the area of child care and welfare, there is no reason why they should not be recognised by the Government of India or the Government of a State for the purpose of inter-country adoptions. We would direct the Government of India to consider and decide within a period of three months from today whether any of the institutions or agencies which have appeared as interveners in the present writ petition are engaged in child care and welfare and if so, whether they deserve to be recognised for inter- country adoptions. Of course it would be open to the Government of India or the Government of a State suo motu or on an application made to it to recognise any other social or child welfare agency for the purpose of inter-country adoptions, provided such social or child welfare agency enjoys good reputation and is known for its work in the field of child care and welfare. We would suggest that before taking a decision to recognise any particular social or child welfare agency for the purpose of intercountry adoptions, the Government of India or the Government of a State would do well to examine whether the social or child welfare agency has proper staff with professional social work experience, because otherwise it may not be possible for the social or child welfare agency to carry out satisfactorily the highly responsible task of ensuring proper placement of a child with a foreign adoptive family. It would also be desirable not to recognise an organisation or agency which has been set up only for the purpose of placing children in adoption: it is only an organisation or agency which is engaged in the work of child care and welfare which should be regarded as eligible for recognition, since inter-country adoption must be looked upon not as an independent activity by itself, but as part of child welfare programme so that it may not tend to degenerate into trading. The Government of India or the Government of a State recognising any social or child welfare agency for inter-country adoptions must insist as a condition of recognition that the social or child welfare agency shall maintain proper accounts which shall be audited by a chartered accountant at the end of every year and it shall not charge to the foreigner wishing to adopt a child any amount in excess of that actually incurred by way of legal or other expenses in connection with the application for appointment of guardian including such reasonable remuneration or honorarium for the work done and trouble taken in processing, filing and pursuing the application as may be fixed by the Court.

Situations may frequently arise where a child may be in the care of a child welfare institution or centre or social or child welfare agency which has not been recognised by the Government. Since an application for appointment as guardian can, according to the principles and norms laid down by us, be processed only by a recognised social or child welfare agency and none else, any unrecognised institution, centre or agency which has a child under its care would have to approach a recognised social or child welfare agency if it desires such child to be given in

inter-country adoption, and in that event it must send without any undue delay the name and particulars of such child to the recognised social or child welfare agency through which such child is proposed to be given in inter-country adoption. Every recognised social or child welfare agency must maintain a register in which the names and particulars of all children proposed to be given in inter-country adoption through it must be entered and in regard to each such child, the recognised social or child welfare agency must prepare a child study report through a professional social worker giving all relevant information in regard to the child so as to help the foreigner to come to a decision whether or not to adopt the child and to understand the child, if he decides to adopt it as also to assist the court in coming to a decision whether it will be for the welfare of the child to be given in adoption to the foreigner wishing to adopt it. The child study report should contain as far as possible information in regard to the following matters:

"*(1) Identifying information, supported where possible by documents.*

(2) Information about original parents, including their health and details of the mother's pregnancy and birth.

(3) Physical, intellectual and emotional development.

(4) Health report prepared by a registered medical practitioner preferably by a paediatrician.

(5) Recent photograph.

(6) Present environment-category of care (Own home, foster home, institution etc.) relationships, routines and habits.

(7) Social worker's assessment and reasons for suggesting inter-country adoption."

The government of India should, with the assistance of the Government of the States, prepare a list of recognised social or child welfare agencies with their names, addresses and other particulars and send such list to the appropriate department of the Government of each foreign country where Indian children are ordinarily taken in adoption so that the social or child welfare agencies licensed or recognised by the Government of such foreign country for intercountry adoptions, would know which social or child welfare agency in India they should approach for processing an application of its national for taking an Indian child in adoption. Such list shall also be sent by the Government of India to each High Court with a request to forward it to the district courts within its jurisdiction so that the High Courts and the district courts in the country would know which are the recognised social or child welfare agencies entitled to process an application for appointment of a foreigner as guardian. Of course, it would be desirable if a Central Adoption Resource Agency is set up by the Government of India with regional branches at a few centres which are active in inter-country adoptions. Such Central Adoption Resource Agency can act as a clearing house of information in regard to children available for inter-country adoption and all applications by foreigners for taking Indian children in adoption can then be forwarded by the social or child welfare agency in the foreign country to such Central Adoption Resource Agency and the latter can in its turn forward them to one or the other of the recognised social or child welfare agencies in the country. Every social or child welfare agency taking children under its care can then be required to send to such Central Adoption Resource Agency the names and particulars of children under its care who are available for adoption and the names and particulars of such children can be entered in a register to be maintained by

such Central Adoption Resource Agency. But until such Central Adoption Resource Agency is set up, an application of a foreigner for taking an Indian child in adoption must be routed through a recognised social or child welfare agency. Now before any such application from a foreigner is considered, every effort must be made by the recognised social or child welfare agency to find placement for the child by adoption in an Indian family. Whenever any Indian family approaches a recognised social or child welfare agency for taking a child in adoption, all facilities must be provided by such social or child welfare agency to the Indian family to have a look at the children available with it for adopt on and if the Indian family wants to see the child study report in respect of any particular child, child study report must also be made available to the Indian family in order to enable the Indian family to decide whether they would take the child in adoption. It is only if no Indian family comes forward to take a child in adoption within a maximum period of two months that the child may be regarded as available for inter-country adoption, subject only to one exception, namely, that if the child is handicapped or is in bad state of health needing urgent medical attention, which is not possible for the social or child welfare agency looking after the child to provide, the recognised social or child welfare agency need not wait for a period of two months and it can and must take immediate steps for the purpose of giving such child in inter-country adoption. The recognised social or child welfare agency should, on receiving an application of a foreigner for adoption through a licensed or recognised social or child welfare agency in a foreign country, consider which child would be suitable for being given in adoption to the foreigner and would fit into the environment of his family and community and send the photograph and child study report of such child to the foreigner for the purpose of obtaining his approval to the adoption of such child. The practice of accepting a general approval of the foreigner to adopt any child should not be allowed, because it is possible that if the foreigner has not seen the photograph of the child and has not studied the child study report and a child is selected for him by the recognised social or child welfare agency in India on the basis of his general approval, he may on the arrival of the child in his country find that he does not like the child or that the child is not suitable in which event the interest of the child would be seriously prejudiced. The recognised social or child welfare agency must therefore insist upon approval of a specific known child and once that approval is obtained, the recognised social or child welfare agency should immediately without any undue delay proceed to make an application for appointment of the foreigner as guardian of the child. Such application would have to be made in the court within whose jurisdiction the child ordinarily resides and it must be accompanied by copies of the home study report, the child study report and other certificates and documents forwarded by the social or child welfare agency sponsoring the application of the foreigner for taking the child in adoption.

Before we proceed to consider what procedure should be followed by the court in dealing with an application for appointment of a foreigner as guardian of a child, we may deal with a point of doubt which was raised before us, namely, whether the social or child welfare agency which is looking after the child should be entitled to receive from the foreigner wishing to take the child in adoption any amount in respect of maintenance of the child or its medical expenses. We were told that there are instances where large amounts are demanded by so called social or child welfare agencies or individuals in consideration of giving a child in adoption and often this is done under the label of maintenance charges and medical expenses supposed to have been incurred for the child. This is a pernicious practice which is really nothing short of trafficking in children and it is absolutely necessary to put an end to it by introducing adequate safeguards.

There can be no doubt that if an application of a foreigner for taking a child in adoption is required to be routed through a recognised social or child welfare agency and the necessary steps for the purpose of securing appointment of the foreigner as guardian of the child have also to be taken only through a recognised social or child welfare agency, the possibility of any so called social or child welfare agency or individual trafficking in children by demanding exorbitant amounts from prospective adoptive parents under the guise of maintenance charges and medical expenses or otherwise, would be almost eliminated. But, at the same time, it would not be fair to suggest that the social or child welfare agency which is looking after the child should not be entitled to receive any amount from the prospective adoptive parent, when maintenance and medical expenses in connection with the child are actually incurred by such social or child welfare agency. Many of the social or child welfare agencies running homes for children have little financial resources of their own and have to depend largely on voluntary donations and therefore if any maintenance or medical expenses are incurred by them on a child, there is no reason why they should not be entitled to receive reimbursement of such maintenance and medical expenses from the foreigner taking the child in adoption. We would therefore direct that the social or child welfare agency which is looking after the child selected by a prospective adoptive parent, may legitimately receive from such prospective adoptive parent maintenance expenses at a rate not exceeding Rs. 60 per day (this outer limit being subject to revision by the Ministry of Social Welfare, Government of India from time to time) from the date of selection of the child by him until the date the child leaves for going to its new home as also medical expenses including hospitalisation charges, if any, actually incurred by such social or child welfare agency for the child. But the claim for payment of such maintenance charges and medical expenses shall be submitted to the prospective adoptive parent through the recognised social or child welfare agency which has processed the application for guardianship and payment in respect of such claim shall not be received directly by the social or child welfare agency making the claim but shall be paid only through the recognised social or child welfare agency. This procedure will to a large extent eliminate trafficking in children for money or benefits in kind and we would therefore direct that this procedure shall be followed in the future. But while giving this direction, we may make it clear that what we have said should not be interpreted as in any way preventing a foreigner from making voluntary donation to any social or child welfare agency but no such donation from a prospective adoptive parent shall be received until after the child has reached the country of its prospective adoptive parent.

It is also necessary to point out that the recognised social or child welfare agency through which an application of a foreigner for taking a child in adoption is routed must, before offering a child in adoption, make sure that the child is free to be adopted. Where the parents have relinquished the child for adoption and there is a document of surrender, the child must obviously be taken to be free for adoption. So also where a child is an orphan or destitute or abandoned child and it has not been possible by the concerned social or child welfare agency to trace its parents or where the child is committed by a juvenile court to an institution, centre or home for committed children and is declared to be a destitute by the juvenile court, it must be regarded as free for adoption. The recognised social or child welfare agency must place sufficient material before the court to satisfy it that the child is legally available for the adoption. It is also necessary that the recognised welfare agency must satisfy itself, firstly, that there is no impediment in the way of the child entering the country of the prospective adoptive parent; secondly, that the travel documents for the child can be obtained at the appropriate time and lastly, that the

law of the country of the prospective adoptive parent permits legal adoption of the child and that no such legal adoption being concluded, the child would acquire the same legal status and rights of inheritance as a natural born child and would be granted citizenship in the country of adoption and it should file along with the application for guardianship, a certificate reciting such satisfaction.

We may also at this stage refer to one other question that was raised before us, namely, whether a child under the care of a social or child welfare agency or hospital or orphanage in one State can be brought to another State by a social or child welfare agency for the purpose of being given in adoption and an application for appointment of a guardian of such child can be made in the court of the latter State. This question was debated before us in view of the judgment given by Justice Lentin of the Bombay High Court of 22nd July, 1982 in Miscellaneous Petition No. 178 of 1982 and other allied petitions. We agree with Justice Lentin that the practice of social or child welfare agencies or individuals going to different States for the purpose of collecting children for being given in inter-country adoption is likely to lead to considerable abuse, because it is possible that such social or child welfare agencies or individuals may, by offering monetary inducement, persuade indigent parents to part with their children and then give the children to foreigners in adoption by demanding a higher price, which the foreigners in their anxiety to secure a child for adoption may be willing to pay. But we do not think that if a child is relinquished by its biological parents or is an orphan or destitute or abandoned child in its parent State, there should be any objection to a social or child welfare agency taking the child to another State, even if the object be to give it in adoption, provided there are sufficient safeguards to ensure that such social or child welfare agency does not indulge in any malpractice. Since we are directing that every application of a foreigner for taking a child in adoption shall be routed only through a recognised social or child welfare agency and an application for appointment of the foreigner as guardian of the child shall be made to the court only through such recognised social or child welfare agency, there would hardly be any scope for a social or child welfare agency or individual who brings a child from another State for the purpose of being given in adoption to indulge in trafficking and such a possibility would be reduced to almost nil.

Moreover before proposing a child for adoption, the recognised social or child welfare agency must satisfy itself that the child has either been voluntarily relinquished by its biological parents without monetary inducement or is an orphan or destitute or abandoned child and for this purpose, the recognised social or child welfare agency may require the agency or individual who has the care and custody of the child to state on oath as to how he came by the child and may also, if it thinks fit, verify such statement, by directly enquiring from the biological parents or from the child care centre or hospital or orphanage from which the child is taken. This will considerably reduce the possibility of abuse while at the same time facilitating placement of children deprived of family love and care in smaller towns and rural areas. We do not see any reason why in cases of this kind where a child relinquished by its biological parents or an orphan or destitute or abandoned child is brought by an agency or individual from one State to another, it should not be possible to apply for guardianship of the child in the court of the latter State, because the child not having any permanent place of residence, would then be ordinarily resident in the place where it is in the care and custody of such agency or individual. But quite apart from such cases, we are of the view that in all cases where a child is proposed to be given in adoption, enquiries regarding biological parents, whether they are traceable or not and if

traceable, whether they have voluntarily relinquished the child and if not, whether they wish to take the child back, should be completed before the child is offered for adoption and thereafter no attempt should be made to trace or contact the biological parents. This would obviate the possibility of an ugly and unpleasant situation of biological parents coming forward to claim the child after it has been given to a foreigner in adoption. It is also necessary while considering placement of a child in adoption to bear in mind that brothers and sisters or children who have been brought up as siblings should not be separated except for special reasons and as soon as a decision to give a child in adoption to a foreigner is finalised, the recognised social or child welfare agency must if the child has reached the age of understanding, take steps to ensure that the child is given proper orientation and is prepared for going to its new home in a new country so that the assimilation of the child to the new environment is facilitated.

We must emphasize strongly that the entire procedure which we have indicated above including preparation of child study report, making of necessary enquiries and taking of requisite steps leading upto the filing of an application for guardianship of the child proposed to be given in adoption, must be completed expeditiously so that the child does not have to remain in the care and custody of a social or child welfare agency without the warmth and affection of family life, longer than is absolutely necessary.

We may also point out that if a child is to be given in intercountry adoption, it would be desirable that it is given in such adoption as far as possible before it completes the age of 3 years. The reason is that if a child is adopted before it attains the age of understanding, it is always easier for it to get assimilated and integrated in the new environment in which it may find itself on being adopted by a foreign parent. Comparatively it may be some what difficult for a grown up child to get acclimatized to new surroundings in a different land and some times a problem may also arise whether foreign adoptive parents would be able to win the love and affection of such grown up child. But we make it clear that we say this, we do not wish to suggest for a moment that children above the age of three years should not be given in inter-country adoption. There can be no hard and fast rule in this connection. Even children between the ages of 3 and 7 years may be able to assimilate themselves in the new surroundings without any difficulty and there is no reason why they should be denied the benefit of family warmth and affection in the home of foreign parents, merely because they are past the age of 3 years. We would suggest that even children above the age of 7 years may be given in inter-country adoption but we would recommend that in such cases, their wishes may be ascertained if they are in a position to indicate any preference. The statistics placed before us show that even children past the age of 7 years have been happily integrated in the family of their foreign adoptive parents.

Lastly, we come to the procedure to be followed by the court when an application for guardianship of a child is made to it. Section 11 of the Guardians and Wards Act, 1890 provides for notice of the application to be issued to various persons including the parents of the child if they are residing in any State to which the Act extends. But, we are definitely of the view that no notice under this section should be issued to the biological parents of the child, since it would create considerable amount of embarrassment and hard ship if the biological parents were then to come forward and oppose the application of the prospective adoptive parent for guardianship of the child. Moreover, the biological parents would then come to know who is the person taking the child in adoption and with this knowledge they would at any time be able to trace the whereabouts of the child and they may try to contact the child resulting in emotional and

psychological disturbance for the child which might affect his future happiness. The possibility also cannot be ruled out that if the biological parents know who are the adoptive parents they may try to extort money from the adoptive parents. It is therefore absolutely essential that the biological parents should not have any opportunity of knowing who are the adoptive parents taking the child in adoption and therefore notice of the application for guardianship should not be given to the biological parents. We would direct that for the same reasons notice of the application for guardianship should also not be published in any newspaper. Section 11 of the Act empowers the court to serve notice of the application for guardianship on any other person to whom, in the opinion of the court, special notice of the application should be given and in exercise of this power the court should, before entertaining an application for guardianship, give notice to the Indian Council of Child Welfare or the Indian Council for Social Welfare or any of its branches for scrutiny of the application with a view to ensuring that it will be for the welfare of the child to be given in adoption to the foreigner making the application for guardianship. The Indian Council of Social Welfare of the Indian Council of Child Welfare to which notice is issued by the court would have to scrutinise the application for guardianship made on behalf of the foreigner wishing to take the child in adoption and after examining the home study report, the child study report as also documents and certificates forwarded by the sponsoring social or child welfare agency and making necessary enquiries, it must make its representation to the court so that the court may be able to satisfy itself whether the principles and norms as also the procedure laid down by us in this judgment have been observed and followed, whether the foreigner will be a suitable adoptive parent for the child and the child will be able to integrate and assimilate itself in the family and community of the foreigner and will be able to get warmth and affection of family life as also moral and material stability and security and whether it will be in the interest of the child to be taken in adoption by the foreigner. If the court is satisfied, then and then only it will make an order appointing the foreigner as guardian of the child and permitting him to remove the child to his own country with a view to eventual adoption. The court will also introduce a condition in the order that the foreigner who is appointed guardian shall make proper provision by way of deposit or bond or otherwise to enable the child to be repatriated to India should it become necessary for and reason. We may point out that such a provision is to be found in clause 24 of the Adoption of Children Bill No. 208 of 1980 and in fact the practice of taking a bond from the foreigner who is appointed guardian of the child is being followed by the courts in Delhi as a result of practice instructions issued by the High Court of Delhi. The order will also include a condition that the foreigner who is appointed guardian shall submit to the Court as also to the Social or Child Welfare Agency processing the application for guardianship, progress reports of the child along with a recent photograph quarterly during the first two years and half yearly for the next three years. The court may also while making the order permit the social or child welfare agency which has taken care of the child pending its selection for adoption to receive such amount as the Court thinks fit from the foreigner who is appointed guardian of such child. The order appointing guardian shall carry, attached to it, a photograph of the child duly counter- signed by an officer of the court. This entire procedure shall be completed by the court expeditiously and as far as possible within a period of two months from the date of filing of the application for guardianship of the child. The proceedings on the application for guardianship should be held by the Court in camera and they should be regarded as confidential and as soon as an order is made on the application for guardianship the entire proceedings including the papers and documents should be sealed.

When an order appointing guardian of a child is made by the court, immediate intimation of the same shall be given to the Ministry of Social Welfare, Government of India as also to the Ministry of Social Welfare of the Government of the State in which the court is situate and copies of such order shall also be forwarded to the two respective ministries of Social Welfare. The Ministry of Social Welfare, Government of India shall maintain a register containing names and other particulars of the children in respect of whom orders for appointment of guardian have been made as also names, addresses and other particulars of the prospective adoptive parents who have been appointed such guardians and who have been permitted to take away the children for the purpose of adoption. The Government of India will also send to the Indian Embassy or High Commission in the country of the prospective adoptive parents from time to time the names, addresses and other particulars of such prospective adoptive parents together with particulars of the children taken by them and requesting the Embassy or High Commission to maintain an unobtrusive watch over the welfare and progress of such children in order to safeguard against any possible maltreatment, exploitation or use for ulterior purposes and to immediately report any instance of maltreatment, negligence or exploitation to the Government of India for suitable action.

We may add even at the cost of repetition that the biological parents of a child taken in adoption should not under any circumstances be able to know who are the adoptive parents of the child nor should they have any access to the home study report or the child study report or the other papers and proceedings in the application for guardianship of the child. The foreign parents who have taken a child in adoption would normally have the child study report with them before they select the child for adoption and in case they do not have the child study report, the same should be supplied to them by the recognised social or child welfare agency processing the application for guardianship and from the child study report, they would be able to gather information as to who are the biological parents of the child, if the biological parents are known. There can be no objection in furnishing to the foreign adoptive parents particulars in regard to the biological parents of the child taken in adoption, but it should be made clear that it would be entirely at the discretion of the foreign adoptive parents whether and if so when, to inform the child about its biological parents.

Once a child is taken in adoption by a foreigner and the child grows up in the surroundings of the country of adoption and becomes a part of the society of that country, it may not be desirable to give information to the child about its biological parents whilst it is young, as that might have the effect of exciting his curiosity to meet its biological parents resulting in unsettling effect on its mind. But if after attaining the age of maturity, the child wants to know about its biological parents, there may not be any serious objection to the giving of such information to the child because after the child attains maturity, it is not likely to be easily affected by such information and in such a case, the foreign adoptive parents may, in exercise of their discretion, furnish such information to the child if they so think fit.

These are the principles and norms which must be observed and the procedure which must be followed in giving a child in adoption to foreign parents. If these principles and norms are observed and this procedure is followed, we have no doubt that the abuses to which inter-country adoptions, if allowed without any safeguards, may lend themselves would be considerably reduced, if not eliminated and the welfare of the child would be protected and it would be able to find a new home where it can grow in an atmosphere of warmth and affection of family

life with full opportunities for physical intellectual and spiritual development. We may point out that the adoption of children by foreign parents need not wait until social or child welfare agencies are recognised by the Government as directed in this order, but pending recognition of social or child welfare agencies for the purpose of inter-country adoptions, which interregnum, we hope, will not last for a period of more than two months, any social or child welfare agency having the care and custody of a child may be permitted to process an application of a foreigner, but barring this departure the rest of the procedure laid down by us shall be followed wholly and the principles and norms enunciated by us in this Judgment shall be observed in giving a child in inter-country adoption.

The writ petition shall stand disposed of in these terms. Copies of this order shall be sent immediately to the Ministry of Social Welfare of the Government of India and the Ministry of Social Welfare of each of the State Governments as also to all the High Courts in the country and to the Indian Council of Social Welfare and the Indian Council of Child Welfare. We would direct that copies of this Order shall also be supplied to the Embassies and Diplomatic Missions of Norway, Sweden, France, Federal Republic of Germany and the United States of America and the High Commissions of Canada and Australia for their informations since the statistics show that these are the countries where Indian children are taken in adoption. S.R.

ANNEXURE-'A'

1. Source of Referral.
2. Number of single and joint interviews.
3. Personality of husband and wife.
4. Health details such as clinical tests, heart condition, past illnesses etc. (medical certificates required, sterility certificate required, if applicable),
5. Social status and family background.
6. Nature and Adjustment with occupation.
7. Relationship with community.
8. Description of home.
9. Accommodation for the child.
10. Schooling facilities.
11. Amenities in the home.
12. Standard of living as it appears in the home.
13. Type of neighbourhood.
14. Current relationship between husband and wife.
15. (a) Current relationship between parents and children (if any children).
    (b) Development of already adopted children (if any) and their acceptance of the child to be adopted.
16. Current relationship between the couple and the members of each other's families.

17. If the wife is working, will she be able to give up the job ?
18. If she cannot leave the job, what arrangements will she make to look after the child ?
19. Is adoption considered because of sterility of one of the maritial partners ?
20. If not, can they eventually have children of their own ?
21. If a child is born to them, how will they treat the adopted child ?
22. If the couple already has children how will these children react to an adopted child ?
23. Important social and psychological experiences which have had a bearing on their desire to adopt a child.
24. Reasons for wanting to adopt an Indian child.
25. Attitude of grand-parents and relatives towards the adoption.
26. Attitude of relatives, friends, community and neighbourhood towards adoption of an Indian child.
27. Anticipated plans for the adopted child.
28. Can the child be adopted according to the adoption law in the adoptive parents country ? Have they obtained the necessary permission to adopt ? (Statement of permission required.)
29. Do the adoptive parents know any one who adopted a child from their own country or another country ? Who are they ? From where did they fail to get a child from that source ?
30. Did the couple apply for a child from any other source ? If yes, which source ?
31. What type of child is the couple interested in ? (sex, age, and for what reasons.)
32. Worker's recommendation concerning the family and the type of child which would best fit into this home.
33. Name and address of the agency conducting the home study. Name of social worker, qualification of social worker.
34. Name of agency responsible for post placement, supervision and follow up.

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LANDMARK JUDGMENTS ON

CUSTODY OF CHILD
&
VISITATION RIGHTS

GAYTRI BAJAJ VERSUS JITEN BHALLA

SUPREME COURT OF INDIA

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

Gaytri Bajaj Appellant
Versus
Jiten Bhalla Respondent

Civil Appeal Nos. 7232-7233 of 2012

(Arising out of SLP (Civil) 35468-69 of 2009)

Decided on 5 October, 2012

- **The appellant (wife) and the respondent (husband) were married on 10.12.1992. Two daughters, Kirti and Ridhi, were born to them on 20.8.1995 and 19.4.2000 respectively. Disputes and differences having developed between the parties a joint petition dated 23.05.2003 was presented by the parties under Section 13 B of the Hindu Marriage Act (hereinafter referred to as the Act) seeking a decree of divorce by mutual consent. In the joint petition filed, it was stated by both the parties that they have been living separately since December, 2001, due to irreconcilable differences and in view of their separate residence and lack of any co-habitation as husband and wife, the parties, upon failure to effect any reconciliation of their differences, have agreed to dissolve their marriage by mutual consent under the provisions of section 13B of the Hindu Marriage Act.**
- **The parties before us have agitated only the question with regard to the custody of the children and if such custody is to remain with the husband the visitation rights, if any, that should be granted to the appellant-wife. As the above is only issue raised before us by the parties we propose to deal only with the same and refrain from entering into any other question.**
- **The above issue, i.e. custody of the children has already received an elaborate consideration of this Court. Such consideration is recorded in the earlier order of this court dated 16.12.2011. From the aforesaid order, it appears that proceeding on the basis of the statement made by Ms. Indu Malhotra, learned senior counsel for the appellant wife that if the issue of visitation rights of the wife is considered by the court, she would not urge any other contention, this court had made an endeavour to explore the possibility of an amicable settlement of the dispute between the parties on the said score. After interacting with both the children this court in its order dated 16.12.2011 had recorded that the two children, who are aged about 17 and 11 years, were very clear and categorical that they wanted to continue to live with their father and they do not want to go with their mother.**
- **This Court, therefore, was of the view that taking away the custody of the children from the father will not be desirable. In fact such a step would be adverse to the best interest of the children. However, keeping in mind the position of the appellant as the mother it was decided that the mother should be allowed to make an initial contact with the children and**

gradually built up a relationship, if possible, so as to arrive at a satisfactory solution to the impasse. Accordingly, the Court made the following interim arrangement:

(i) The respondent-husband is directed to bring both daughters, namely, Kirti Bhalla and Ridhi Bhalla to the Supreme Court Mediation Center at 10 a.m. on Saturday of every fortnight and hand over bo`th of them to the petitioner-wife. The mother is free to interact with them and take them out and keep them in her house for overnight stay. On the next day, i.e. Sunday at 10 a.m. the petitioner-wife is directed to hand over the children at the residence of the respondent- husband. The above arrangement shall commence from 17.12.2011 and continue till the end of January, 2012.

(ii) The respondent-husband is directed to inform the mobile number of elder daughter (in the course of hearing we were informed that she is having separate mobile phone) and also landline number to enable the petitioner-wife to interact with the children.

- **In the present case irrespective of the question whether the abandonment of visitation rights by the wife was occasioned by the fraud or deceit practiced on her, as subsequently claimed, an attempt was made by this Court, even by means of a personal interaction with the children, to bring the issue with regard to custody and visitation rights to a satisfactory conclusion. From the materials on record, it is possible to conclude that the children, one of whom is on the verge of attaining majority, do not want to go with their mother. Both appear to be happy in the company of their father who also appears to be in a position to look after them; provide them with adequate educational facilities and also to maintain them in a proper and congenial manner. The children having expressed their reluctance to go with the mother, even for a short duration of time, we are left with no option but to hold that any visitation right to the mother would be adverse to the interest of the children. Besides, in view of the reluctance of the children to even meet their mother, leave alone spending time with her, we do not see how such an arrangement, i.e., visitation can be made possible by an order of the court.**

JUDGMENT

Hon'ble Mr. Justice Ranjan Gogoi :—

Leave granted.

2. These appeals are directed against the judgment and order dated 08.09.2008 passed by the High Court of Delhi in Matrimonial Appeal No. 72/2007 and the order dated 10.7.2009 declining review of the aforesaid order dated 08.09.2008.

3. The facts lies in a short compass and may be usefully recapitulated at this stage. The appellant (wife) and the respondent (husband) were married on 10.12.1992. Two daughters, Kirti and Ridhi, were born to them on 20.8.1995 and 19.4.2000 respectively. Disputes and differences having developed between the parties a joint petition dated 23.05.2003 was presented by the parties under Section 13 B of the Hindu Marriage Act (hereinafter referred to as the Act) seeking a decree of divorce by mutual consent. In the joint petition filed, it was stated by both the parties that they have been living separately since December, 2001, due to irreconcilable differences and in view of their separate residence and lack of any co-habitation as husband and wife, the parties, upon failure to effect any reconciliation of their differences, have agreed to dissolve their marriage by mutual consent under the provisions of section 13B of the Hindu Marriage Act.

4. It appears that without waiting for the period prescribed under Section 13B (2) of the Act, a second Motion was moved by the parties before the learned Court on 26.05.2003 seeking divorce by mutual consent. By order dated 3.6.2003 the learned trial court, after recording its satisfaction in the matter, granted a decree of divorce under the aforesaid provision of the Act. It may be specifically noticed, at this stage, that in the joint petition filed before the learned trial court it was specifically stated that, under the terms of the agreement between the parties, the respondent-husband was to have sole custody of the two minor daughters and the appellant-wife had agreed to forego her rights of visitation keeping in view the best interest and welfare of the children.

5. After the expiry of a period of almost three years from the date of decree of the divorce granted by the learned trial court, the appellant- wife instituted a suit seeking a declaration that the decree of divorce dated 3.6.2003 is null and void on the ground that her consent was obtained by acts of fraud and deceit committed by the respondent husband. A further declaration that the marriage between the parties is subsisting and for a decree of perpetual injunction restraining the husband from marrying again was also prayed for in the suit. The respondent-husband filed written statement in the suit denying the statements made and contesting the challenge to the decree of divorce. While the aforesaid suit was pending, the appellant-wife filed an application under Section 151 of the Code of Civil Procedure to recall/set aside the judgment and decree dated 03.06.2003 passed in the divorce proceeding between the parties. The aforesaid application under section 151 of the Code was filed despite the institution of the separate suit seeking the same/similar reliefs. On the basis of the aforesaid application filed by the appellant-wife the learned trial court by order dated 25.09.2007 recalled the decree of divorce dated 3.6.2003. Aggrieved, an appeal i.e. Matrimonial appeal No. 72/2007, was filed by the respondent-husband in the High Court of Delhi which was allowed by the order dated 08.09.2008. The application seeking review of the aforesaid order dated 08.09.2008 was dismissed by the High Court on 10.07.2009. Both the aforesaid orders dated 08.09.2008 and 10.07.2009 have been assailed before us in the present appeals.

6. In so far as the validity of the decree of divorce dated 03.06.2003 is concerned we do not propose and also do not consider it necessary to go into the merits of the said decree inasmuch as the High Court, while setting aside the order of the learned trial court dated 25.09.2007 recalling the decree of divorce, had clearly observed that it is open for the appellant-wife to establish the challenge to the said decree made in the suit already instituted by her. Thus, while taking the view that the order of the learned trial court dated 25.09.2007 recalling the decree of divorce was not correct, the High Court had left the question of validity of the decree, on ground of alleged fraud, open for adjudication in the suit.

7. Apart from the above, the parties before us have agitated only the question with regard to the custody of the children and if such custody is to remain with the husband the visitation rights, if any, that should be granted to the appellant-wife. As the above is only issue raised before us by the parties we propose to deal only with the same and refrain from entering into any other question.

8. We have already noticed that in the joint petition filed by the parties seeking a decree of divorce by mutual consent it was clearly and categorically stated that the husband would have custody of the children and the wife will not insist on any visitation rights. It was also stated that the wife had agreed to do so in the interest and welfare of the children.

9. The above issue, i.e. custody of the children has already received an elaborate consideration of this Court. Such consideration is recorded in the earlier order of this court dated 16.12.2011. From the aforesaid order, it appears that proceeding on the basis of the statement made by Ms. Indu Malhotra, learned senior counsel for the appellant wife that if the issue of visitation rights of the wife is considered by the court, she would not urge any other contention, this court had made an endeavour to explore the possibility of an amicable settlement of the dispute between the parties on the said score. After interacting with both the children this court in its order dated 16.12.2011 had recorded that the two children, who are aged about 17 and 11 years, were very clear and categorical that they wanted to continue to live with their father and they do not want to go with their mother.

   This Court, therefore, was of the view that taking away the custody of the children from the father will not be desirable. In fact such a step would be adverse to the best interest of the children.

   However, keeping in mind the position of the appellant as the mother it was decided that the mother should be allowed to make an initial contact with the children and gradually built up a relationship, if possible, so as to arrive at a satisfactory solution to the impasse. Accordingly, the Court made the following interim arrangement:

   (i) The respondent-husband is directed to bring both daughters, namely, Kirti Bhalla and Ridhi Bhalla to the Supreme Court Mediation Center at 10 a.m. on Saturday of every fortnight and hand over bo`th of them to the petitioner-wife. The mother is free to interact with them and take them out and keep them in her house for overnight stay. On the next day, i.e. Sunday at 10 a.m. the petitioner-wife is directed to hand over the children at the residence of the respondent- husband. The above arrangement shall commence from 17.12.2011 and continue till the end of January, 2012.

   (ii) The respondent-husband is directed to inform the mobile number of elder daughter (in the course of hearing we were informed that she is having separate mobile phone) and also landline number to enable the petitioner-wife to interact with the children.

10. What happened thereafter has been stated in an application filed by the respondent-husband before this Court (Interlocutory Application No.4/2012) seeking vacation/modification of the interim arrangement made by the order dated 16.12.2011. In the said application, it has been stated that pursuant to the order dated 16.12.2011 the respondent-father along with both the children had come to the Supreme Court Mediation Centre at about 10 a.m. on 17.12.2011. However, the children refused to go with their mother and the appointed Mediator, inspite of all efforts, did not succeed in persuading the children. At about 1.30 p.m. the respondent, who had left the children in the Mediation Centre, received a call that he should come and take the children back with him. In the aforesaid I.A. it has been further stated that on 30.12.2011 when the children were due to visit the Mediation Centre once again, both the children started behaving abnormally since the morning and had even refused to take any food. After reaching the Mediation Centre, the children once again refused to go with their mother and the mediator had also failed to convince the children.

    Eventually, at about 12.00 p.m., the respondent took both the children home. Thereafter, both the children have declined to visit the Mediation Centre any further. Before the next date for

appearance in the Mediation Centre, i.e., 14.01.2012 the said fact was informed to the learned counsel for the appellant by the respondent through his counsel by letter dated 13.01.2012.

11. Though the above facts stated in the aforesaid I.A. are not mentioned in the report of the Mediator submitted to this Court, what is stated in the aforesaid report dated 14.01.2012 is that on 14.01.2012 the respondent and the children were not present and that a letter dated 13.01.2012 from the counsel for the respondent had been placed before the Mediator wherein it has been stated that though the children had earlier attended the Mediation Centre they are now refusing to come to the Centre and all efforts in this regard made by their father have failed. It will also be significant to note that the statements made in the I.A. have not been controverted by the appellant - wife in any manner.

12. The law relating to custody of minors has received an exhaustive consideration of this Court in a series of pronouncements. In Gaurav Nagpal v. Sumedha Nagpal[1] the principles of English and American law in this regard were considered by this Court to hold that the legal position in India is not in any way different. Noticing the judgment of the Bombay High Court in Saraswati Bai Shripad Ved v. Shripad Vasanji Ved[2]; Rosy Jacob v. Jacob A Chakramakkal[3] and Thirty Hoshie Dolikuka v. Hoshiam Shavdaksha Dolikuka[4] this Court eventually concluded in paragraph 50 and 51 that: 50. That when the Court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The Court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues.

The Court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mousmi Moitra Gangulis case the court has to give due weightage to the childs ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.

51. The word welfare used in section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being. Though the provisions of the special statutes which governs the rights of the parents and guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases.

13. The views expressed in Para 19 and 20 of the report in Mousmi Moitra Ganguli v. Jayant Ganguli[5] would require special notice. In the said case it has been held that it is the welfare and interest of the child and not the rights of the parents which is the determining factor for deciding the question of custody. It was the further view of this Court that the question of welfare of the child has to be considered in the context of the facts of each case and decided cases on the issue may not be appropriate to be considered as binding precedents. Similar observations of this Court contained in para 30 of the Report in Sheila B. Das v. P.R. Sugasree[6] would also require a special mention.

14. From the above it follows that an order of custody of minor children either under the provisions of The Guardians and Wards Act, 1890 or Hindu Minority and Guardianship Act, 1956 is required to be made by the Court treating the interest and welfare of the minor to be of paramount importance. 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. What must be emphasized is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the Court.

15. In the present case irrespective of the question whether the abandonment of visitation rights by the wife was occasioned by the fraud or deceit practiced on her, as subsequently claimed, an attempt was made by this Court, even by means of a personal interaction with the children, to bring the issue with regard to custody and visitation rights to a satisfactory conclusion. From the materials on record, it is possible to conclude that the children, one of whom is on the verge of attaining majority, do not want to go with their mother. Both appear to be happy in the company of their father who also appears to be in a position to look after them; provide them with adequate educational facilities and also to maintain them in a proper and congenial manner. The children having expressed their reluctance to go with the mother, even for a short duration of time, we are left with no option but to hold that any visitation right to the mother would be adverse to the interest of the children. Besides, in view of the reluctance of the children to even meet their mother, leave alone spending time with her, we do not see how such an arrangement, i.e., visitation can be made possible by an order of the court.

16. Taking into account all the aforesaid facts, we dismiss these appeals, affirm the impugned orders passed by the High Court of Delhi and deny any visitation rights to the petitioner and further direct that the children would continue to remain in the custody of their father until they attain the age of majority.

[P. SATHASIVAM] J.

[RANJAN GOGOI] J.

New Delhi, October 05, 2012.

[1] 2009 (1) SCC 142

[2] AIR 1941 (Bom.) 103

[3] (1973) 1 SCC 840

[4] (1982) 2 SCC 544

[5] (2008) 7 SCC 673

[6] (2006) 3 SCC 62

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JITENDER ARORA & ORS VERSUS SUKRITI ARORA & ORS

SUPREME COURT OF INDIA

Bench: Hon'ble Mr. Justice A.K. Sikri and Hon'ble Mr. Justice R.K. Agrawal

Jitender Arora & Ors
Versus
Sukriti Arora & Ors

Criminal Appeal No. 717 of 2013

Decided on 17 February, 2017

Headnotes :

- **Marriage between appellant No. 1 (hereinafter referred to as the 'appellant') and respondent No. 1 (hereinafter referred to as the 'respondent') was solemnized sometime in the year 1999,**
- **Ms. Vaishali Arora was born out of this wedlock on 14.01.2002.**
- **Appellant and respondent have put an end to their matrimonial alliance and the aforesaid move on their part clearly depicts that both of them wanted divorce from each other. That is the reason that the aforesaid ex- parte divorce decrees are not questioned by any of them.**
- **High Court vide judgment dated 25.05.2010 directed the appellant to handover the custody of Vaishali to her mother i.e. the respondent. It is this judgment which is impugned in the present proceedings.**
- **The child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conducive to his social and physical health is assured to him. Every nation, developed or developing, links its future with the status of the child. Childhood holds the potential and also sets the limit to the future development of the society. Children are the greatest gift to humanity. Mankind has the best hold of itself.**
- **In the instant case, the factors which weigh in favour of the appellant are that child Saesha is living with him from tender age of 21 months. She is happy in his company. In fact, her desire is to continue to live with the appellant. Normally, these considerations would have prevailed upon us to hold that custody of Saesha remain with the appellant. However, that is only one side of the picture.**
- **The respondent was forcibly deprived by the custody of Saesha from August 04, 2010 when she was forced to leave the matrimonial house. As per the respondent, on that date the appellant in a drunken state gave beatings to her and threw her out of the house. The respondent had called the police. The police personnel called the military police and a complaint was lodged. The respondent 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 appellant pulled out the child from the hands of her mother and went inside the house and locked himself.**

- **The respondent, therefore, cannot be blamed at all, if the custody of the child remained with the appellant, after the separation of the parties. In fact, during the course of arguments before us, when the respondent was also present, we asked the respondent as to whether she could shift to India, even temporarily for a year or so, as in that eventuality, the Court can consider giving custody of Vaishali to her for that period. However, she expressed her inability to do so. She wants custody of Vaishali on her own terms. She wants Vaishali to come to U.K. and live with her. Vaishali does not want to go to U.K. at all. This Court cannot take the risk of sending Vaishali to a foreign country, against the wishes of a mature girl like Vaishali, as it may prove to be a turbulent and tormenting experience for her. That would not be in her interest.**
- **On the facts of the present case, we are convinced that custody of the child needs to be with father. She is already 15 years of age and within 3 years, she would be major and all this custody battle between her parents would come to an end. She would have complete freedom to decide the course of action she would like to adopt in her life.**

JUDGMENT

Hon'ble Mr. Justice A.K. Sikri :—

Marriage between appellant No. 1 (hereinafter referred to as the 'appellant') and respondent No. 1 (hereinafter referred to as the 'respondent') was solemnized sometime in the year 1999, which was got registered with the Registrar of Marriages, Faridabad on 14.12.1999. The parties lived thereafter till March 2000 in Faridabad. However, carrying this notion that great future lies for them out of India, the couple shifted to U.K. on 23.03.2000. Ms. Vaishali Arora was born out of this wedlock on 14.01.2002. Career-wise or financially, whether the couple was better off in U.K., is not known.

However, the soil of U.K. certainly did not prove conducive to their matrimonial relationship which, with the passage of time, turned bad to worst and from sweet to savoury to bitter. So much so, legal battles started between them. Eschewing the details in this behalf which are not needed and can be avoided for the sake of brevity, suffice is to mention that respondent has taken decree of divorce from the Court in U.K. Likewise, appellant who had shifted to India along with Vaishali in 2010, filed the petition for divorce and has obtained decree of divorce against the respondent. Both the divorce decrees are ex- parte against each other. Fact remains, which is to be emphasised, that the appellant and respondent have put an end to their matrimonial alliance and the aforesaid move on their part clearly depicts that both of them wanted divorce from each other. That is the reason that the aforesaid ex- parte divorce decrees are not questioned by any of them.

As it happens in such cases, an acrimonious and charged up battle between the appellant and the respondent has got concentrated upon the custody of Vaishali Arora. Though the couple had moved to U.K. on 23.03.2000, Vaishali was born on 14.01.2002 in Holy Family Hospital, Delhi. The respondent had come to India when she was pregnant and shortly after her birth, she went back along with the appellant and the new born child. Vaishali came to India in July, 2002 to stay with her paternal grandparents in Faridabad and went back to U.K. in January, 2003. Matrimonial discord started erupting between the parties thereafter. Since both of them were having their permanent jobs, the services of Katie Bradbury, a Child Minder were obtained by them when Vaishali was merely 13 months old. In July, 2004, both husband and wife and their child were granted permanent resident status of U.K. Thereafter, the parties had been coming to India off and on quite regularly. Vaishali

was admitted in a school in Camberley, U.K. In July, 2007, Vaishali came to India and joined Manav Rachna International School where she studied upto March, 2008.

Thereafter, she again went back to U.K. where she was admitted in a school. On 07.02.2007, Pushti, second daughter, was born to the parties. Thereafter, the matrimonial relationship between the appellant and the respondent became more bitter and abusive. Respondent alleged the acts of domestic violence perpetrated upon her by the appellant. Surrey Social Services Department investigated into the issues of domestic violence. During this period, the impact of adverse relations between the spouses upon their child Vaishali was also studied from psychological point of view by the officer of the said Department and reports given from time to time.

In June, 2007, Vaishali was issued Indian Passport by Indian High Commission in London. On 04.08.2007, the appellant came to India. As pointed out above, Vaishali had already come to India and was admitted in a school in July, 2007. The appellant and Vaishali remained in India till April, 2008. Even the respondent decided to move back to India with her parents. However, on 13.04.2008, the appellant went back to U.K. The respondent remained in India and went back to U.K. in May, 2009. On reaching U.K., she lodged a complaint with the police on 13.05.2009 to trace the whereabouts of Vaishali. Thereafter, she filed a case in the U.K. Court in which, on 04.06.2009, an ex-parte order was passed prohibiting the appellant from removing two minor children from England and Wales. Further, restraint order was passed against the appellant from removing Vaishali from attendance at Alwyn Infants School where she was studying at that time. The appellant filed cross application and it led to further legal tussle between the parties wherein the Court passed orders from time to time. It is in November, 2009 that the respondent filed divorce proceedings against the appellant in a Court in U.K. wherein she has been granted decree of divorce.

On 24.11.2009, as aforesaid, the appellant shifted to India along with Vaishali. In their absence, the respondent obtained British Citizenship of Vaishali on 13.07.2010.

Since the appellant had come to India with Vaishali, the respondent filed Habeas Corpus Petition bearing Criminal Writ Petition No. 712 of 2010 in the High Court of Punjab & Haryana wherein she impleaded, apart from the appellant, his parents as well as Vaishali, as respondents. Other parties who were made respondents were State of Haryana, Senior Superintendent of Police, Haryana and Station House Officer, Police Station City Faridabad, Haryana. This petition has been allowed by the High Court vide judgment dated 25.05.2010 directing the appellant to handover the custody of Vaishali to her mother i.e. the respondent. It is this judgment which is impugned in the present proceedings.

It would be noticed that in May, 2010, when the petition was allowed, Vaishali was almost 8½ years of age. Today, she is 15 years old.

The Special Leave Petition (which is converted into the instant appeal after the grant of special leave) was filed immediately after the passing of the impugned judgment by the High Court, which came up for hearing on 02.06.2010 before the Vacation Bench of this Court. While issuing notice in the petition, this Court stayed the operation of the aforesaid judgment of the High Court. That stay order has remained in operation, as a consequence whereof custody of the child continues to be with the father. The respondent, of course, has been granted visitation rights from time to time as and when she came to India and moved an application in this behalf. Such visitation rights have normally been for the entire period of her stay in India on these visits, which range from seven days to even two months. This fact is highlighted to show that the respondent is given access to child for long periods as well, the details whereof are mentioned hereafter.

When the case came up before this Court on 31.01.2013 (at that time, Vaishali was 11 years of age), the Bench (comprising of Aftab Alam and Ranjana Prakash Desai, JJ.) decided to meet Vaishali in order to interact with her to ascertain her view point. Thereafter, the matter came up for hearing on 02.04.2013 when the following order was passed: In the proceedings held on January 31, 2013, it was agreed between the parties and was also noted in the order passed on that date that the child Vaishali should stay with respondent No.1 (Sukriti Arora), the mother of the child at her residence in Delhi for one month under monitoring by this Court.

In continuation of that order, therefore, we direct that Vaishali should stay with her mother, tentatively for one month from today, subject to any further direction that may be passed by this Court in the meanwhile. The address of respondent No.1 where she will stay with her daughter Vaishali is 6578, Sector-C, Pocket-6&7, Vasant Kunj, Delhi and her contact number (mobile)is:9968661822.

Ms. Madhavi Divan, one of the counsel representing the petitioner shall hand over the child to her mother-respondent No.1 outside the court room after we complete the passing of this order.

Respondent No.1 shall deposit her passport with the Registrar (J-III) of this Court which shall be returned back to her after Vaishali goes back to her father on completion of the term of her stay with respondent No.1.

We are informed that Vaishali's school is reopening from April 4, 2013. On behalf of Respondent No.1, it is stated that she will ensure that the child reaches the school in time and is brought back to her residence after school hours. The child's stay with her mother will, in no way, affect her attendance at the school or her studies.

During her stay with the mother, the child will be free to speak to her father on telephone (Mobile No. 9968661822). On behalf of respondent No.1, it was stated that she would not create any obstruction in the way of the child speaking to her father.

During the child's stay with her mother, we would like some responsible and competent person to monitor the arrangement. We, accordingly, request Mrs. Sadhana Ramachandran, who works for the Delhi High Court Mediation and Conciliation Centre, to monitor the arrangement on behalf of this Court. Mrs. Ramachandran shall visit the mother and the child at the address noted above on a date and time of her convenience. She would inform respondent No.1 on her mobile phone about the proposed date and time of her visit to the respondent's place. She would see how the relationship between the child and the mother is developing and if need be, she would counsel both the child and the mother.

If the father wants to visit the child while she is staying with her mother, he may do so at a time when Mrs. Sadhana Ramachandran is also present there. For the purpose of the visit he will have to take the necessary permission from Mrs. Ramachandran.

It is submitted on behalf of Respondent No.1 that she would like to take the child to some resort or some hill station for a brief holiday. We would like the mother and the child to stay in Delhi itself but, in case, both the child and the mother together wish to go outside, they may do so subject to the permission in writing taken from Mrs. Ramachandran.

Mrs. Ramachandran would submit a report to this Court within ten days from today. Let this matter be listed for further direction along with the report from Mrs. Ramachandran on April 12, 2013.` Mrs. Sadhana Ramachandran, who monitored the arrangement as per the directions contained in the aforesaid order submitted her report. On going through that report, further order dated 15.04.2013

was passed in the matter and we reproduce that order as well in its entirety: Seen the report submitted by Mrs. Sadhana Ramachandran.

This Court is thankful to Mrs. Ramachandran for giving her valuable time and attention and for acting as the counselor and the Court's agent in this arrangement.

We note that under the exigencies of the situation, the mother and the child have shifted from the address noted in the previous order and are now living at the following address:

Ms. Sukriti Arora, C/o. K.D. Prasher C-2633, Sushant Lok Phase I, Gurgaon (Haryana).

The shift has been made with the permission of Mrs. Ramachandran and with the consent of the father of the child.

The arrangement made by order dated April 02, 2013 may continue for a period of one month from that date as indicated in that order.

It is, however, made clear that while staying with her mother, the child Vaishali can speak to her father and to Mrs. Ramachandran as and when she wishes.

Both the petitioner and the respondent are directed to pay heed to the advice of Mrs. Ramachandran and take part in mediation, as suggested by her, with an open mind.

List on May 01, 2013.

Before that date, Mrs. Sadhana Ramachandran is requested to submit a final report. On 01.05.2013, this Court took note of the fact that the respondent was leaving for U.K. In these circumstances, direction was given to her to return the custody of Vaishali to her father i.e. the appellant. The aforesaid background needs to be kept in mind while deciding this custody dispute.

We have gone through the entire record, including the orders passed by the Courts in U.K. from time to time in various proceedings. In a recent judgment pronounced on 13.02.2017 delivered by this Court in the case of Vivek Singh v. Romani Singh, of which one of us (A.K. Sikri, J.) was the member of the Bench, dilemma of the Court and the law on the subject was taken note of. We reproduce the following paras of the said judgment in order to make it self-contained in all respects:

7. We have given our utmost serious consideration to the respective submissions which a case of this nature deserves to be given. In cases of this nature, where a child feels tormented because of the strained relations between her parents and ideally needs the company of both of them, it becomes, at times, a difficult choice for the court to decide as to whom the custody should be given. No doubt, paramount consideration is the welfare of the child. However, at times the prevailing circumstances are so puzzling that it becomes difficult to weigh the conflicting parameters and decide on which side the balance tilts.

8. The Hindu Minority and Guardianship Act, 1956 lays down the principles on which custody disputes are to be decided. Section 7 of this Act empowers the Court to make order as to guardianship. Section 17 enumerates the matters which need to be considered by the Court in appointing guardian and among others, enshrines the principle of welfare of the minor child. This is also stated very eloquently in Section 13 which reads 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.

9. The Court in the case of Gaurav Nagpal v. Sumedha Nagpal[1] stated in detail, the law relating to custody in England and America and pointed out that even in those jurisdictions, welfare of the minor child is the first and paramount consideration and in order to determine child custody, the jurisdiction exercised by the Court rests on its own inherent equality powers where the Court acts as 'Parens Patriae'. The Court further observed that various statutes give legislative recognition to the aforesaid established principles. The Court explained the expression 'welfare', occurring in Section 13 of the said Act in the following manner:

51. The word welfare used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well-being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its parens patriae jurisdiction arising in such cases.

52. The trump card in the appellant's argument is that the child is living since long with the father. The argument is attractive. But the same overlooks a very significant factor. By flouting various orders, leading even to initiation of contempt proceedings, the appellant has managed to keep custody of the child. He cannot be a beneficiary of his own wrongs. The High Court has referred to these aspects in detail in the impugned judgments.

10. We understand that the aforesaid principle is aimed at serving twin objectives. In the first instance, it is to ensure that the child grows and develops in the best environment. The best interest of the child has been placed at the vanguard of family/custody disputes according the optimal growth and development of the child primacy over other considerations. The child is often left to grapple with the breakdown of an adult institution. While the parents aim to ensure that the child is least affected by the outcome, the inevitability of the uncertainty that follows regarding the childs growth lingers on till the new routine sinks in. The effect of separation of spouses, on children, psychologically, emotionally and even to some extent physically, spans from negligible to serious, which could be insignificant to noticeably critical. It could also have effects that are more immediate and transitory to long lasting thereby having a significantly negative repercussion in the advancement of the child. While these effects dont apply to every child of a separated or divorced couple, nor has any child experienced all these effects, the deleterious risks of maladjustment remains the objective of the parents to evade and the courts intent to circumvent. This right of the child is also based on individual dignity.

11. Second justification behind the 'welfare' principle is the public interest that stand served with the optimal growth of the children. It is well recognised that children are the supreme asset of the nation. Rightful place of the child in the sizeable fabric has been recognised in many international covenants, which are adopted in this country as well. Child-centric human rights jurisprudence that has been evolved over a period of time is founded on the principle that public good demands proper growth of the child, who are the future of the nation. It has been emphasised by this Court also, time and again, following observations in Bandhua Mukti Morcha v. Union of India & Ors.[2]:

4. The child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conducive to his social and physical health is assured to him. Every nation, developed or developing, links its future with the status of the child. Childhood holds the potential and also sets the limit to the future development of the society. Children are the greatest gift to humanity. Mankind has the best hold of itself. The parents themselves live for them. They embody the joy of life in them and in the innocence relieving the fatigue and drudgery in their struggle of daily life. Parents regain peace and happiness in the company of the children. The children signify eternal optimism in the human being and always provide the potential for human development. If the children are better equipped with a broader human output, the society will feel happy with them. Neglecting the children means loss to the society as a whole. If children are deprived of their childhood socially, economically, physically and mentally the nation gets deprived of the potential human resources for social progress, economic empowerment and peace and order, the social stability and good citizenry. The Founding Fathers of the Constitution, therefore, have emphasised the importance of the role of the child and the need of its best development.

12. Same sentiments were earlier expressed in Rosy Jacob v. Jacob A. Chakramakkal[3] in the following words:

> *15. ...The children are not mere chattels : nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society...*

13. It hardly needs to be emphasised that a proper education encompassing skill development, recreation and cultural activities has a positive impact on the child. The children are the most important human resources whose development has a direct impact on the development of the nation, for the child of today with suitable health, sound education and constructive environment is the productive key member of the society. The present of the child links to the future of the nation, and while the children are the treasures of their parents, they are the assets who will be responsible for governing the nation. The tools of education, environment, skill and health shape the child thereby moulding the nation with the child equipped to play his part in the different spheres aiding the public and contributing to economic progression. The growth and advancement of the child with the personal interest is accompanied by a significant public interest, which arises because of the crucial role they play in nation building. In the case of Vivek Singh, the girl was 8 years of age. There also, the child had remained with father for most of the period. It was decided to give the custody to the mother. Among others, two weighty reasons which prevailed with this Court were the age of the child, i.e. 8 years, and that during this period, custody had remained with the father because of no fault of the mother. This is clear from the following discussion in the said judgment:

14. In the instant case, the factors which weigh in favour of the appellant are that child Saesha is living with him from tender age of 21 months. She is happy in his company. In fact, her desire is to continue to live with the appellant. Normally, these considerations would have prevailed upon us to hold that custody of Saesha remain with the appellant. However, that is only one side of the picture. We cannot, at the same time, ignore the other side. A glimpse, nay, a proper glance at

the other side is equally significant. From the events that took place and noted above, following overwhelming factors in favour of respondent emerge.

(a) For first 21 months when the parties were living together, it is the respondent who had nursed the child. The appellant cannot even claim to have an edge over the respondent during this period, when the child was still an infant, who would have naturally remained in the care and protection of the respondent - mother, more than the appellant father. Finding to this effect has been arrived at by the High Court as well. This position even otherwise cannot be disputed.

(b) The respondent was forcibly deprived by the custody of Saesha from August 04, 2010 when she was forced to leave the matrimonial house. As per the respondent, on that date the appellant in a drunken state gave beatings to her and threw her out of the house. The respondent had called the police. The police personnel called the military police and a complaint was lodged. The respondent 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 appellant 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 appellant would harm the child. It was assured that the child would be returned to her in the morning. In any case, the respondent and the appellant were instructed to come to the police along with the child, next morning. The appellant 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 the child back but respondent had been refusing. The respondent, therefore, cannot be blamed at all, if the custody of the child remained with the appellant, after the separation of the parties.

(c) Within the few days, i.e. on August 26, 2010, the respondent filed the petition seeking custody of the child and for appointment of her guardian. She did not lose any time making her intentions clear that as a natural mother she wanted to have the custody of the child. It was her mis- fortune that the trial court vide its judgment dated December 07, 2011 dismissed her petition. Though, she filed the appeal against the said judgment immediately, but during the pendency of the appeal, the custody remained with the appellant because of the dismissal of the petition by the Family Court. The High Court has, by impugned judgment dated April 02, 2013 granted the custody to the respondent. However, the respondent has not been able to reap the benefit thereof because of the interim orders passed in the instant appeal. It is in these circumstances that child Saesha from the tender age of 21 months has remained with the appellant and today she is 8 years and 3 months. Obviously, because of this reason, as of today, she is very much attached to the father and she thinks that she should remain in the present environment. A child, who has not seen, experienced or lived the comfort of the company of the mother is, naturally, not in a position to comprehend that the grass on the other side may turn out to be greener. Only when she is exposed to that environment of living with her mother, that she would be in a position to properly evaluate as to whether her welfare lies more in the company of her mother or in the company of her father. As of today, the assessment and perception are one sided. Few years ago, when the High Court passed the impugned judgment, the ground realities were different.

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16. The aforesaid observations, contained in para 31 of the order of the High Court extracted above, apply with greater force today, when Saesha is 8 years' old child. She is at a crucial phase when there is a major shift in thinking ability which may help her to understand cause and effect better and think about the future. She would need regular and frequent contact with each parent as well as shielding from parental hostility. Involvement of both parents in her life and regular school attendance are absolutely essential at this age for her personality development. She would soon be able to establish her individual interests and preferences, shaped by her own individual personality as well as experience... The circumstances, in the present case, however, are materially different. Vaishali is a mature girl of 15 years of age. At this age, she can fully understand what is in her best interest. She is competent to take a decision for herself. There has been interaction with her by different Benches of this Court from time to time, outcome whereof is reflected in the orders passed after such meetings. She has unequivocally and without any reservations expressed her desire to be with her father. More importantly, she has very categorically said that she does not want to go to U.K.

On 31.01.2013, this Court had noted that when her mother came to India, she was not even willing to meet her. However, with the intervention of the Court, a meeting was arranged between Vaishali and her mother. Even after the said meeting, she was not willing to live with the respondent, her mother. Fully realising that it may be due to the reason that all this period, she had lived with her father, the Court deemed it proper to give opportunity to the respondent to win love, confidence and trust of Vaishali. The mother was allowed to stay for one month with Vaishali. This order was continued on 02.04.2013 by extending the period by another month. This time the arrangement that was made was to be monitored by Mrs. Sadhana Ramachandran who was appointed for this purpose. Specific job given to Mrs. Sadhana Ramachandran was to see how the relationship between the child and the mother is developing. In case of need she was to counsel both the child as well as the mother. Thus, an opportunity was given to the respondent by allowing her the access of Vaishali for significant period i.e. till 01.05.2013, whereafter the child was restored back to her father, since the respondent had decided to go back to U.K. It is unfortunate that even during this period, she was not able to influence the thought process of Vaishali who is determined to remain with her father. In fact, during the course of arguments before us, when the respondent was also present, we asked the respondent as to whether she could shift to India, even temporarily for a year or so, as in that eventuality, the Court can consider giving custody of Vaishali to her for that period. However, she expressed her inability to do so. She wants custody of Vaishali on her own terms. She wants Vaishali to come to U.K. and live with her. Vaishali does not want to go to U.K. at all. This Court cannot take the risk of sending Vaishali to a foreign country, against the wishes of a mature girl like Vaishali, as it may prove to be a turbulent and tormenting experience for her. That would not be in her interest. We also had interaction with Vaishali in the Chambers earlier. On the date of hearing also, Vaishali was present in the Court and in front of her parents, she unequivocally expressed that she was happy with her father and wanted to continue in his company and did not want to go with her mother, much less to U.K. From the interaction, it is clearly discernible that she is a mature girl who is in a position to weigh the pros and cons of two alternatives and to decide as to which course of action is more suited to her. She has developed her personality and formed her opinion after considering all the attendant circumstances. Her intellectual characteristics are adequately developed. She is able to solve problems, think about her future and understands the long term effects of the decision which she has taken. We also find that she has been brought up in a

conducive atmosphere. It, thus, becomes apparent that in the instant case, we are dealing with the custody of a child who is 15 years of age and has achieved sufficient level of maturity. Further, in spite of giving ample chances to the respondent by giving temporary custody of Vaishali to her, respondent has not been able to win over the confidence of Vaishali. We, therefore, feel that her welfare lies in the continued company of her father which appears to be in her best interest. The High Court in the impugned judgment had stated that since Vaishali was a minor girl, she needed company of her mother more to understand girly things. The High Court mentioned about the bond between girl child and mother in abstract and from there only the High Court came to the conclusion that it would be better to give the custody to the mother. The High Court did not go into the specific situation and circumstances of this case and did not make any objective assessment about the welfare of Vaishali. Many circumstances which we have narrated above were not taken note of.

On the facts of the present case, we are convinced that custody of the child needs to be with father. She is already 15 years of age and within 3 years, she would be major and all this custody battle between her parents would come to an end. She would have complete freedom to decide the course of action she would like to adopt in her life. We, thus, allow this appeal and set aside the judgment of the High Court.

No costs.

.....J.
(A.K. SIKRI)

.....J.
(R.K. AGRAWAL)

NEW DELHI; FEBRUARY 17, 2017.

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PURVI MUKESH GADA VERSUS MUKESH POPATLAL GADA & ANR.

SUPREME COURT OF INDIA

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

Purvi Mukesh Gada
Versus
Mukesh Popatlal Gada & anr.

Criminal Appeal No.1553 of 2017

arising out of SLP (CRL.) No. 1867 of 2016

Decided on 4 September, 2017

Headnotes :

- **Failure of marriage generally leads to disputes of varied nature, either in the form of divorce or enforcement of conjugal rights or maintenance etc. and even criminal cases in the form of proceedings under Section 498A of the Code of Criminal Procedure, 1973 and so on.**
- **However, in those cases where their togetherness as spouses had resulted in procreation of children, the war is extended by laying respective claims on the custody of those children as well. These minor children, for their proper upbringing, need the company of both the parents - mother as well as the father.**
- **In the instant case, marriage between the parties as per Hindu rites and ceremonies was solemnised way back in November 1997. They lived together for number of years. Their first child, a boy named Taney, was born in the year 2000 and second child, a daughter named Varenya, was born in the year 2004. The appellant herein left the matrimonial home on February 18, 2013.**
- **Though the 'welfare principle' is correctly enunciated and explained in the impugned judgment, no reasons are given as to how this principle weighed, on the facts and circumstances of this case, in favour of the respondent.**
- **It also needs to be emphasised that the Court, in these proceedings, is not concerned with the dispute between the husband and the wife inter se but about the custody of children and their welfare. A holistic approach in this behalf is to be undertaken. Scales tilt in favour of the appellant when the matter is examined from that point of view.**
- **As a result, this appeal is allowed. At the same time, weekend access given to the respondent by interim directions of this Court shall continue to prevail.**

  Moreover, during Dussehra, Diwali, Christmas or summer vacations etc., the respondent shall be entitled to avail the custody for half of the durations of those vacations. However, while effecting this arrangement, it shall be ensured that studies of the children are not affected. In case of any difficulty in working out the aforesaid modalities, the parties shall be at liberty to approach the trial court. Since the custody of the children is allowed to

be retained by the appellant-mother, domicile certificates of the children as well as their passports which are with the respondent, shall be handed over to the appellant.

Hon'ble Mr. Justice A.K. Sikri :—

1. It is an unfortunate case where the parties, who are wife and husband, are having a bitter and acrimonious fight over the custody of their children. Such custody battles are always regrettable, not only for the spouses who resort to this kind of litigation, which is the offshoot of matrimonial discord and results in their separation from each other, but also for their child/children who become the subject matter of this kind of dispute. Failure of marriage generally leads to disputes of varied nature, either in the form of divorce or enforcement of conjugal rights or maintenance etc. and even criminal cases in the form of proceedings under Section 498A of the Code of Criminal Procedure, 1973 and so on.

   However, in those cases where their togetherness as spouses had resulted in procreation of children, the war is extended by laying respective claims on the custody of those children as well. 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.

2. In the instant case, marriage between the parties as per Hindu rites and ceremonies was solemnised way back in November 1997. They lived together for number of years. Their first child, a boy named Taney, was born in the year 2000 and second child, a daughter named Varenya, was born in the year 2004. The appellant herein left the matrimonial home on February 18, 2013.

   Thus, they were together for more than fifteen years when the desertion took place, though as per the allegations of the appellant she had suffered mental and physical torture at the hands of the respondent since the beginning of the marriage, but for the sake and well being of the children and also because of her financial dependency on the respondent she continued to live with the respondent. These allegations of maltreatment of the appellant are denied by the respondent. In any case, that is not the crux of the matter.

3. It so happened that when the appellant left her matrimonial home in Pune and came to her parents house in Mumbai, children remained in the custody of the respondent. Tanay was not at home as he was studying in a boarding school at Coimbatore at that time. Insofar as Varenya is concerned, the allegation of the appellant is that it is the respondent who did not allow the appellant to take her along to Mumbai. Some attempts were made thereafter for settlement of their disputes, which did not bear any results.

   On September 18, 2014, the appellant filed a domestic violence case in the 38th Court of Additional ACMM, Ballard Estate, Mumbai on the ground of gross mental and physical cruelty, including verbal and physical abuse and occult practices. Three months after filing the said case, the appellant (arising out of SLP (Crl.) No. 1867 of 2016) moved an application therein praying

for access to her minor children during Christmas vacation, which was allowed to be availed of in the respondent's house in Pune.

4. In February 2015, Varenya was also admitted in a boarding school by the respondent. The appellant, at that juncture, moved an application for interim custody of the minor children as well as for maintenance. However, custody was not allowed on the ground that children were studying and it would not be proper to give custody during the midst of their academic year. At the same time, interim maintenance @ Rs.30,000/- per month was directed to be given to the appellant. In May 2015, when the summer vacations were approaching, the appellant filed an application praying for custody of children for half of the vacations.

   Though this application was still pending and no orders passed thereon, the respondent himself handed over the custody of the children to the appellant on June 17, 2015. There are divergent stands of the parties behind such a move on the part of respondent in voluntarily giving custody of the children to the appellant. As per the respondent, even when there was no order of the Court, as a goodwill gesture, he gave custody of the children to the mother for a period of three days with clear understanding that custody of the children would be handed back to the appellant after three days.

   On the other hand, the appellant claims that the respondent entrusted the children to her even when without any order of the Court, compelled by the circumstance inasmuch as Tanay had miserably failed in his Grade IX examinations while studying in the boarding school at Coimbatore and the respondent wanted the appellant to give coaching to him so that he could reappear and pass the examination in order to get promoted to Grade X without wasting an academic year.

5. The children were not given back to the respondent after the expiry of three days. Here again both the parties have their own version. According to the appellant, the children themselves refused to go back to the respondent. On the other hand, the respondent maintains that it is the appellant whose intentions became bad and, thereby, she refused to handover the custody of the children to him. Be that as it may, the respondent filed an application before the Court of Additional ACMM for restoration of custody of the children. The learned Additional ACMM called both the children in his Chambers and interacted with them.

   Thereafter, he passed the orders dated July 01, 2015 vide which custody of the children was given to the appellant, rejecting the for restoration of their custody to the respondent. Appeal was filed against this order in the Sessions Court, which was also dismissed vide judgment dated August 06, 2016. Orders of the learned ACMM dated July 01, 2015 and that of the Sessions Court dated August 06, 2015, were challenged by the respondent in the form of writ petition filed in the High Court of Bombay. Disposing of this writ petition vide judgment dated February 17, 2016, the High Court has directed that custody of the children be restored with the respondent. It is this order which is the subject matter of challenge in the instant appeal.

6. Before stating the reasons which prevailed with the High Court in directing the custody of the children to the respondent, it is imperative to take note of certain proceedings before the High Court during the pendency of the writ petition.

7. Vide order dated January 29, 2015, the High Court directed day access on September 21 and 24, 2015. Again vide order dated November 11, 2015, overnight access for the coming weekend was

accorded to the respondent. Identical overnight access was given by the High Court vide order dated November 23, 2015. However, the respondent could not avail the benefit of these orders. According to the respondent, the appellant had violated these orders, whereas the appellant has pleaded that on September 24, 2015 the respondent himself did not come to have the access of the children and insofar as order granting overnight access during weekends is concerned, the explanation of the appellant is that it is the children who refused to go to their father as they were petrified and, therefore, themselves took such a decision.

8. On December 11, 2015, the respondent was given seven days access during Christmas vacation with Counsellor's help. For carrying out this order, the trial court called the children on December 23, 2015 where the respondent was also called. Again, as per the appellant's version, the children, after remaining with the respondent for forty five minutes alone, ultimately told him that they did not wish to go with him. The respondent was to come to pick the children on December 25, 2015 and as per the appellant, he did not come to pick the children.

9. The respondent maintained that on all the aforesaid occasions it is the appellant who had refused to handover the custody to him and had, thus, violated the orders of the High Court. Accordingly, he filed an affidavit in the High Court for initiating contempt proceedings against the appellant. The appellant filed reply affidavit thereto refuting the allegations. Matter was finally heard and culminated in the judgment dated February 17, 2016.

10. With this, we come to the reasons which have weighed with the High Court in directing the custody of the children to be given to their father, namely, the respondent. After perusing the impugned judgment, these are summarised as below:

    (i) Orders dated December 28, 2014 and March 04, 2015 were passed by the Additional ACMM, confirming the custody of the children with the respondent-father inasmuch as by these orders prayer for giving interim custody of children to the appellant-wife was rejected. Instead, the appellant was only given limited access during vacation to meet the children in the school at Pune whenever she desired.

    (ii) Even though the appellant had moved application dated May 27, 2015 seeking access to the children during vacation, which was from June 13, 2015 to August 09, 2015, and no orders were passed in the said application, as per the respondent, as a humanitarian gesture and without there being any legal obligation or court directions, he went to the appellant's residence at Mumbai on June 17, 2015 and left the children with the appellant with a clear understanding that he would pick them up by June 19, 2015.

    The High Court has noted the stand of the appellant as well, but has mentioned that as per the respondent's case when he went to take the custody of the children on June 19, 2015, the appellant refused to restore the custody. The High Court has given weightage to the fact that on June 17, 2015, the respondent had placed the children in the custody of the appellant even when there was no court order or legal obligation.

    (iii) The High Court wanted to interact with the children in order to ascertain their wishes as well as to determine as to which course of action is appropriate in the welfare of the children. However, before doing so, the High Court deemed it appropriate to grant weekend access to the respondent. For this, directions were given (which have already been taken note of). As per the High Court, prima facie it appeared that the appellant was

responsible for non-compliance of those orders and even if it is to be believed that the children did not show their unwillingness to go to their father, it indicates the extent of influence exerted by the mother upon her minor children.

(iv) As per the High Court, in the face of two detailed orders dated December 28, 2014 and March 04, 2015 passed by the Additional ACMM declining custody of minor children to the appellant and allowing the respondent to retain their custody, there was no reason not to restore the custody to the respondent on June 19, 2015. It has observed that subsequent orders of Additional ACMM declining to give the custody, which is upheld by the Sessions Court, are without application of mind.

(v) The High Court has discussed the law on custody of children and explained the 'welfare principle', which is the paramount consideration while deciding custody matters is to see where the welfare of children lies. Applying this principle, the direction is given to restore the custody of the children to the respondent after the end of academic term in April or May 2016.

11. We may say at the outset that though the 'welfare principle' is correctly enunciated and explained in the impugned judgment, no reasons are given as to how this principle weighed, on the facts and circumstances of this case, in favour of the respondent. Instead two main reasons which have influenced the High Court are:

(i) earlier detailed orders are passed by the Additional ACMM allowing the respondent to retain the custody; and

(ii) the appellant here had not given access of children to the respondent even during weekend, in spite of orders passed by the High Court.

12. After hearing the counsel for the parties at length, we are of the opinion that the matter is not dealt with by the High Court in right perspective. Before supporting these comments with our reasons, it would be apposite to take note of certain developments from June 17, 2015, the date on which the respondent had himself handed over the children to the appellant, till the passing of the orders by the High Court. It is also necessary to state the events which took place during the pendency of these proceedings.

13. Whether the respondent had handed over the custody of the children to the appellant on a humanitarian gesture or not, fact which is not in dispute is that Tanay had failed in his Grade IX examinations and he was to reappear for the same. It is also a fact that it is the guidance and tuition of the appellant that Tanay passed the examinations on reappearance and could be promoted to Grade X.

Another fact which needs to be noted here is that when the appellant left the matrimonial home, Tanay was not residing with the parties. He was admitted in a boarding school in Coimbatore, a far-away place from Pune. No doubt, the respondent claims that intention in admitting Tanay in a boarding school in Coimbatore was that he should get best education as the school in which he was admitted is a prestigious educational institution.

At the same time, it is also a fact that Tanay was not in the physical company of his father on day-to-day basis. It is also a harsh reality that he was not doing well in studies during the period his legal custody was entrusted to the respondent. His overall performance in most of the subjects was dismal and he had even failed in Grade IX.

At that stage when, within few days, there was a re-examination, handing over Tanay, along with Varenya, to the appellant, without even any court order, lends credence to the version of the appellant that the purpose was to give appropriate tuition to Tanay by the appellant so that his academic year is not wasted. Another fact which needs to be emphasised at this stage is that though the custody of Varenya was also with the respondent and request of the appellant to hand over interim custody of the children did not prevail with the Additional ACMM who rejected this request vide orders dated December 28, 2014 and March 04, 2015, even Varenya was admitted in a boarding school by the respondent thereafter.

This fact also gives some credence to the version of the appellant that because of his pre-occupation in the business or otherwise, the respondent was not in a position to take personal care of the children and, therefore, he put both of the children in the boarding schools.

14. After the children came to the appellant, they were admitted in a school in Mumbai. It is pertinent to note that Tanay's academic performance has improved significantly. He is getting very high grades in the examinations. In fact, academic performance of Varenya has also gone up. This factor, though noted by the High Court, has been lightly brushed aside with the observations that if the children were not doing well earlier, blame cannot be put on the respondent as it could be the result of disputes between the parents. In the process what is ignored is that in spite of the said dispute still subsisting, the academic performance of the children, while in the custody of their mother, has gone up tremendously.

15. When the special leave petition had come up for hearing, on the first day itself the respondent had appeared through his counsel as a caveator. Children were also brought to the Court and this Court interacted with them. While issuing the notice, based on the interaction with the children, who desired to remain with their mother, directions contained in the impugned judgment were stayed. At the same time, the respondent was given access to these children as well as visitation rights.

Notice was issued on March 04, 2016. During the period of pendency of these proceedings for more than a year, the respondent has met the children regularly with the grant of visitation rights. This Court, just before final hearing, again met the children. Tanay is seventeen years of age and Varenya is thirteen years old. At this age, they are capable of understanding where their welfare lies. This Court has found that both the children are very comfortable in the company of their mother.

They have expressed their desire to stay with their mother. This Court also feels that welfare of the children lies by allowing the appellant to retain the custody of the children. Circumstances explained above provide adequate reasons for taking this course of action. Children at discernible age of seventeen and thirteen years respectively, are better equipped, mentally as well as psychologically, to take a decision in this behalf. It would be worthwhile to mention that during our interaction with these children, they never spoke ill of their father. In fact, they want to be with the respondent as well and expressed their desire to remain in touch with him and to meet him regularly.

They never showed any reluctance in this behalf. At the same time, when it came to choosing a particular parent for the purposes of custody, they preferred their mother. In fact, these were the reasons because of which the Additional ACMM had passed orders dated July 01, 2015 (after interviewing the children and ascertaining their wishes as well as welfare) rejecting the request of the respondent to restore custody to him.

Same course of action was adopted by the learned Sessions Court while dismissing the appeal of the respondent on August 06, 2015 and affirming the order of Additional ACMM dated July 01, 2015. The High Court has discarded these orders without giving any cogent reasons and on the spacious and tenuous ground that such orders could not have been passed in view of the earlier detailed orders of the Additional ACMM dated December 28, 2015 and March 04, 2015, thereby refusing the custody of the children to the appellant.

In this process, what is ignored by the High Court was that even those were interim orders and the custody was refused at that juncture because of the reason that children were in the mid-term of the academic session. Be that as it may, it was incumbent upon the High Court to find out the welfare of the children as on that time when it was passing the order. As pointed out above, apart from discussing the 'welfare principle', the High Court has not done any exercise in weighing the pros and cons for determining as to which of the two alternatives, namely, giving custody to the appellant or to the respondent, is better and more feasible.

16. Learned counsel for the respondent had made a fervent plea to the effect that if custody is retained by the appellant, it would amount to giving her advantage of her own wrong as she took undue advantage of the gracious act of the respondent in voluntarily handing over the custody of the children, but only for three days. He also highlighted the conduct of the appellant, as discussed by the High Court, which has castigated the appellant in this behalf in not obeying the interim directions of giving access to the respondent.

17. In view of our aforesaid discussion, we do not find these arguments to be meritorious. It also needs to be emphasised that the Court, in these proceedings, is not concerned with the dispute between the husband and the wife inter se but about the custody of children and their welfare. A holistic approach in this behalf is to be undertaken. Scales tilt in favour of the appellant when the matter is examined from that point of view. Criminal Appeal No. of 2017 Page 16 of 19 (arising out of SLP (Crl.) No. 1867 of 2016)

18. As a result, this appeal is allowed, resulting in setting aside of the impugned order dated February 17, 2016 passed by the High Court in the writ petition and restoring the order dated August 06, 2015 passed by the Court of Sessions, Greater Mumbai, which affirmed the order dated July 01, 2015 passed by the Court of 38th Court of Additional ACMM, Ballard Estate, Mumbai. At the same time, weekend access given to the respondent by interim directions of this Court shall continue to prevail.

Moreover, during Dussehra, Diwali, Christmas or summer vacations etc., the respondent shall be entitled to avail the custody for half of the durations of those vacations. However, while effecting this arrangement, it shall be ensured that studies of the children are not affected. In case of any difficulty in working out the aforesaid modalities, the parties shall be at liberty to approach the trial court. Since the custody of the children is allowed to be retained by the appellant-mother, domicile certificates of the children as well as their passports which are with the respondent, shall be handed over to the appellant. No costs.

(A.K. SIKRI) J.
(ASHOK BHUSHAN) J.

NEW DELHI; SEPTEMBER 4, 2017

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PRATEEK GUPTA VERSUS SHILPI GUPTA & ORS.

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICITON

Bench: Hon'ble Mr. Justice Dipak Misra, C.J & Hon'ble Mr. Justice Amitava Roy

Prateek Gupta ..... Appellant
Versus
Shilpi Gupta & Ors. ..... Respondents

Criminal Appeal No. 968 of 2017

Decided on December 6, 2017

Headnotes :

- **The appellant-father has been directed to hand over thecustody of the child, Master Aadvik, aged about 5 years to respondent No. 1-mother. The appellant-father is in assailment of this determination and seeks the remedial intervention of this Court.**
- **The pleaded facts reveal that the child resided with the parents from his birth till 07.11.2014 and thereafter from 07.11.2014 till 06.03.2015 with the respondent-mother in the United States.**
- **We see no reason to take a different view or course. In view of order dated 03.05.2016 of this Court, the child has remained in the custody of the appellant-father. To reiterate, no material has been brought on record, persuasive and convincing enough, to take a view that immediate restoration of the custody of the child to the respondent-mother in the native country is obligatorily called for in its interest and welfare. The High Court, as the impugned judgment and order would demonstrate, did not at all apply itself to examine the facts and circumstances and the other materials on record bearing on the issue of welfare of the child which are unmistakably of paramount significance and instead seems to have been impelled by the principle of comity of courts and the doctrines of "intimate contact" and "closest concern" de hors thereto. The appellant being the biological father of Aadvik, his custody of the child can by no means in law be construed as illegal or unlawful drawing the invocation of a superior Court's jurisdiction to issue a writ in the nature of habeas corpus. We are, in the textual facts and on an in-depth analysis of the attendant circumstances, thus of the view that the dislodgment of the child as directed by the impugned decision would be harmful to it. Having regard to the nature of the proceedings before the US Court, the intervening developments thereafter and most importantly the prevailing state of affairs, we are of the opinion that the child, till he attains majority, ought to continue in the custody, charge and care of the appellant, subject to any order to the contrary, if passed by a court of competent jurisdiction in an appropriate proceeding deciding the issue of its custody in accordance with law. The High Court thus, in our estimate, erred in law and on facts in passing the impugned verdict**

The Judgment of the Court was delivered by

Hon'ble Mr. Justice Amitava Roy :—

By the impugned judgment and order dated 29.04.2016 rendered by the High Court ofDelhi, in a writ petition filed by the respondent No. 1 seeking a writ in the nature of habeas corpus, the appellant-father has been directed to hand over thecustody of the child, Master Aadvik, aged about 5 years to respondent No. 1-mother. The appellant-father is in assailment of this determination and seeks the remedial intervention of this Court. By order dated 03.05.2016, the operation of the impugned verdict was stayed and as the said arrangement was continued thereafter from time to time, the custodyof the child as on date has remained with the appellant. The orders passed by this Court though attest its earnest endeavour to secure a reconciliation through interactions with the parents and the child, the efforts having failed, the appeal is being disposedof on merits.

2. We have heard Ms. Binu Tamta, learned counsel for the appellant and Mr. N.S Dalal, learned counsel for the respondent No. 1 (hereafter to be referred to as "respondent").

3. A skeletal outline of the factual backdrop is essential. The appellant and the respondent who married on 20.01.2010 in accordance with the Hindu rites at New Delhi had shifted to the United States ofAmerica (for short, hereafter referred to as 'U.S'), as the appellant was already residing and gainfully employed there prior to the nuptial alliance. In due course, the couple was blessed with two sons, the elder being Aadvik born on 28.09.2012 and the younger, Samath born on 10.09.2014 As adverted tohereinabove, the present lis is with regard to thecustody of Master Aadvik, stemming from an application under Article 226 of the Constitution ofIndia filed by the respondent alleging illegal and unlawful keeping of him by the appellant and that too in violation of the orders passed by the Juvenile and Domestic Relations Court of Fairfax County, passed on 28.05.2015 and 20.10.2015 directing him to return thechild to the Commonwealth of Virginia and to thecustody and control of the respondent.

4. The pleaded facts reveal that the child resided with the parents from his birth till 07.11.2014 and thereafter from 07.11.2014 till 06.03.2015 with the respondent-mother in the United States. This is so, as in view of irreconcilable marital issues, as alleged by the respondent, particularly due to the volatile temperament and regular angry outbursts of the appellant often in front of the child, the parties separated on or about 15.11.2014 Prior thereto, the appellant had on 08.11.2014 left for India leaving behind the respondent and her children in U.S He returned on 18.01.2015 to the U.S, but the parties continued to live separately, the respondent with her children. The appellant however, made short time visits in between and on one such occasion i.e on 24.01.2015, he took along with him Aadvik, representing that he would take him for a short while to the Dulles Mall. According to the respondent, she did not suspect any foul play and permitted the child to accompany hisfather, but to her dismay though assured, the appellant did not return with the child in spite offervent insistences and implorations of the mother. As alleged by the respondent, the appellant thus separated the child from her from 24.01.2015 to 07.03.2015 in a pretentious and cruel move, seemingly acting on a nefarious strategy which surfaced when on 07.03.2015, the appellant left U.S with the child to India without any prior information or permission or consent ofhers.

5. Situated thus, the respondent approached Juvenile and Domestic Relations Court Fairfax County, for its intervention and for that, on 15.05.2015, she filed "Emergency Motion For Return of Minor Child and Established Temporary Custody".

6. On the next date fixed i.e 19.05.2015, after the service of the process on the appellant, his counsel made a "special appearance" to contest the service. On the date thereafter i.e 28.05.2015, he however informed the court that he was not contesting the service upon the appellant, whereupon hearing the counsel for the parties at length and also noticing the plea on behalf ofthe appellant that he intended to return with the childin U.S and that the delay was because of his mother's illness, the U.S Court passed the following order:

"IN THE JUVENILE & DOMESTIC RELATIONS DISTRICT COURT FOR FAIRFAX COUNTRY SHILPI GUPTA Petitioner

IN re: Aadvik Gupta

D.O.B September 28, 2012

Case No. JJ 431468-01-00 Vs. Prateek Gupta Respondent

ORDER

This cause came before this Court on the 19thMay, 2015, upon the petitioner Shilpi Gupta's verified motion for return of minor child and toestablish temporary custody;

It appearing to the Court that this Court has proper jurisdiction over the parties to this action pursuant to the Uniform Child CustodyJurisdiction and Enforcement Act, more specifically 20-146.24 and 20-146.32 of the Code of Virginia, 1950, as amended.

It further appearing to the Court that it is in the best interest of the child, Aadvik Gupta, (hereinafter "Aadvik") born on September 28, 2012, that he be immediately returned to the custodyof the petitioner and to the Commonwealth ofVirginia pending any further order of this Court and that good cause exists with which to require that the petitioner take immediate possession of thechild by all means necessary. It is therefore adjourned and ordered as follows:

1. *Custody: The petitioner Shilpi Gupta, is hereby granted sole legal and physicalcustody of the minor child, Aadvik Gupta, pending further order of this Court.*
2. *Return of the Child: That the respondent, Prateek Gupta, is hereby ordered toimmediately return Aadvik to the Commonwealth of Virginia, and to thecustody and control of the petitioner or her agents. Thereafter, the respondent shall not remove the child from the Commonwealthof Virginia under any circumstances without further order of the Court.*
3. *Enforcement: That the all law enforcement agencies and related agencies (including but not limited to Police Department(s), Sheriff's Department(s), U.S State Department, Federal Bureau of Investigations) are hereby directed to assist and/or facilitate the transfer of Aadvik to the petitioner, if necessary, including taking the child intocustody from anyone who has possessionof him and placing him in the physicalcustody of the petitioner.*
4. *Passport: That once the child has been returned to Virginia, any and all of Aadvik's passports must be immediately surrenderedto the petitioner where it will be held until further order of this Court.*

5. Removal from the Commonwealth of Virginia: That all relevant and/or local law enforcement agencies shall do whatever possible toprevent the removal of Aadvik Gupta, from the Commonwealth of Virginia except at the direction of the petitioner, Shilpi Gupta.

And this cause is continued.
Entered this 28 day of May, 2015.
Sd/- Judge"

7. Thereby, the Court in U.S being satisfied that it had the proper jurisdiction over the parties to the action before it and also being of the opinion that it was in the best interest of the child, that he be returned to the custody of the respondent and tothe Commonwealth of Virginia pending further orders, and that being convinced that good cause existed torequire that the respondent-mother take immediate possession of the child by all means necessary, granted sole legal and physical custody of the childto the respondent pending further orders of the Court. The appellant was directed to immediately return the child to the Commonwealth of Virginia and to the custody and control of the respondent or her agents with a further restraint on him not toremove the child from the Commonwealth of Virginia under any circumstance without the further order ofthe Court. Thereby, all law enforcement and related agencies as mentioned in the order were directed toassist and/or facilitate the transfer of the child to the respondent, if necessary by taking the child intocustody from anyone who had his possession and by placing him in the physical custody of the respondent.

8. As the records laid before this Court would divulge, the appellant meanwhile on 26.05.2015 filed a petition for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1956 (as amended) and also a petition under Section 7(b) of the Guardian and Wards Act, 1890 in the court of the Principal Judge, Family Court, Rohini, Delhi seeking a decree for restitution of conjugal rights between the parties and for a declaration that he was the sole and permanent guardian of the child, respectively. Subsequent thereto on 26.08.2015 he also instituted a suit in the High Court of Delhi at New Delhi praying for a decreeinter alia to adjudge the proceedings initiated by the respondent in the court in U.S to be false, malicious, vexatious, oppressive and nullis juris, being without jurisdiction and also to declare the order dated 28.05.2015 with regard to the return of the child tothe custody of the respondent-mother to be also null and void and not binding on him. A decree for permanent injunction against the respondent, her agents etc. from pursuing her proceedings before the court in U.S was also sought for. The orders, if any, passed in these proceedings instituted by the appellant having a bearing on those pursued by the respondent before the court in U.S are however not on record and we therefore refrain from making any comment thereon. Suffice is to state that the lodging of the proceedings by the appellant in courts in India demonstrates in unambiguous terms, his knowledge about the lis in the Court in U.S and the order dated 28.08.2015, interim though, directing him to return thecustody of the child immediately to the respondent-mother and to the Commonwealth ofVirginia, pending further orders.

9. Be that as it may, the court in U.S on 20.10.2015 noticing inter alia that the appellant had refused toreturn the child to the U.S and to the custody ofthe respondent in direct violation of its earlier order dated 28.05.2015, ordered that the respondent be granted sole, legal and physical custody of the childand also declared that no visitation be granted to the appellant. It was further directed that if either party intended to relocate his or her residence, he/she would have to give 30 days'

advance written notice ofany such intended relocation and of any intended change in address to the other party and the court. The proceedings concluded with the observation "This cause is final". For immediate reference the proceedingsof 20.10.2015 is also extracted hereinbelow:

"IN THE JUVENILE & DOMESTIC RELATIONS DISTRICT COURT FOR FAIRFAX COUNTY

Shilpi Gupta Petitioner
In re: Aadvik Gupta
D.O.B September 28, 2012
Case No. JJ431468-01-00/02-00
Vs.
Prateek Gupta Respondent

CUSTODY AND VISITATION ORDER

This cause came before this Court on the 20thday of October, 2015, upon the petitioner Shilpi Gupta's petitions for custody and visitation ofAadvik Gupta.

It appearing to the Court that it has jurisdiction over the parties and the subject matter of the above-styled matter;

It further appearing to the Court that the respondent, Prateek Gupta, unilaterally removed Aadvik Gupta to India without notice to or consentof the petitioner, and has further refused to return said child to the United States and into thecustody of the petitioner in direct violation of this Court's order entered on May 28, 2015.

Having considered all of the factors of 20-124.3of the Code of Virginia, 1950, as amended, it is hereby:

Adjudged and ordered that petitioner is granted sole legal and physical custody ofAadvik Gupta; it is further.

Adjudged and ordered that no visitation is granted to the respondent at this time; and it is further;

Adjudged and ordered that pursuant to 20-124.5 of the Code of Virginia, 1950 as amended, either party who intends to relocate his or her residence shall give thirty-days advance written notice of any such intended relocation and of any intended change of address, said notice being givento both the other party and to this Court.

This cause is final

Entered this 20th day of October, 2015."

10. Mentionably, before the order dated 20.10.2015 was passed, the respondent in the face of deliberate non-compliance of the order dated 28.05.2015 of the court in U.S had filed a contempt petition before it and the copy thereof was served on the appellant asking him to show cause. It is also a matter of record that the order dated 28.05.2015 of the court in U.S had been published in the daily "The Washington Times" on 03.09.2015, whereafter the order dated 20.10.2015 was passed in the presence of the counsel for the appellant after affording the respondent due hearing, whereupon the counsel of the appellant signed the order with the following endorsement "objected to for returning thechild to mother sole legal and physical custody". The proceedings

of the order dated 20.10.2015 would also testify that he failed to appear even after personal service. That the notice of the proceedings in U.S Court at both the stages had been served on the appellant is a minuted fact. It was in this eventful backdrop, that the respondent invoked the writ jurisdiction of the High Court of Delhi seeking a writ of habeas corpus against the appellant for the custody of the child alleging its illegal and unlawful charge by him.

11. In reinforcement of her imputations, the respondent elaborated that the child was an American citizen by birth, Virginia being his home State and that in spite of the order(s) of a court of competent jurisdiction, the appellant had illegally detained him. Various correspondences made by her with different authorities seeking their intervention and assistance as the last resort before approaching the Writ Court were highlighted.

12. In refutation, it was pleaded on behalf of the appellant that the petition for a writ in the nature ofhabeas corpus was misconceived in absence of any imminent danger of the life or physical or moral well-being of the child. Referring to, amongst others the proceedings initiated by him under the Guardian and Wards Act, 1890 which was pending adjudication, it was asserted on his behalf that as the same assured effective and efficacious remedy in law, the prayer in the writ petition ought to be declined. It was insisted as well that as the issue of the custody of the childwas involved, a summary adjudication thereof was unmerited and that a proper trial was the imperative. Apart from referring to the reasons for the acrimonious orientation of the parties, the initiatives and efforts made by him and his family members tofruitlessly effect a resolution of the differences, were underlined. It was maintained on his behalf that the parties however, as an interim arrangement made on 24.01.2015 had agreed to live separately with each parent keeping one child in his/her custody and that in terms thereof Aadvik, the minor whose custody is in dispute, was given in charge of the appellant. Institution and pendency of the other proceedings before the Indian Courts were also cited to oppose the relief of the writ of habeas corpus. It was contended as well that the respondent being a single working woman, she would not, in any view of the matter, be capable of appropriately looking after both the children.

13. In rejoinder, it was asserted on behalf of the respondent that the proceedings instituted by the appellant were all subsequent to the one commenced by her in the court in U.S on 15.05.2015 and in the faceof the final order(s) passed, directing return ofcustody of the child to her and the Commonwealthof Virginia, the continuance of the child with the appellant was apparently illegal and unauthorized, warranting the grant of writ of habeas corpus.

14. The High Court, as the impugned judgment would evince, after traversing the recorded facts, amongst others took note of the disinclination of the respondent-wife to join the company of her husband in India because of his alleged past conduct and the trauma and torture suffered by her, a plea duly endorsed by her father present in court, granted the writ as prayed for. While rejecting the contention ofthe appellant that no orders ought to be passed in the writ petition in view of the pendency of the three proceedings initiated by him in India, the High Court seemed to place a decisive reliance on the decision ofthis Court in Surya Vadanan v. State of Tamil Nadu,1and after subscribing to the principle of "comity ofcourts" and the doctrines of "most intimate contact" and "closest concern" returned the finding, in the prevailing factual setting, that the domestic court had much less concern with the child as against the foreign court which had passed the order prior in time. It observed further that no special or compelling reason had been urged to ignore the principle of comity ofcourts which predicated due deference to the orders passed by the U.S Court, more particularly when the appellant was represented before it

through his counsel and had submitted to its jurisdiction. It was held that as the child remained in the U.S since birth upto March, 2015, it could be safely construed that he was accustomed to and had adapted himself to the social and cultural milieu different from that of India. It was observed that no plea had been raised on behalf of the appellant that the foreign court was either incompetent or incapable of exercising its jurisdiction or had not rendered a reasonable or fair decision in the best interest of child and his best welfare. In the textual facts, the conclusion of the High Court was that the most intimate contact with the parties and their children was of the court in U.S which did have the closest concern for their well-being.

15. Having determined thus, the High Court directed the appellant to produce the child in court on the date fixed for consequential handing over of hiscustody to the respondent.

16. In the process of impeachment of the impugned ruling of the High Court, the learned counsel for the appellant at the threshold has assiduously questioned the maintainability of the writ proceeding for habeas corpus. According to the learned counsel, in the attendant facts and circumstances, the custody of the child of the appellant who is the biological father can by no means be construed as illegal or unlawful and thus the writ proceeding is misconceived. Further the appellant being in-charge of the child on the basis of an agreement between the parties, which also stands corroborated by various SMS and e-mails exchanged between them during the period from January, 2015 to 07.03.2015, the departure of the appellant with the child from the U.S to India and its custody with him is authorized and approved in law. The learned counsel argued as well that during the interregnum, after the appellant had returned to India with the child, the couple had been in touch with each other with interactions about the well-being of the child and thus in law and on facts, there is no cause of action whatsoever for the writ of habeas corpus as prayed for. That in passing the impugned order, the High Court had visibly omittedto analyze the perspectives pertinent for evaluating the interest or welfare of the child has been underlinedto urge that on that ground alone, the assailed ruling is liable to be interfered with. The learned counsel dismissed any binding effect of the order of the U.S Court on the ground that the same had been obtained by the respondent by resorting to fraud in withholding the relevant facts from it and deliberately projecting wrongly that the safety of the child was in danger in the custody of the appellant. The order of the court in U.S having thus been obtained by resorting to fraud, it is non est in law, she urged. Even otherwise, India being not a signatory to the Hague Convention of "The Civil Aspects of International Child Abduction", the order of the U.S Court was not per se enforceable qua the appellant and as in any view of the matter, the principle of comity of courts was subject to the paramount interest and welfare of the child, the High Court had fallen in error in relying on the rendition ofthis Court in Surya Vardanan1 which in any event, wasof no avail to the respondent in the singular facts ofthe case. According to the learned counsel, the parties are Indian nationals and citizens having Indian passports and they are only residents of U.S on temporary work visa. It has been argued that the respondent is all alone in U.S with the younger child on a temporary work visa which would expire in 2017 and her parents and other family members are all in India. It has been pleaded as well that when the child was brought to India by the appellant, he was aged 2½ years, by which age he could not be considered tohave been accustomed and adapted to the lifestyle in U.S for the application of the doctrines of "intimate contact" and "closest concern" by a court of that country. According to the learned counsel, the childafter his return to India, has been admitted to a reputed school and has accustomed himself to a desired congenial family environment, informed with love and

affection, amongst others of his grand-parents for which it would be extremely harsh toextricate him herefrom and lodge him in an alien setting, thus adversely impacting upon the process ofhis overall grooming. That the removal of the child by the appellant to India had not been in defiance of any order of the court in U.S and that the issue, more particularly with regard to his custody as per the Indian law is presently pending in a validly instituted proceeding here has also been highlighted in endorsement of the challenge to the impugned judgment and order. The decisions of this Court inDhanwanti Joshi v. Madhav Unde2, Sarita Sharma v.Sushil Sharma3 and Surya Vadanan1 have been advertedto in consolidation of the above arguments.

17. In his contrasting response, the learned counsel for the respondent, while edifying the sanctified statusof a mother and her revered role qua her child in its all round development, urged with reference to the factual background in which the child had been removed from his native country, that his continuingcustody with the appellant is patently illegal and unauthorized besides being ruthless and inconsiderate vis-à-vis the respondent-mother and his younger sibling. Heavily relying on the determination of this Court in Surya Vadanan1, the learned counsel has insisted that the High Court had rightly invoked the principle of comity of courts and the doctrines of"intimate contact" and "closest concern" and therefore, no interference is called for in the ultimate interest and well-being of the child. It was urged that the orders passed by the court in U.S directing the return of thechild to the custody of the respondent and the Commonwealth of Virginia is perfectly legal and valid, the same having been rendered after affording due opportunity to the appellant and also on an adequate appreciation of the aspects bearing on the welfare ofthe child. The orders thus being binding on the appellant, the defiance thereof is inexcusable in law and only displays a conduct unbecoming of a father tojustify retention of the custody of the child in disobedience of the process of law. The High Court as well on a due consideration of the facts and the law involved had issued its writ for return of the custodyof the child to the respondent after affording a full-fledged hearing to both the parties for which no interference is warranted, he urged. The learned counsel however denied that there was ever any agreement or understanding between the couple, under which they agreed that each parent would have thecustody of one child as represented by the appellant. In the case in hand as a final order has been passed by the court in U.S with regard to the custodyof the child in favour of the respondent after discussing all relevant aspects, the impugned order ofthe High Court being in conformance with the letter and spirit thereof, no interference is merited, he urged. While placing heavy reliance on the decision of this Court in Surya Vadanan1, it was also insisted that the return of the elder child to the custody of the mother was indispensably essential also for the proper growth and grooming of the younger child in his company and association, sharing the common bondof love, affection and concern.

18. The recorded facts and the contentious assertions have received our due attention. A brief recapitulation of the state of law on the issue at the outset is the desideratum.

19. A three Judge Bench of this Court in Nithya Anand Raghavan v. State (NCT of Delhi)4 did have the occasion to exhaustively revisit the legal postulations qua the repatriation of a minor child removed by one of the parents from the custody of the other parent from a foreign country to India and its retention in the face of an order of a competent foreign court directing its return to the place of abode from which it had been displaced. The appeal before this Court arose from a decision of the High Court in a Writ Petition filed by the father alleging that theminor daughter of the parties had been illegally removed from his custody in United Kingdom (for short,

hereafter referred to as "UK"), thus seeking a writ of habeas corpus for her production. By the verdict impugned, the High Court directed the appellant-mother therein to produce the minor childand to comply with an earlier order passed by the High Court of Justice, Family Division, Principal Registry, United Kingdom within three weeks or in the alternativeto handover the custody of the daughter to the respondent-father therein within that time. The proceeding in which the Court in the UK had passed the order dated 08.01.2016 had been initiated by the respondent/father after the appellant/mother had returned to India with the minor.

20. A brief outline of the factual details, would assist better the comprehension of the issues addressed therein. The parties to start with, were Indian citizens and were married as per the Hindu rites and customs on 30.11.2006 which was registered before the SDM Court, Chennai, whereafter on the completionof the traditional formalities, they shifted to U.K in early 2007 and set up their matrimonial home in Watford (U.K). Differences surfaced between them so much so that as alleged by the wife, she was subjectedto physical and mental abuse. She having conceived in and around December, 2008, left U.K for Delhi in June, 2009 to be with her parents and eventually was blessed with a girl child, Nethra in Delhi. The husband soon joined the mother and the child in Delhi whereafter, they together left for U.K in March, 2010. Skipping over the intervening developments, suffice itto state that the mother with the child who had meanwhile been back on a visit to India, returned toLondon in December, 2011, whereafter the minor was admitted in a Nursery School in U.K in January, 2012. In December, 2012, the daughter was granted citizenshipof U.K and subsequent thereto, the husband also acquired the same. Meanwhile from late 2014 till early 2015, the daughter was taken ill and was diagnosed tobe suffering from cardiac disorder for which she was required to undergo periodical medical reviews. As imputed by the wife, the father however, dis-played total indifference to the daughter's health condition. Finally on 02.07.2015, the appellant-mother returnedto India along with the daughter because of alleged violent behavior of the respondent and also informed the school that the ward would not be returning to U.K for her well-being and safety. The appellant thereafter filed a complaint on 16.12.2015 against the respondent with the Crime Against Women Cell, New Delhi, which issued notice to the respondent and his parents toappear before it. According to the appellant, neither the respondent nor his parents did respond to the said notice and instead as a counter-blast, he filed acustody/wardship petition on 08.01.2006 before the High Court of Justice, Family Division, U.K praying for the restoration of his daughter to the jurisdiction ofthat Court. The Court in U.K on 08.01.2016 passed an ex-parte order inter alia directing the appellant toreturn the daughter to U.K and to attend the hearingof the proceedings. Within a fortnight therefrom, the respondent also filed a writ petition before the High Court of Delhi against the appellant-wife seeking a writof habeas corpus for production of the minor before the Court. By the impugned Judgment and Order, the High Court directed the appellant to produce the daughter and comply with the orders passed by the U.K Court or hand over the minor to the respondent-father within three weeks therefrom.

21. Assailing this determination, it was urged on behalf of the appellant inter alia that the High Court had wrongly assigned emphasis on the principle ofcomity of courts in complete disregard of the paramount interest and welfare of the child, more particularly in view of the vicious environment at her matrimonial home in U.K in which she (appellant) had been subjected to physical and verbal abuse and had even placed the child at risk with his behaviour. The fact that India not being a signatory to the Hague Convention intended to prevent parents from

abducting children across the borders, the principle ofcomity of courts did not merit precedence over the welfare of the child, an aspect overlooked by the High Court, was underlined. It was asserted that the impugned order did also disregard the parens patriaejurisdiction of the Indian court within whose jurisdiction the child was located as well as the welfareof the child in question in mechanically applying the principle of comity of courts. That though the welfareof the child in situations of the like as well, is ofparamount consideration, this Court in Shilpa Aggarwalv. Aviral Mittal5 and in Surya Vadanan1 had deviated from this governing precept and had directed the childand mother to return to the jurisdiction of the foreign court by mis-interpreting the concept of'intimate contact' of the child with the place ofrepatriation, was highlighted for reconsideration of the views expressed therein. It was urged that the decision in Surya Vadanan1 had a chilling effect of assigning dominance to the principle of comity of courts over the welfare of a child, which mentionably undermined the perspective of the child, thus encouraging multiplicity of proceedings.

22. It was insistingly canvassed that the view adopted in Surya Vadanan1 was in direct conflict with an earlier binding decision in V. Ravi Chandran (Dr.) v.Union of India6 in which a three-Judge Bench had categorically held that under no circumstance can the principle of welfare of the child be eroded and that achild can seek refuge under the parens patriaejurisdiction of the Court. While dismissing the initiativeof the respondent before the UK Court to be one in retaliation of the appellant's allegation of abuse and violence and noticeably after she had filed a complaint with the Crime Against Women Cell (CAWC), New Delhi, it was also urged that the U.K Court had passed ex parte order without affording any opportunity to her topresent her case. It was canvassed further that the writ petition filed by the respondent seeking a writ ofhabeas corpus which is envisaged for urgent and immediate relief was also a designed stratagem of his bordering on the abuse of the process of the court and thus ought to have been discouraged by the High Court. It was underlined as well that the High Court in passing the impugned direction had also overlooked that the respondent had defaulted in the discharge ofhis parental duty towards the child, who was suffering from serious health problems, thus compromising in all respects the supervening consideration of overall well-being of the child.

23. In refutation, it was maintained on behalf of the respondent that the child was a British citizen and brought up in U.K and as he had acquired its citizenship and the appellant was also a permanent resident ofU.K, they had the abiding intention to permanently settle there along with the child and thus the U.K Court had the closest concern and intimate contact with thechild as regards her welfare and custody and thus indubitably had the jurisdiction in the matter. It was urged on behalf of the respondent by referring amongst others to the rendering in Surya Vadanan1that the child had clearly adapted to the social and cultural milieu of U.K and thus it was in its best interestto be rehabilitated there. That there was no materialto suggest that the return of the child to U.K would result in psychological, physical or cultural harm to her or that the U.K Court was incompetent to take a decision in the interest and welfare of the child, was underlined. It was insisted as well that there was no compelling reason for the High Court to ignore the principle of comity of courts and that as acknowledged by the High Court, better medical facilities were available in U.K to treat the child. The steps taken by the respondent towards the child's boarding and travelling expenses together with the expenditure incurrable for the school and other incidental aspects and his undertaking not to pursue any criminal proceeding against the appellant for kidnapping the child with the avowed desire ofreinstating

his home was highlighted to demonstrate his bona fides. That there was no delay on the part ofthe respondent in filing the writ petition, which he did immediately after coming to learn that the appellant was disinclined to return the child to U.K, was stressed upon as well.

24. In this disputatious orientation, this Court premised its adjudication on the necessity to comply with the direction issued by the foreign court against the appellant to produce the minor child before the U.K Court where the issue regarding wardship was pending for consideration and also to ascertain as towhich Court could adjudicate the same.

25. While recalling that the concept of forum convenience has no place is wardship jurisdiction, this Court at the outset dwelt upon the efficacy of the principle of comity of courts as applicable to India in respect of child custody matters and for that purpose, exhaustively traversed the relevant decisions on the issue. It referred to the verdict in Dhanwanti Joshi2, which recorded the enunciation of the Privy Council in Mark T. Mckee v. Evelyn Mckee7, which in essence underlined the paramountcy of the consideration of welfare and happiness of the infantto be of decisive bearing in the matter of deciding itscustody with the observation that comity of courts demanded not its enforcement but its grave consideration. In that case, a decree of divorce was passed in USA and custody of the child was given tothe father and later varied in favour of the mother. At that stage, the father took away the child to Canada, whereafter in the habeas corpus proceedings by the mother, though initially the decisions of the lower courts went against her, the Supreme Court of Canada gave her custody and the said Court held that thefather could not have the question of custody retried in Canada once the question was adjudicated in favourof the mother in the U.S.A earlier. The above observation was made by the Privy Council on appealto it which held that in the proceedings relating to thecustody before the Canadian Court, the welfare and happiness of the infant was of paramount consideration and the order of a foreign court in USA as to the custody can be given due weight in the circumstances of the case but such an order of a foreign court was only one of the factors which must be taken into consideration. The duty of the Canadian Court to form any independent judgment on the merits of the matter with regard to the welfare ofthe child was emphasized. It recorded as well that this view was sustained in L (minors) (Wardship: Jurisdiction), In. re8, which reiterated that the limited question which arose in the latter decisions was whether the court in the country in which the child was removed could conduct (a) summary enquiry or (b) an elaborate enquiry in the question of custody. It was explicated that in case of (a) a summary enquiry, the court would return custody to the country from which the child was removed unless such return could be shown to be harmful to the child and in case of (b) an elaborate enquiry, the court could go into the meritsto determine as to where the permanent welfare lay and ignore the order of the Foreign Court or treat the fact of removal of the child from another country as only one of the circumstances and the crucial question as to whether the court (in the country to which thechild is removed) would exercise the summary or elaborate procedure is to be determined according tothe child's welfare. It was indicated that the summary jurisdiction to return the child is invoked, for example, if the child had been removed from its native land to another country where, may be, his native language is not spoken, or the child gets divorced from the social customs and contacts to which he has been accustomed, or its education in his native land is interrupted and the child is being subjected to a foreign system of education, for these are all acts which could psychologically disturb the child. It was mentioned as well that the summary jurisdiction is exercised only if the court to which the child has been removed is moved promptly and quickly, for in that event, the Judge

may be well persuaded that it will be better for the child that those facets be investigated in the court in his native country on the expectation that an early decision in the native country could be in the interest of the child before it would develop roots in the country to which he had been removed. It was expounded in the alternative, that the Court might as well think of conducting an elaborate enquiry on merits and have regard to the other facts of the case and the time that has elapsed after the removal of thechild and consider, if it would be in the interest of thechild not to have it returned from the country towhich it had been removed, so much so that in such an eventuality, the unauthorized removal of the childfrom the native country would not come in the way ofthe court in the country to which the child has been removed, to ignore the removal and independently consider whether the sending back of the child to its native country would be in the paramount interest ofthe child.

26. This Court recalled its mandate in Elizabeth Dinshaw v. Arvand M. Dinshaw9, directing the fatherof the child therein, who had removed it from USA contrary to the custody orders of U.S Court, torepatriate it to USA to the mother not only becauseof the principle of comity but also because on facts, which on independent consideration merited such restoration of the child to its native State, in its interest. The following observations in Dhanwanti Joshi2qua the state of law vis-a-vis the countries who are not the signatories of the Hague Convention are offormidable significance and as noticed in Nithya Anand Raghavan4, are extracted hereinbelow:

> *"33. So far as non-Convention countries are concerned, or where the removal related to a period before adopting the Convention, the law is that the court in the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration as stated in McKee v. McKee unless the Court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare, as explained in Re [L. (Minors) (Wardship : Jurisdiction). As recently as 1996-1997, it has been held in P. (A minor) (Child Abduction: Non-Convention Country), Re: by Ward, L.J [1996 Current Law Year Book, pp. 165-166] that in deciding whether to order the return of a child who has been abducted from his or her country of habitual residence—which was not a party to the Hague Convention, 1980—the courts' overriding consideration must be the child's welfare. There is no need for the Judge to attempt to apply the provisions of Article 13 of the Convention by ordering the child's return unless a grave risk ofharm was established. See also A. (A Minor) (Abduction: Non-Convention Country) [Re, The Times, 3-7-1997 by Ward, L.J (CA) (quoted in Current Law, August 1997, p. 13]. This answers the contention relating to removal of the child from USA."*

27. Here again the court in the country to which thechild is removed was required to consider the question on merits bearing on its welfare as ofparamount significance and take note of the order ofthe foreign court as only a factor to be taken into consideration as propounded in Mckee7, unless the court thought it fit to exercise the summary jurisdiction of the child and its prompt return to its native country for its welfare. In elaboration of the above exposition, this Court in Nithya Anand Raghavan4propounded thus:

> *"40. The Court has noted that India is not yet a signatory to the Hague Convention of 1980 on "Civil Aspects of International Child Abduction". As regards the non-*

Convention countries, the law is that the court in the country to which the child has been removed must consider the question on merits bearing the welfare of the child as of paramount importance and reckon the order of the foreign court as only a factor to be taken into consideration, unless the court thinks it fit toexercise summary jurisdiction in the interests ofthe child and its prompt return is for its welfare. In exercise of summary jurisdiction, the court must be satisfied and of the opinion that the proceeding instituted before it was in close proximity and filed promptly after the child was removed from his/her native state and brought within its territorial jurisdiction, the child has not gained roots here and further that it will be in the child's welfare to returnto his native state because of the difference in language spoken or social customs and contacts towhich he/she has been accustomed or such other tangible reasons. In such a case the court need not resort to an elaborate inquiry into the merits ofthe paramount welfare of the child but leave that inquiry to the foreign court by directing return ofthe child. Be it noted that in exceptional cases the court can still refuse to issue direction to return the child to the native state and more particularly in spite of a pre-existing order of the foreign court in that behalf, if it is satisfied that the child's return may expose him to a grave risk of harm. This means that the courts in India, within whose jurisdiction the minor has been brought must "ordinarily" consider the question on merits, bearing in mind the welfare of the child as of paramount importance whilst reckoning the pre-existing orderof the foreign court if any as only one of the factors and not get fixated therewith. In either situation—be it a summary inquiry or an elaborate inquiry—the welfare of the child is of paramount consideration. Thus, while examining the issue the courts in India are free to decline the relief ofreturn of the child brought within its jurisdiction, if it is satisfied that the child is now settled in its new environment or if it would expose the child tophysical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return. We are in respectful agreement with the aforementioned exposition."

28. The above excerpt would in no uncertain terms underscore the predication that the courts in India, within whose jurisdiction the minor has been brought "ordinarily" while examining the question on merits, would bear in mind the welfare of the child as ofparamount and predominant importance while noting the preexisting order of the foreign court, if any, as only one of the factors and not get fixated therewith and that in either situation, be it a summary enquiry or elaborate enquiry, the welfare of the child is ofpreeminent and preponderant consideration, so much so that in undertaking this exercise, the courts in India are free to decline the relief of repatriation of thechild brought within its jurisdiction, if it is satisfied that it had settled in its new environment or that it would be exposed thereby to physical harm or otherwise, if it is placed in an intolerable or unbearable situation or environment or if the child in a given case, if matured, objects to its return.

29. Sustenance of this view was sought to be drawn from the verdict of another three-Judge Benchof this Court in V. Ravichandran6, as expressed in paragraphs 27 to 30 in the following terms:

"27. … However, in view of the fact that the child had lived with his mother in India for nearly twelve years, this Court held that it would not exercise a summary

jurisdiction to return the childto the United States of America on the ground that its removal from USA in 1984 was contrary to the orders of US courts. It was also held that whenever a question arises before a court pertaining to thecustody of a minor child, the matter is to be decided not on considerations of the legal rightsof the parties but on the sole and predominant criterion of what would best serve the interest ofthe minor." *(emphasis supplied)*

Again in paras 29 and 30, the three-Judge Bench observed thus: (SCC pp. 195-96)

"29. While dealing with a case of custodyof a child removed by a parent from one country to another in contravention of the orders of the court where the parties had set up their matrimonial home, the court in the countryto which the child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question ofcustody or by dealing with the matter summarily order a parent to return custodyof the child to the country from which thechild was removed and all aspects relating tothe child's welfare be investigated in a court in his own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects ofwelfare of the child including stability and security, loving and understanding care and guidance and full development of the child's character, personality and talents. While doing so, the order of a foreign court as to hiscustody 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 summarilyto return the child to his own country, keeping in view the jurisdiction of the court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child tobe investigated by the court in his own native country as that could be in the best interests ofthe child. The indication given in McKee v.McKee that there may be cases in which it is proper for a court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care ofthe child on the ground that such an order is in the best interests of the child has been explained in L. (Minors), In re [L. (Minors) (Wardship : Jurisdiction), (1974) 1 WLR 250 (CA)] and the said view has been approved by this Court in Dhanwanti Joshi [Dhanwanti Joshi. Similar view taken by the Court of Appeal in H. (Infants) (1966) 1 WLR 381 has been approved by this Court in Elizabeth Dinshaw."(emphasis supplied)

30. The quintessence of the legal exposition on the issue was succinctly synopsised in the following terms:

"42. The consistent view of this Court is that if the child has been brought within India, the courts in India may conduct: (a) summary inquiry; or (b) an elaborate inquiry on the question of custody. In the case of a summary inquiry, the court may deem it fit to order return of the child to the country from where he/she was

removed unless such return is shown to be harmful to the child. In other words, even in the matter of a summary inquiry, it is open to the court to decline the relief of return of the child to the country from where he/she was removed irrespective of a pre-existing order of return of the child by a foreign court. In an elaborate inquiry, the court is obliged to examine the merits as to where the paramount interests and welfare of the child lay and reckon the fact of a pre-existing order of the foreign court for return of the child as only one of the circumstances. In either case, the crucial question to be considered by the court (in the country to which the child is removed) is to answer the issue according to the child's welfare. That has to be done bearing in mind the totality of facts and circumstances of each case independently. Even on close scrutiny of the several decisions pressed before us, we do not find any contra view in this behalf. To put it differently, the principle of comity of courts cannot be given primacy or more weightage for deciding the matter of custody or for return of the child to the native State."

31. Thus the state of law as approved in Nithya Anand Raghavan4 is that if a child is brought from a foreign country, being its native country to India, the court in India may conduct (a) summary enquiry, or (b) an elaborate enquiry on the question of custody, if called for. In the case of a summary enquiry, the court may deem it fit to order the return of the child to the country from where he/she has been removed unless such return is shown to be harmful to the child. Axiomatically thus, even in case of a summary enquiry, it is open to the court to decline the relief of return of the child to the country from where he/she has been removed irrespective of a pre-existing order of return of a child by a foreign court, in case it transpires that its repatriation would be harmful to it. On the other hand, in an elaborate enquiry, the court is obligated to examine the merits as to where the paramount interest and welfare of the child lay and take note of the pre-existing order of the foreign court for the return of the child as only one of the circumstances. As a corollary, in both the eventualities whether the enquiry is summary or elaborate, the court would be guided by the pre-dominant consideration of welfare of the child assuredly on an overall consideration on all attendant facts and circumstances. In other words, the principle of comity of courts is not to be accorded a yielding primacy or dominance over the welfare and well-being of the child which unmistakeably is of paramount and decisive bearing.

32. This Court in Nithya Anand Raghavan4 also had to examine as to whether a writ of habeas corpus was available to the father qua the child which was in the custody of the mother, more particularly in the face of ex-parte order of the court in U.K against her and directing her for its return to its native country by declaring it to remain as a ward of that court during its minority or until further orders. This Court noted that this order had remained not only unchallenged by the appellant mother but also no application had been made by her before the foreign court for its modification. This Court however was firstly of the view that this order per se did not declare the custody of the minor with the appellant mother to be unlawful or that till it returned to England, its custody with the mother had become or would be treated as unlawful inter aliafor the purposes of considering a petition for issuance of writ of Hebeas Corpus. In this regard, the decision of this Court, amongst others in Syed Saleemuddin v. Dr. Rukhsana10, was adverted to, wherein it had been proclaimed that the principal duty of the court moved for the issuance of writ of habeas corpus in relation to the custody of a minor child is to ascertain whether such custody is unlawful or illegal and whether the welfare of the child requires, that his present

custody should be changed and the child ought to be handed over to the care and custody of any person. It was once again emphasized that while doing so, the paramount consideration must be, the welfare of the child.

33. The observation in Elizabeth Dinshaw9 that in such matters, the custody must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion as to what would best serve the interest and welfare of the minor and that to that extent, the High Court would exercise its parens patriae jurisdiction, as the minor is within its jurisdiction was reminisced. In the facts of the case also, noting the supervening fact that the appellant was the biological mother and natural guardian of the minor child, the remedy of writ of habeas corpus invoked for enforcement of the directions of the foreign court was declined, however leaving the respondent/father to take recourse to such other remedy as would be available in law for the enforcement of the order passed by the foreign court for securing the custody of the child. It was held that the appellant being the biological mother and natural guardian of the child, it could be presumed that its custody with her was lawful.

34. This Court in Nithya Anand Raghavan4 next turned to the contextual facts to record that the parents of the child were of Indian origin and that the minor was an Indian citizen by birth as she was born in Delhi and that she had not given up her Indian citizenship though she was granted UK citizenship subsequent thereto. That the child was admitted to a primary school in UK in September 2013 and that she had studied there in July 2015 was noted. It was mentioned as well that till she accompanied her mother on 02.07.2015 to India, no proceeding of any kind had been filed in the UK Court, either in relation to any matrimonial dispute between the parents or for her custody. In India, the child had been living with her grand-parents and other family members and relations unlike in U.K, where she lived in a nuclear family of three with no other relatives. That she had been studying in India for last over one year and had spent equal time in both the countries up to the first six years of her life was taken note of as well. This Court also expressed that the child would be more comfortable and secured to live with her mother here in India, who can provide her with motherly love, care, guidance and the required upbringing for her desired grooming of personality, character and faculties. That being a girl child, the custody, company and guardianship of the mother was of utmost significance was felt. It was also recorded that being a girl child of the age of about seven years, she ought to be ideally in the company of her mother in absence of circumstances that such association would be harmful to her. That there was no restraint order passed by any court or authority in U.K before the child had travelled with her mother to India was accounted for as well. This Court noticed most importantly, that the child was suffering from cardiac disorder, which warranted periodical medical reviews and appropriate care and attention, which it felt could be provided only by the mother as the respondent/father being employed would not be in a position to extend complete and full attention to his daughter. That the appellant/mother had neither any intention to return to UK nor according to her if the child returns to UK, she would be able to secure the desired access to her to the child to provide care and attention was noted in express terms. On an evaluation of the overall facts and circumstances, this Court thus was of the unhesitant opinion that it would be in the interest of the child to remain in the custody of her mother and that her return to UK would prove harmful to her. While concluding thus, it was stated that this arrangement notwithstanding the appellant/mother ought to participate in the proceedings before the UK Court so long as it had the jurisdiction to adjudicate the matter before it. It was

observed as well that, as the scrutiny involved with regard to the custody had arisen from a writ petition filed by the respondent/father for issuance of writ of a habeas corpus and not to decide the issue of grant or otherwise of the custody of the minor, all relevant aspects would have to be considered on their own merit in case a substantive proceeding for custody is made before any court of competent jurisdiction, including in India, independent of any observation made in the judgment.

35. To complete the narrative, the analysis of the other relevant pronouncements rendered on the issue would be adverted to in seriatim. In V. Ravi Chandran6, a writ of habeas corpus for production of minor son from the custody of his mother was sought for by his father. The child was born in US and was an American citizen and was about eight years of age when he was removed by the mother from U.S, in spite of her consent order on the issue of custody and guardianship of the minor passed by the competent U.S Court. The minor was given in the joint custody to the parents and a restraint order was operating against the mother when it was removed from USA to India. Prior to his removal, the minor had spent few years in U.S All these factors weighed against the mother as is discernible from the decision, whereupon this Court elected to exercise the summary jurisdiction in the interest of the child, whereupon the mother was directed to return the child to USA within a stipulated time.

36. In Shilpa Aggarwal5, the minor girl child involved was born in England having British citizenship and was only 3½ years of age at the relevant time. The parents had also acquired the status of permanent residents of U.K In the facts and circumstances of the case, this Court expressed its satisfaction that in the interest of the minor child, it would be proper to return her to U.K by applying the principle of comity of courts. The Court was also of the opinion that the issue regarding custody of the child should be decided by the foreign court from whose jurisdiction the child was removed and brought to India. A summary enquiry was resorted to in the facts of the case.

37. In Arathi Bandi v. Bandi Jagadrakshaka Rao11 the minor involved was a male child who was born in USA and had acquired the citizenship of that country by birth. The child was removed from USA by the mother in spite of a restraint order and a red corner notice operating against her had been issued by a court of competent jurisdiction in USA. This Court therefore held that the facts involved were identical to those in V. Ravi Chandran6 and further noticed that the mother of the child also had expressed her intention to return to USA and live with her husband though the latter was not prepared to cohabit with her.

38. In Surya Vadanan1, the two minor girls aged 10 years 6 years respectively were British citizens by birth. Following intense matrimonial discords, the mother had left UK and had come to India with her two daughters. She also instituted a proceeding in the Family Court at Coimbatore seeking dissolution of marriage. The husband, finding the wife to be unrelenting and disinclined to return to U.K with her daughters, petitioned the High Court of Justice in U.K for making the children as the wards of the Court, which passed an order granting the prayer and required the mother to return the children to its jurisdiction. This order was passed even before any formal order could be passed on the petition filed by the wife seeking divorce. This order was followed by another order of the U.K Court giving peremptory direction to the wife to produce the two daughters before the U.K Court and was supplemented by a penal notice to her. It was thereafter that the husband moved the Madras High Court for a writ of habeas corpus on the ground that

the wife had illegal custody of the two daughters. On the following considerations as extracted hereinbelow, relief as prayed for by the husband was granted:

> *"56. However, if there is a pre-existing order of a foreign court of competent jurisdiction and the domestic court decides to conduct an elaborate inquiry (as against a summary inquiry), it must have special reasons to do so. An elaborate inquiry should not be ordered as a matter of course. While deciding whether a summary or an elaborate inquiry should be conducted, the domestic court must take into consideration:*
>
> *(a) The nature and effect of the interim or interlocutory order passed by the foreign court.*
>
> *(b) The existence of special reasons for repatriating or not repatriating the child to the jurisdiction of the foreign court.*
>
> *(c) The repatriation of the child does not cause any moral or physical or social or cultural or psychological harm to the child, nor should it cause any legal harm to the parent with whom the child is in India. There are instances where the order of the foreign court may result in the arrest of the parent on his or her return to the foreign country. In such cases, the domestic court is also obliged to ensure the physical safety of the parent.*
>
> *(d) The alacrity with which the parent moves the foreign court concerned or the domestic court concerned, is also relevant. If the time gap is unusually large and is not reasonably explainable and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry."*

39. vis-à-vis the renditions in V. Ravi Chandran6,Shilpa Aggarwal5 and Arathi Bandi11, this Court inNithya Anand Raghavan4 distinguished the facts involved therein from the one under its scrutiny. While underlining that the considerations which impelled the court to adopt its summary approach/jurisdiction in directing the return of the child to its native country, did not in any way discount or undermine the predominant criterion of welfare and interest of the child even to outweigh neuter or offset the principle of comity of courts, it disapproved the primacy sought to be accorded to the order of the foreign court on the issue of custody of minor in Surya Vadanan1 though negated earlier in Dhanwanti Joshi2 and reiterated that whether it was a case of summary enquiry or an elaborate enquiry, the paramount consideration was the interest and welfare of the child so much so that the preexisting order of a foreign court could be taken note of only as one of the factors. The alacrity or the expedition with which the applicant/parent moves the foreign court or the domestic court concerned, for custody as a relevant factor was also not accepted to be of any definitive bearing. This notion of "first strike principle" was not subscribed to and further the extrapolation of that principle to the courts in India as predicated in Surya Vadanan1 was also held to be in-apposite by advertinginter alia to Section 14 of the Guardians and Wards Act, 1890 and Section 10 of the Civil Procedure Code.

40. The following passage from Nithya Anand Raghavan4 discarding the invocation of "first strike" principle as a definitive factor in furtherance of the applicability of the principle of comity of courts is quoted as hereunder:

> *"66. The invocation of first strike principle as a decisive factor, in our opinion, would undermine and whittle down the wholesome principle of the duty of the court having jurisdiction to consider the best interests and welfare of the child, which is of paramount importance. If the Court is convinced in that regard, the fact that there is already an order passed by a foreign court in existence may not be so significant as it must yield to the welfare of the child. That is only one of the factors to be taken into consideration. The interests and welfare of the child are of paramount consideration. The principle of comity of courts as observed in Dhanwanti Joshi case in relation to non-Convention countries is that the court in the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration. While considering that aspect, the court may reckon the fact that the child was abducted from his or her country of habitual residence but the court's overriding consideration must be the child's welfare."*

41. In conclusion, qua the decisions relied upon by the respondent-father, the facts contained therein were held to be distinguishable and it was observed that though the factual backdrop as obtained therein necessitated the court to issue direction to return the child to the native State, it did not follow that in deserving cases, the Courts in India were denuded of their powers to decline the relief to relocate the child to the native State merely because of a pre-existing order of foreign court of competent jurisdiction. The law laid down in Dhanwanti Joshi2 and approved by a three Judge Bench of this Court in V. Ravi Chandran6 was enounced to be the good law, thus reiterating that so far as non-convention countries are concerned, the court in the country in which the child is removed while examining the issue of its repatriation to its native country, would essentially bear in mind that the welfare of the child was of paramount importance and that the existing order of foreign court was only a factor to be taken note of. It was reiterated that the summary jurisdiction to return the child could be exercised in cases where the child had been removed from his native land to another country where his native language is not spoken or the child gets divorced from social customs and contacts to which he is accustomed or if his education in his native land is interrupted and the child is subjected to foreign system of education, thus adversely impacting upon his psychological state and overall process of growth. Though a prompt and expeditious move on the part of the applicant parent for the repatriation of the child in a court in the country to which it had been removed may be a relevant factor, the overwhelming and determinative consideration unfailingly has to be in the interest and welfare of the child. It was observed that in the facts of the case, the minor child after attaining majority would be free to exercise her choice to go to U.K and stay with her father but till that eventuality, she should stay in the custody of mother unless the court of competent jurisdiction trying the issue of custody of the child did order to the contrary. Visitation right to the respondent-father however was granted and directions were issued so as to facilitate the participation of the appellant-mother in the pending proceedings before the U.K Court, inter aliaby requiring the respondent-husband to bear the necessary costs to meet the expenditure towards all relevant aspects related thereto. The impugned judgment of the High Court issuing the writ of habeas corpus in favour of the respondent-husband was thus set aside.

42. The dialectics and determinations in Nithya Anand Raghavan4 have been alluded to in pervasive details as the adjudication therein by a Bench of larger coram has forensically analyzed all the comprehensible facets of the issue, to which we deferentially subscribe.

43. The decisions cited at the Bar and heretofore, traversed present fact situations with fringe variations, the common and core issue being the justifiability or otherwise factually and/or legally, of the relocation of a child removed from its native country to India on the basis of the principle of comity of courts and doctrines of "intimate contact" and "closest concern".

44. The following observations in Ruchi Majoo v.Sanjeev Majoo12 bearing on the parens patriae jurisdiction of Indian courts in cases involving custody of minor children are apt as well:

"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 of the Code of Civil Procedure, 1908, as amended by the Amendment Acts of 1999 and 2002. The duty of a court exercising its parens patriae 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 factory to be kept in view. But 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."

45. The gravamen of the judicial enunciation on the issue of repatriation of a child removed from its native country is clearly founded on the predominant imperative of its overall well-being, the principle of comity of courts, and the doctrines of "intimate contact and closest concern" notwithstanding. Though the principle of comity of courts and the aforementioned doctrines qua a foreign court from the territory of which a child is removed are factors which deserve notice in deciding the issue of custody and repatriation of the child, it is no longer res integra that the ever overriding determinant would be the welfare and interest of the child. In other words, the invocation of these principles/doctrines has to be judged on the touchstone of myriad attendant facts and circumstances of each case, the ultimate live concern being the welfare of the child, other factors being acknowledgeably subservient thereto. Though in the process of adjudication of the issue of repatriation, a court can elect to adopt a summary enquiry and order immediate restoration of the child to its native country, if the applicant/parent is prompt and alert in his/her initiative and the existing circumstances ex facie justify such course again in the overwhelming exigency of the welfare of the child, such a course could be approvable in law, if an effortless discernment of the relevant factors testify irreversible, adverse and prejudicial impact on its physical, mental, psychological, social, cultural existence, thus exposing it to visible, continuing and irreparable detrimental and nihilistic attentuations. On the other hand, if the applicant/parent is slack and there is a considerable time lag between the removal of the child from the native country and the steps taken for its repatriation thereto, the court would prefer an elaborate enquiry into all relevant aspects bearing on the child, as meanwhile with the

passage of time, it expectedly had grown roots in the country and its characteristic milieu, thus casting its influence on the process of its grooming in its fold.

46. The doctrines of "intimate contact" and "closest concern" are of persuasive relevance, only when the child is uprooted from its native country and taken to a place to encounter alien environment, language, custom etc., with the portent of mutilative bearing on the process of its overall growth and grooming.

47. It has been consistently held that there is no forum convenience in wardship jurisdiction and the peremptory mandate that underlines the adjudicative mission is the obligation to secure the unreserved welfare of the child as the paramount consideration.

48. Reverting to the present facts, the materials as available, do substantiate lingering dissensions between the parties. They are living separately since 2014 with one child each in their company and charge. The children are US citizens by birth. Noticeably, the child Aadvik, who is the subject matter of the lis and custody was barely 2½ years old when he came over to India and had stayed here since then. Today, he is a little over 5 years old. In other words, he has spent half of his life at this age, in India. Considering his infant years of stay in US, we construe it to be too little for the required integration of his with the social, physical, psychological, cultural and academic environment of US to get totally upturned by his transition to this country, so much so that unless he is immediately repatriated, his inherent potentials and faculties would suffer an immeasurable set back. The respondent-mother also is not favourably disposed to return to India, she being a working lady in US and is also disinclined to restore her matrimonial home. The younger son is with her. There is no convincing material on record that the continuation of the child in the company and custody of the appellant in India would be irreparably prejudicial to him. The e-mails exchanged by the parties as have been placed on records do suggest that they had been in touch since the child was brought to India and even after the first order dated 28.05.2015 was passed by the court in US. In the said e-mails, they have fondly and keenly referred to both the sons staying in each other's company, expressing concern about their illness and general well-being as well. As has been claimed by the appellant, the child is growing in a congenial environment in the loving company of his grand-parents and other relatives. He has been admitted to a reputed school and contrary to the nuclear family environment in US, he is exposed to a natural process of grooming in the association of his elders, friends, peers and playmates, which is irrefutably indispensable for comprehensive and conducive development of his mental and physical faculties. The issue with regard to the repatriation of a child, as the precedential explications would authenticate has to be addressed not on a consideration of legal rights of the parties but on the sole and preponderant criterion of the welfare of the minor. As aforementioned, immediate restoration of the child is called for only on an unmistakable discernment of the possibility of immediate and irremediable harm to it and not otherwise. As it is, a child of tender years, with malleable and impressionable mind and delicate and vulnerable physique would suffer serious set-back if subjected to frequent and unnecessary translocation in its formative years. It is thus imperative that unless, the continuance of the child in the country to which it has been removed, is unquestionably harmful, when judged on the touchstone of overall perspectives, perceptions and practicabilities, it ought not to be dislodged and extricated from the environment and setting to which it had got adjusted for its well-being.

49. Noticeably, a proceeding by the appellant seeking custody of the child under the Guardian and Wards Act, 1890 has been instituted, which is pending in the court of the Principal Judge, Family

Court, Rohini, Delhi. This we mention, as the present adjudication pertains to a challenge to the determination made in a writ petition for habeas corpus and not one to decide on the entitlement in law for the custody of the child.

50. In Nithya Anand Raghavan4 as well, this Court while maintaining the custody of the child in favour of the mother in preference to the applicant-father had required the mother to participate in the proceeding before the foreign court initiated by the respondent-father therein. It was observed that the custody of the child would remain with the respondent-mother till it attained majority, leaving it at liberty then to choose its parent to reside with. The arrangement approved by this Court was also made subject to the decision with regard to its custody, if made by a competent Court.

51. In the overwhelming facts and circumstances, we see no reason to take a different view or course. In view of order dated 03.05.2016 of this Court, the child has remained in the custody of the appellant-father. To reiterate, no material has been brought on record, persuasive and convincing enough, to take a view that immediate restoration of the custody of the child to the respondent-mother in the native country is obligatorily called for in its interest and welfare. The High Court, as the impugned judgment and order would demonstrate, did not at all apply itself to examine the facts and circumstances and the other materials on record bearing on the issue of welfare of the child which are unmistakably of paramount significance and instead seems to have been impelled by the principle of comity of courts and the doctrines of "intimate contact" and "closest concern" de hors thereto. The appellant being the biological father of Aadvik, his custody of the child can by no means in law be construed as illegal or unlawful drawing the invocation of a superior Court's jurisdiction to issue a writ in the nature of habeas corpus. We are, in the textual facts and on an in-depth analysis of the attendant circumstances, thus of the view that the dislodgment of the child as directed by the impugned decision would be harmful to it. Having regard to the nature of the proceedings before the US Court, the intervening developments thereafter and most importantly the prevailing state of affairs, we are of the opinion that the child, till he attains majority, ought to continue in the custody, charge and care of the appellant, subject to any order to the contrary, if passed by a court of competent jurisdiction in an appropriate proceeding deciding the issue of its custody in accordance with law. The High Court thus, in our estimate, erred in law and on facts in passing the impugned verdict.

52. The impugned judgment and order is thus set aside. We however direct that the parties would participate in the pending proceedings relating to the custody of the child, if the same is pursued and the court below, before which the same is pending, would decide the same in accordance with law expeditiously without being influenced in any way, by the observations and findings recorded in this determination.

53. The appeal is thus allowed.

1 (2015) 5 SCC 450
2 (1998) 1 SCC 112
3 (2000) 3 SCC 14
4 (2017) 8 SCC 454
5 (2010) 1 SCC 591
6 (2010) 1 SCC 174
7 (1951) AC 352 (PC)
8 (1974) 1 WLR 250 (CA)
9 (1987) 1 SCC 42
10 (2001) 5 SCC 247
11 (2013) 15 SCC 790
12 (2011) 6 SCC 479

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SURYA VADANAN VERSUS STATE OF TAMIL NADU & ORS.

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

Bench: Hon'ble Mr. Justice Madan B. Lokur & Hon'ble Mr. Justice Uday Umesh Lalit

Surya Vadanan …Appellant
Versus
State of Tamil Nadu & Ors. …Respondents

CRIMINAL APPEAL NO. 395 OF 2015

(Arising out of S.L.P. (Crl.) No.3634 of 2014)

Surya filed a writ petition in the Madras High Court in February 2013 (being HCP No.522 of 2013) for a writ of habeas corpus on the ground, inter alia, that Mayura had illegal custody of the two daughters of the couple that is Sneha Lakshmi Vadanan and Kamini Lakshmi Vadanan and that they may be produced in court and appropriate orders may be passed thereafter.

There are five comparatively recent and significant judgments delivered by this court on the issue of child custody where a foreign country or foreign court is concerned on the one hand and India or an Indian court (or domestic court) is concerned on the other. These decisions are:

(1) Sarita Sharma v. Sushil Sharma, (2) Shilpa Aggarwal v. Aviral Mittal & Anr., (3) V. Ravi Chandran v. Union of India, (4) Ruchi Majoo v. Sanjeev Majoo, and (5) Arathi Bandi v. Bandi Jagadrakshaka Rao. These decisions were extensively read out to us and we propose to deal with them in seriatim. (1) Sarita Sharma v. Sushil Sharma.

The following principles were accepted and adopted by this court:

(1) The welfare of the child is the paramount consideration. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of a child is not enough for the courts in this country to shut out an independent consideration of the matter. The principle of comity of courts simply demands consideration of an order passed by a foreign court and not necessarily its enforcement.

(2) One of the factors to be considered whether a domestic court should hold a summary inquiry or an elaborate inquiry for repatriating the child to the jurisdiction of the foreign court is the time gap in moving the domestic court for repatriation. The longer the time gap, the lesser the inclination of the domestic courts to go in for a summary inquiry.

(3) An order of a foreign court is one of the factors to be considered for the repatriation of a child to the jurisdiction of the foreign court. But that will not override the consideration of welfare of the child. Therefore, even where the removal of a child from the jurisdiction of the foreign court goes against the orders of that foreign court, giving custody of the child to the parent who approached the foreign court would not be warranted if it were not in the welfare of the child.

(4) Where a child has been removed from the jurisdiction of a foreign court in contravention of an order passed by that foreign court where the parties had set up their matrimonial home, the domestic court must consider whether to conduct an elaborate or summary inquiry on the question of custody of the child. If an elaborate inquiry is to be held, the domestic court may give due weight to the order of the foreign court depending upon the facts and circumstances in which such an order has been passed.

(5) A constitutional court exercising summary jurisdiction for the issuance of a writ of habeas corpus may conduct an elaborate inquiry into the welfare of the child whose custody is claimed and a Guardian Court (if it has jurisdiction) may conduct a summary inquiry into the welfare of the child, depending upon the facts of the case.

(6) Since the interest and welfare of the child is paramount, a domestic court "is entitled and indeed duty-bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication."

This court took into consideration various principles laid down from time to time in different decisions rendered by this court with regard to the custody of a minor child. It was held that:

(1) It is the duty of courts in all countries to see that a parent doing wrong by removing a child out of the country does not gain any advantage of his or her wrong doing.

(2) In a given case relating to the custody of a child, it may be necessary to have an elaborate inquiry with regard to the welfare of the child or a summary inquiry without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child.

(3) Merely because a child has been brought to India from a foreign country does not necessarily mean that the domestic court should decide the custody issue. It would be in accord with the principle of comity of courts to return the child to the jurisdiction of the foreign court from which he or she has been removed.

JUDGMENT

Hon'ble Mr. Justice Madan B. Lokur :—

1. Leave granted.

2. The question before us relates to the refusal by the Madras High Court to issue a writ of habeas corpus for the production of the children of Surya Vadanan and Mayura Vadanan. The appellant sought their production to enable him to take the children with him to the U.K. since they were wards of the court in the U.K. to enable the foreign court to decide the issue of their custody.

3. In our opinion, the High Court was in error in declining to issue the writ of habeas corpus.

The facts

4. The appellant (hereafter referred to as Surya) and respondent No.3 (hereafter referred to as Mayura) were married in Chennai on 27th January, 2000. While both are of Indian origin, Surya is a resident and citizen of U.K. and at the time of marriage Mayura was a resident and citizen of India.

5. Soon after their marriage Mayura joined her husband Surya in U.K. sometime in March 2000. Later she acquired British citizenship and a British passport sometime in February 2004. As

such, both Surya and Mayura are British citizens and were ordinarily resident in U.K. Both were also working for gain in the U.K.

6. On 23rd September, 2004, a girl child Sneha Lakshmi Vadanan was born to the couple in U.K. Sneha Lakshmi is a British citizen by birth. On 21st September, 2008 another girl child Kamini Lakshmi Vadanan was born to the couple in U.K. and she too is a British citizen by birth. The elder girl child is now a little over 10 years of age while the younger girl child is now a little over 6 years of age.

7. It appears that the couple was having some matrimonial problems and on 13th August, 2012 Mayura left U.K. and came to India along with her two daughters. Before leaving, she had purchased return tickets for herself and her two daughters for 2nd September, 2012. She says that the round-trip tickets were cheaper than one-way tickets and that is why she had purchased them.

   According to Surya, the reason for the purchase of roundtrip tickets was that the children's schools were reopening on 5th September, 2012 and she had intended to return to U.K. before the school reopening date.

8. Be that as it may, on her arrival in India, Mayura and her daughters went to her parents house in Coimbatore (Tamil Nadu) and have been staying there ever since.

9. On 21st August, 2012 Mayura prepared and signed a petition under Section 13(1)(i-a) of the Hindu Marriage Act, 1955[1] seeking a divorce from Surya. The petition was filed in the Family Court in Coimbatore on 23rd August, 2012. We are told that an application for the custody of the two daughters was also filed by Mayura but no orders seem to have been passed on that application one way or the other.

10. On or about 23rd August, 2012 Surya came to know that Mayura was intending to stay on in India along with their two daughters. Therefore, he came to Coimbatore on or about 27th August, 2012 with a view to amicably resolve all differences with Mayura. Interestingly while in Coimbatore, Surya lived in the same house as Mayura and their two daughters, that is, with Surya's in-laws. According to Surya, he was unaware that Mayura had already filed a petition to divorce him.

11. Since it appeared that the two daughters of the couple were not likely to return to U.K. in the immediate future and perhaps with a view that their education should not be disrupted, the children were admitted to a school in Coimbatore with Surya's consent.

12. Since Surya and Mayura were unable to amicably (or otherwise) resolve their differences, Surya returned to U.K. on or about 6th September, 2012. About a month later, on 16th October, 2012 he received a summons dated 6th October, 2012 from the Family Court in Coimbatore in the divorce petition filed by Mayura requiring him to enter appearance and present his case on 29th October, 2012. We are told that the divorce proceedings are still pending in the Family Court in Coimbatore and no substantial or effective orders have been passed therein.

Proceedings in the U.K.

1 13. Divorce.—(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—
(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or
(i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or (i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or [rest of the provision is not relevant]

13. Faced with this situation, Surya also seems to have decided to initiate legal action and on 8th November, 2012 he petitioned the High Court of Justice in U.K. (hereinafter referred to as 'the foreign court') for making the children as wards of the court. It seems that along with this petition, he also annexed documents to indicate (i) that he had paid the fees of the children for a private school in U.K. with the intention that the children would continue their studies in U.K. (ii) that the children had left the school without information that perhaps they would not be returning to continue their studies.

14. On 13th November, 2012 the High Court of Justice passed an order making the children wards of the court "during their minority or until such time as this provision of this order is varied or alternatively discharged by the further order of the court" and requiring Mayura to return the children to the jurisdiction of the foreign court. The relevant extract of the order passed by the foreign court on 13th November, 2012 reads as under:-

"IT IS ORDERED THAT:

1. The children SNEHA LAKSHMI VADANAN AND KAMINI LAKSHMI VADANAN shall be and remain wards of this Honourable Court during their minority or until such time as this provision of this order is varied or alternatively discharged by the further order of the court.

2. The Respondent mother shall :

a. By no later than 4 p.m. on 20th November 2012 inform the father, through his solicitors (Messrs Dawson Cornwell, 15 Red Lion Square, London, WC1R 4QT. Tel: 0207 242 2556 Ref: SJ/AMH), of the current care arrangements for the children;

b. By no later than 4 p.m. on 20th November 2012 inform the father, through his said solicitors, of the arrangements that will be made for the children's return pursuant to paragraph 2(c) herein;

c. Return the children to the jurisdiction of England and Wales by no later than 11.59 p.m. on 27th November 2012;

d. Attend at the hearing listed pursuant to paragraph 3 herein, together with solicitors and/or counsel if so instructed. A penal notice is attached to this paragraph.

3. The matter shall be adjourned and relisted for further directions or alternatively determination before a High Court Judge of the Family Division sitting in chambers at the Royal Court of Justice, Strand, London on 29th November 2012 at 2 p.m. with a time estimate of 30 minutes.

4. The mother shall have leave, if so advised, to file and serve a statement in response to the statement of the Applicant father. Such statement to be filed and served by no later than 12 noon on 29th November 2012.

5. Immediately upon her and the children's return to the jurisdiction of England and Wales the mother shall lodge her and the children's passports and any other travel documents with the Tipstaff (Tipstaff's Office, Royal Courts of Justice, Strand, London) to be held by him to the order of the court.

6. The solicitors for the Applicant shall have permission to serve these proceedings, together with this order, upon the Respondent mother outside of the jurisdiction of England and Wales, by facsimile or alternatively scanned and e-mailed copy if necessary.

7. The Applicant father shall have leave to disclose this order to:

a. The Foreign and Commonwealth Office;

b. The British High Commission, New Delhi;

c. The Indian High Commission, London

d. Into any proceedings as the mother may have issued of India, including any divorce proceedings.

8. Costs reserved.

AND THIS HON'BLE COURT RESPECTFULLY REQUESTS THAT the administrative authorities of the British Government operating in the jurisdiction of India and the judicial and administrative authorities of India, including the Indian High Commission in England, assist in any way within their power and control in ascertaining the current whereabouts of the children herein, who have been made wards of court, and in assisting in repatriating them to England and Wales, the country of their habitual residence."

15. In response to the petition filed by Surya, a written statement was filed by Mayura on 20th November, 2012. A rejoinder was filed by Surya on 13th December, 2012.

16. Apparently, after taking into consideration the written statement, the foreign court passed another order on 29th November, 2012 virtually repeating its earlier order and renewing its request to the administrative authorities of the British Government in India and the judicial and administrative authorities in India for assistance for repatriation of the wards of the court to England and Wales, the country of their habitual residence. The relevant extract of the order dated 29th November, 2012 reads as under:-

"IT IS ORDERED THAT :

1. The children SNEHA LAKSHMI VADANAN AND KAMINI VADANAN shall be and remain wards of this Hon'ble Court during their minority and until such time as this provision of this Order is varied or alternatively discharged by the further Order of the Court.

2. The 1st Respondent mother, 2nd Respondent maternal Grandfather and 3rd Respondent maternal Grandmother shall:

a. Forthwith upon serve of this Order upon them inform the father, through his said solicitors, of the arrangements that will be made for the children's return pursuant to paragraph 2(c) herein;[2]

b. Return the children to the jurisdiction of England and Wales forthwith upon service of this Order upon them;

A penal notice is attached to this paragraph.

2 There is no paragraph 2(c) in the text of the order supplied to this court.

3. The matter shall be adjourned and relisted for further directions or alternatively determination before a High Court Judge of the Family Division sitting in chambers at the Royal Court of Justice, Strand, London within 72 hours of the return of the children or alternatively upon application to the Court for a further hearing.

4. The father shall have leave, if so advised, to file and serve a statement of the mother. Such statement to be filed and served by no later than 12 noon on 13th December 2012.

5. Immediately upon her and the children's return to the jurisdiction of England and Wales the mother shall lodge her and the children's passports and any other travel documents with the Tipstaff (Tipstaff's Office, Royal Courts of Justice, Strand, London) to be held by him to the Order of the Court.

6. The solicitors for the Applicant shall have permission to serve these proceedings, together with this Order, upon the Respondent mother outside of the jurisdiction of England and Wales, by facsimile or alternatively scanned and e-mailed copy if necessary.

7. The Applicant father shall have leave to disclose this order to:

a. The Foreign and Commonwealth Office;

b. The British High Commission, New Delhi;

c. The Indian High Commission, London;

d. Into any proceedings as the mother may have issued in the jurisdiction of India, including any divorce proceedings.

8. The maternal grandparents Dr. Srinivasan Muralidharan and Mrs. Rajkumari Murlidharan shall be joined as Respondents to this application as the 2nd and 3rd Respondents respectively.

9. The mother shall make the children available for skype or alternatively telephone contact each Sunday and each Wednesday at 5.30 p.m. Indian time.

10. Liberty to the 1st Respondent mother, 2nd Respondent maternal Grandfather and 3rd Respondent maternal grandmother to apply to vary and/or discharge this order (or any part of it) upon reasonable notice to the Court and to the solicitors for the father.

11. Costs reserved.

AND THIS HON'BLE COURT RESPECTFULLY REQUESTS THAT the administrative authorities of the British Government operating in the jurisdiction of India and the judicial and administrative authorities of India, including the Indian High Commission in England, assist in any way within their power and control in ascertaining the current whereabouts of the children herein, who have been made wards of court, and in assisting in repatriating them to England and Wales, the country of their habitual residence."

17. We are told that no further effective or substantial orders have been passed by the foreign court thereafter.

Proceedings in the High Court

18. Since Mayura was not complying with the orders passed by the foreign court, Surya filed a writ petition in the Madras High Court in February 2013 (being HCP No.522 of 2013) for a writ of habeas corpus on the ground, inter alia, that Mayura had illegal custody of the two daughters of the couple that is Sneha Lakshmi Vadanan and Kamini Lakshmi Vadanan and that they may be produced in court and appropriate orders may be passed thereafter.

19. After completion of pleadings, the petition filed by Surya was heard by the Madras High Court and by a judgment and order dated 4th November, 2013 the writ petition was effectively dismissed.

20. The Madras High Court, in its decision, took the view that the welfare of the children (and not the legal right of either of the parties) was of paramount importance. On facts, the High Court was of opinion that since the children were in the custody of Mayura and she was their legal guardian, it could not be said that the custody was illegal in any manner. It was also noted that Surya was permitted to take custody of the children every Friday, Saturday and Sunday during the pendency of the proceedings in the Madras High Court; that the order passed by the foreign court had been duly complied with and that Surya had also returned to the U.K. On these facts and in view of the law, the Madras High Court "closed" the petition filed by Surya seeking a writ of habeas corpus.

21. Feeling aggrieved, Surya has preferred the present appeal on or about 9th April, 2014.

Important decisions of this court

22. There are five comparatively recent and significant judgments delivered by this court on the issue of child custody where a foreign country or foreign court is concerned on the one hand and India or an Indian court (or domestic court) is concerned on the other. These decisions are: (1) Sarita Sharma v. Sushil Sharma[3], (2) Shilpa Aggarwal v. Aviral Mittal & Anr.[4], (3) V. Ravi Chandran v. Union of India[5], (4) Ruchi Majoo v. Sanjeev Majoo[6], and (5) Arathi Bandi v. Bandi Jagadrakshaka Rao.[7] These decisions were extensively read out to us and we propose to deal with them in seriatim. (1) Sarita Sharma v. Sushil Sharma

23. As a result of matrimonial differences between Sarita Sharma and her husband Sushil Sharma an order was passed by a District Court in Texas, USA regarding the care and custody of their children (both American citizens) and their respective visiting rights. A subsequent order placed the children in the care of Sushil Sharma and only visiting rights were given to Sarita Sharma. Without informing the foreign court, Sarita Sharma brought the children to India on or about 7th May, 1997.

24. Subsequently on 12th June, 1997 Sushil Sharma obtained a divorce decree from the foreign court and also an order that the sole custody of the children shall be with him. Armed with this, he moved the Delhi High Court on 9th September, 1997 for a writ of habeas corpus seeking custody of the children. The High Court allowed the writ petition and ordered that the passports of the children be handed over to Sushil Sharma and it was declared that he could take the children to USA without any hindrance. Feeling aggrieved, Sarita Sharma preferred an appeal in this court.

3 (2000) 3 SCC 14
4 (2010) 1 SCC 591
5 (2010) 1 SCC 174
6 (2011) 6 SCC 479
7 (2013) 15 SCC 790

25. This court noted that Sushil Sharma was an alcoholic and had used violence against Sarita Sharma. It also noted that Sarita Sharma's conduct was not "very satisfactory" but that before she came to India, she was in lawful custody of the children but "she had committed a breach of the order of the American Court directing her not to remove the children from the jurisdiction of that Court without its permission."

26. This court noted the following principles regarding custody of the minor children of the couple:

    (1) The modern theory of the conflict of laws recognizes or at least prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case.[8]

    (2) Even though Section 6 of the Hindu Minority and Guardianship Act, 1956 constitutes the father as the natural guardian of a minor son, that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor.[9]

    (3) The domestic court will consider the welfare of the child as of paramount importance and the order of a foreign court is only a factor to be taken into consideration.[10]

On the merits of the case, this Court observed:

> *"Considering all the aspects relating to the welfare of the children, we are of the opinion that in spite of the order passed by the Court in U.S.A. it was not proper for the High Court to have allowed the habeas corpus writ petition and directed the appellant to hand over custody of the children to the respondent and permit him to take them away to U.S.A. What would be in the interest of the children requires a full and thorough inquiry and, therefore, the High Court should have directed the respondent to initiate appropriate proceedings in which such an inquiry can be held."*

27. Notwithstanding this, neither was the matter remanded to the High Court for issuing such a direction to Sushil Sharma to approach the appropriate court for conducting a "full and thorough" inquiry nor was such a direction issued by this court. The order of the Delhi High Court was simply set aside and the writ petition filed by Sushil Sharma was dismissed.

28. We may note that significantly, this court did not make any reference at all to the principle of comity of courts nor give any importance (apart from its mention) to the passage quoted from Surinder Kaur Sandhu to the effect that:

> *"The modern theory of Conflict of Laws recognizes and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged. To allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum shopping. Ordinarily, jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offsprings of marriage."*

(2) Shilpa Aggarwal v. Aviral Mittal & Anr.

8 Surinder Kaur Sandhu v. Harbax Singh Sandhu, (1984) 3 SCC 698

9 Surinder Kaur Sandhu v. Harbax Singh Sandhu

10 Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112 which in turn referred to McKee v. McKee, 1951 AC 352: (1951) 1 All ER 942 (PC)

29. Shilpa Aggarwal and her husband Aviral Mittal were both British citizens of Indian origin. They had a minor child (also a foreign national) from their marriage. They had matrimonial differences and as a result, Shilpa Aggarwal came to India from the U.K. with their minor child. She was expected to return to the U.K. but cancelled their return tickets and chose to stay on in India. Aviral Mittal thereupon initiated proceedings before the High Court of Justice, Family Division, U.K. and on 26th November, 2008 the foreign court directed Shilpa Aggarwal, inter alia, to return the minor child to the jurisdiction of that foreign court. Incidentally, the order passed by the foreign court is strikingly similar to the order passed by the foreign court subject matter of the present appeal.

30. Soon thereafter, Shilpa Aggarwal's father filed a writ petition in the Delhi High Court seeking protection of the child and for a direction that the custody of the child be handed over to him. The High Court effectively dismissed the writ petition and granted time to Shilpa Aggarwal to take the child on her own to the U.K. and participate in the proceedings in the foreign court failing which the child be handed over to Aviral Mittal to be taken to the U.K. as a measure of interim custody, leaving it for the foreign court to determine which parent would be best suited to have the custody of the child.

31. Feeling aggrieved, Shilpa Aggarwal preferred an appeal before this court which noted and observed that the following principles were applicable for deciding a case of this nature:

    (1) There are two contrasting principles of law, namely, comity of courts and welfare of the child.

    (2) In matters of custody of minor children, the sole and predominant criterion is the interest and welfare of the minor child.[11] Domestic courts cannot be guided entirely by the fact that one of the parents violated an order passed by a foreign court.[12]

32. On these facts and applying the principles mentioned above, this court agreed with the view of the High Court that the order dated 26th November, 2008 passed by the foreign court did not intend to separate the child from Shilpa Aggarwal until a final decision was taken with regard to the custody of the child. The child was a foreign national; both parents had worked for gain in the U.K. and both had acquired permanent resident status in the U.K. Since the foreign court had the most intimate contact[13] with the child and the parents, the principle of "comity of courts" required that the foreign court would be the most appropriate court to decide which parent would be best suited to have custody of the child.

(3) V. Ravi Chandran v. Union of India

33. The mother (Vijayasree Voora) had removed her minor child (a foreign national) from the U.S.A. in violation of a custody order dated 18th June, 2007 passed by the Family Court of the State of New York. The custody order was passed with her consent and with the consent of the child's father (Ravi Chandran, also a foreign national).

34. On 8th August, 2007, Ravi Chandran applied for modification of the custody order and was granted, the same day, temporary sole legal and physical custody of the minor child and Vijayasree Voora was directed to immediately turn over the minor child and his passport to Ravi

11 Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42. Even though this court used the word "sole", it is clear that it did not reject or intend to reject the principle of comity of courts.
12 Sarita Sharma v. Sushil Sharma
13 Surinder Kaur Sandhu v. Harbax Singh Sandhu

Chandran and further, her custodial time with the child was suspended. The foreign court also ordered that the issue of custody of the child shall be heard by the jurisdictional Family Court in the USA.

35. On these broad facts, Ravi Chandran moved a petition for a writ of habeas corpus in this court for the production of the child and for his custody. The child was produced in this court and the question for consideration was: "What should be the order in the facts and circumstances keeping in mind the interest of the child and the orders of the courts of the country of which the child is a national."

36. This court referred to a large number of decisions and accepted the following observations, conclusions and principles:

(1) The comity of nations does not require a court to blindly follow an order made by a foreign court.[14]

(2) Due weight should be given to the views formed by the courts of a foreign country of which the child is a national. The comity of courts demands not the enforcement of an order of a foreign court but its grave consideration.[15] The weight and persuasive effect of a foreign judgment must depend on the facts and circumstances of each case.[16]

(3) The welfare of the child is the first and paramount consideration,[17] whatever orders may have been passed by the foreign court.[18]

(4) The domestic court is bound to consider what is in the best interests of the child. Although the order of a foreign court will be attended to as one of the circumstances to be taken into account, it is not conclusive, one way or the other.[19]

(5) One of the considerations that a domestic court must keep in mind is that there is no danger to the moral or physical health of the child in repatriating him or her to the jurisdiction of the foreign country.[20]

(6) While considering whether a child should be removed to the jurisdiction of the foreign court or not, the domestic court may either conduct a summary inquiry or an elaborate inquiry in this regard. In the event the domestic court conducts a summary inquiry, it would return the custody of the child to the country from which the child was removed unless such return could be shown to be harmful to the child. In the event the domestic court conducts an elaborate inquiry, the court could go into the merits as to where the permanent welfare of the child lay and ignore the order of the foreign court or treat the fact of removal of the child from another country as only one of the circumstances.[21] An order that the child should be returned forthwith to the country from which he or she has been removed in the expectation that any dispute about his or her custody will be satisfactorily resolved in the courts of that country may well be regarded as being in the best interests of the child.[22]

14 B's Settlement, In re. B. v. B.,1940 Ch 54: (1951) 1 All ER 949 and McKee v. McKee
15 McKee v. McKee
16 McKee v. McKee
17 McKee v. McKee
18 B's Settlement, In re
19 Kernot v. Kernot, 1965 Ch 217: (1964) 3 WLR 1210: (1964) 3 All ER 339
20 H. (Infants) , In re, (1966) 1 WLR 381 (Ch & CA) : (1966) 1 All ER 886 (CA)
21 L. (Minors), In re, (1974) 1 WLR 250 : (1974) 1 All ER 913 (CA)
22 L. (Minors), In re,

(7) The modern theory of conflict of laws recognizes and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged.[23]

37. On the facts of the case, it was held that an elaborate inquiry was not required to be conducted. It was also observed that there was nothing on record which could remotely suggest that it would be harmful for the child to return to his native country. Consequently, this court directed the repatriation of the child to the jurisdiction of the foreign court subject to certain directions given in the judgment.

38. This court also quoted a passage from Sarita Sharma to the effect that a decree passed by a foreign court cannot override the consideration of welfare of a child.

(4) Ruchi Majoo v. Sanjeev Majoo

39. Ruchi Majoo (wife) had come to India with her child consequent to matrimonial differences between her and her husband (Sanjeev Majoo). All three that is Ruchi Majoo, Sanjeev Majoo and their child were foreign nationals.

40. Soon after Ruchi Majoo came to India, Sanjeev Majoo approached the Superior Court of California, County of Ventura in the USA seeking a divorce from Ruchi Majoo and obtained a protective custody warrant order on 9th September, 2008 which required Ruchi Majoo to appear before the foreign court. She did not obey the order of the foreign court perhaps because she had initiated proceedings before the Guardian Court at Delhi on 28th August, 2008. In any event, the Guardian Court passed an ex-parte ad interim order on 16th September, 2008 (after the protective custody warrant order passed by the foreign court) to the effect that Sanjeev Majoo shall not interfere with the custody of her minor child till the next date of hearing.

41. Aggrieved by this order, Rajiv Majoo challenged it through a petition under Article 227 of the Constitution filed in the Delhi High Court. The order of 16th September, 2008 was set aside by the High Court on the ground that the Guardian Court had no jurisdiction to entertain the proceedings since the child was not ordinarily resident in Delhi. It was also held that the issue of the child's custody ought to be decided by the foreign court for the reason that it had already passed the protective custody warrant order and also because the child and his parents were American citizens.

42. On these broad facts, this court framed three questions for determination. These questions are as follows:-

(i) Whether the High Court was justified in dismissing the petition for custody of the child on the ground that the court at Delhi had no jurisdiction to entertain it;

(ii) Whether the High Court was right in declining exercise of jurisdiction on the principle of comity of courts; and

(iii) Whether the order granting interim custody of the child to Ruchi Majoo calls for any modification in terms of grant of visitation rights to the father pending disposal of the petition by the trial court.

23 Surinder Kaur Sandhu v. Harbax Singh Sandhu

43. We are not concerned with the first and the third question. As far as the second question is concerned, this court was of the view that there were four reasons for answering the question in the negative. Be that as it may, the following principles were accepted and adopted by this court:

(1) The welfare of the child is the paramount consideration. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of a child is not enough for the courts in this country to shut out an independent consideration of the matter. The principle of comity of courts simply demands consideration of an order passed by a foreign court and not necessarily its enforcement.[24]

(2) One of the factors to be considered whether a domestic court should hold a summary inquiry or an elaborate inquiry for repatriating the child to the jurisdiction of the foreign court is the time gap in moving the domestic court for repatriation. The longer the time gap, the lesser the inclination of the domestic courts to go in for a summary inquiry.[25]

(3) An order of a foreign court is one of the factors to be considered for the repatriation of a child to the jurisdiction of the foreign court. But that will not override the consideration of welfare of the child. Therefore, even where the removal of a child from the jurisdiction of the foreign court goes against the orders of that foreign court, giving custody of the child to the parent who approached the foreign court would not be warranted if it were not in the welfare of the child.[26]

(4) Where a child has been removed from the jurisdiction of a foreign court in contravention of an order passed by that foreign court where the parties had set up their matrimonial home, the domestic court must consider whether to conduct an elaborate or summary inquiry on the question of custody of the child. If an elaborate inquiry is to be held, the domestic court may give due weight to the order of the foreign court depending upon the facts and circumstances in which such an order has been passed.[27]

(5) A constitutional court exercising summary jurisdiction for the issuance of a writ of habeas corpus may conduct an elaborate inquiry into the welfare of the child whose custody is claimed and a Guardian Court (if it has jurisdiction) may conduct a summary inquiry into the welfare of the child, depending upon the facts of the case.[28]

(6) Since the interest and welfare of the child is paramount, a domestic court "is entitled and indeed duty-bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication."

44. On the facts of the case, this court held that "repatriation of the minor to the United States, on the principle of "comity of courts" does not appear to us to be an acceptable option worthy of being exercised at that stage." Accordingly, it was held that the "Interest of the minor shall be better served if he continued to be in the custody of his mother [Ruchi Majoo]."

(5) Arathi Bandi v. Bandi Jagadrakshaka Rao

45. The facts in this case are a little complicated and it is not necessary to advert to them in any detail. The sum and substance was that Arathi Bandi and her husband Bandi Rao were ordinarily

24 Dhanwanti Joshi v. Madhav Unde
25 Dhanwanti Joshi v. Madhav Unde
26 Sarita Sharma v. Sushil Sharma
27 V. Ravi Chandran and Aviral Mittal
28 Dhanwanti Joshi referring to Elizabeth Dinshaw v. Arvand M. Dinshaw

residents of USA and they had a minor child. There were some matrimonial differences between the couple and proceedings in that regard were pending in a court in Seattle, USA.

46. In violation of an order passed by the foreign court, Arathi Bandi brought the child to India on 17th July, 2008. Since she did not return with the child to the jurisdiction of the foreign court bailable warrants were issued for her arrest by the foreign court.

47. On or about 20th November, 2009 Bandi Rao initiated proceedings in the Andhra Pradesh High Court for a writ of habeas corpus seeking production and custody of the child to enable him to take the child to USA. The Andhra Pradesh High Court passed quite a few material orders in the case but Arathi Bandi did not abide by some of them resulting in the High Court issuing non-bailable warrants on 25th January, 2011 for her arrest. This order and two earlier orders passed by the High Court were then challenged by her in this court.

48. This court observed that Arathi Bandi had come to India in defiance of the orders passed by the foreign court and that she also ignored the orders passed by the High Court. Consequently, this court was of the view that given her conduct, no relief could be granted to Arathi Bandi.

49. This court took into consideration various principles laid down from time to time in different decisions rendered by this court with regard to the custody of a minor child. It was held that:

    (1) It is the duty of courts in all countries to see that a parent doing wrong by removing a child out of the country does not gain any advantage of his or her wrong doing.[29]

    (2) In a given case relating to the custody of a child, it may be necessary to have an elaborate inquiry with regard to the welfare of the child or a summary inquiry without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child.[30]

    (3) Merely because a child has been brought to India from a foreign country does not necessarily mean that the domestic court should decide the custody issue. It would be in accord with the principle of comity of courts to return the child to the jurisdiction of the foreign court from which he or she has been removed.[31]

Discussion of the law

50. The principle of the comity of courts is essentially a principle of self-restraint, applicable when a foreign court is seized of the issue of the custody of a child prior to the domestic court. There may be a situation where the foreign court though seized of the issue does not pass any effective or substantial order or direction. In that event, if the domestic court were to pass an effective or substantial order or direction prior in point of time then the foreign court ought to exercise self-restraint and respect the direction or order of the domestic court (or vice versa), unless there are very good reasons not to do so.

51. From a review of the above decisions, it is quite clear that there is complete unanimity that the best interests and welfare of the child are of paramount importance. However, it should be clearly understood that this is the final goal or the final objective to be achieved – it is not the beginning of the exercise but the end.

29 Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw
30 V. Ravi Chandran v. Union of India
31 V. Ravi Chandran v. Union of India

52. Therefore, we are concerned with two principles in a case such as the present. They are (i) The principle of comity of courts and (ii) The principle of the best interests and the welfare of the child. These principles have been referred to "contrasting principles of law"[32] but they are not 'contrasting' in the sense of one being the opposite of the other but they are contrasting in the sense of being different principles that need to be applied in the facts of a given case.

53. What then are some of the key circumstances and factors to take into consideration for reaching this final goal or final objective? First, it must be appreciated that the "most intimate contact" doctrine and the "closest concern" doctrine of Surinder Kaur Sandhu are very much alive and cannot be ignored only because their application might be uncomfortable in certain situations. It is not appropriate that a domestic court having much less intimate contact with a child and having much less close concern with a child and his or her parents (as against a foreign court in a given case) should take upon itself the onerous task of determining the best interests and welfare of the child. A foreign court having the most intimate contact and the closest concern with the child would be better equipped and perhaps best suited to appreciate the social and cultural milieu in which the child has been brought up rather than a domestic court. This is a factor that must be kept in mind.

54. Second, there is no reason why the principle of "comity of courts" should be jettisoned, except for special and compelling reasons. This is more so in a case where only an interim or an interlocutory order has been passed by a foreign court (as in the present case). In McKee which has been referred to in several decisions of this court, the Judicial Committee of the Privy Council was not dealing with an interim or an interlocutory order but a final adjudication. The applicable principles are entirely different in such cases. In this appeal, we are not concerned with a final adjudication by a foreign court – the principles for dealing with a foreign judgment are laid down in Section 13 of the Code of Civil Procedure.[33] In passing an interim or an interlocutory order, a foreign court is as capable of making a prima facie fair adjudication as any domestic court and there is no reason to undermine its competence or capability. If the principle of comity of courts is accepted, and it has been so accepted by this court, we must give due respect even to such orders passed by a foreign court. The High Court misdirected itself by looking at the issue as a matter of legal rights of the parties. Actually, the issue is of the legal obligations of the parties, in the context of the order passed by the foreign court.

55. If an interim or an interlocutory order passed by a foreign court has to be disregarded, there must be some special reason for doing so. No doubt we expect foreign courts to respect the orders passed by courts in India and so there is no justifiable reason why domestic courts should not reciprocate and respect orders passed by foreign courts. This issue may be looked at from another perspective. If the reluctance to grant respect to an interim or an interlocutory order is extrapolated into the domestic sphere, there may well be situations where a Family Court in one

32 Shilpa Aggarwal v. Aviral Mittal

33 13. When foreign judgment not conclusive.—A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—
(a) where it has not been pronounced by a Court of competent jurisdiction;
(b) where it has not been given on the merits of the case;
(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;
(d) where the proceedings in which the judgment was obtained are opposed to natural justice;
(e) where it has been obtained by fraud;
(f) where it sustains a claim founded on a breach of any law in force in India.

State declines to respect an interim or an interlocutory order of a Family Court in another State on the ground of best interests and welfare of the child.

This may well happen in a case where a person ordinarily resident in one State gets married to another person ordinarily resident in another State and they reside with their child in a third State. In such a situation, the Family Court having the most intimate contact and the closest concern with the child (the court in the third State) may find its orders not being given due respect by a Family Court in the first or the second State. This would clearly be destructive of the equivalent of the principle of comity of courts even within the country and, what is worse, destructive of the rule of law.

56. What are the situations in which an interim or an interlocutory order of a foreign court may be ignored? There are very few such situations. It is of primary importance to determine, prima facie, that the foreign court has jurisdiction over the child whose custody is in dispute, based on the fact of the child being ordinarily resident in the territory over which the foreign court exercises jurisdiction. If the foreign court does have jurisdiction, the interim or interlocutory order of the foreign court should be given due weight and respect. If the jurisdiction of the foreign court is not in doubt, the "first strike" principle would be applicable. That is to say that due respect and weight must be given to a substantive order prior in point of time to a substantive order passed by another court (foreign or domestic).

57. There may be a case, as has happened in the present appeal, where one parent invokes the jurisdiction of a court but does not obtain any substantive order in his or her favour and the other parent invokes the jurisdiction of another court and obtains a substantive order in his or her favour before the first court. In such an event, due respect and weight ought to be given to the substantive order passed by the second court since that interim or interlocutory order was passed prior in point of time. As mentioned above, this situation has arisen in the present appeal – Mayura had initiated divorce proceedings in India before the custody proceedings were initiated by Surya in the U.K. but the foreign court passed a substantive order on the custody issue before the domestic court. This situation also arose in Ruchi Majoo where Ruchi Majoo had invoked the jurisdiction of the domestic court before Rajiv Majoo but in fact Rajiv Majoo obtained a substantive order from the foreign court before the domestic court. While the substantive order of the foreign court in Ruchi Majoo was accorded due respect and weight but for reasons not related to the principle of comity of courts and on merits, custody of the child was handed over to Ruchi Majoo, notwithstanding the first strike principle.

58. As has been held in Arathi Bandi a violation of an interim or an interlocutory order passed by a court of competent jurisdiction ought to be viewed strictly if the rule of law is to be maintained. No litigant can be permitted to defy or decline adherence to an interim or an interlocutory order of a court merely because he or she is of the opinion that that order is incorrect – that has to be judged by a superior court or by another court having jurisdiction to do so. It is in this context that the observations of this court in Sarita Sharma and Ruchi Majoo have to be appreciated. If as a general principle, the violation of an interim or an interlocutory order is not viewed seriously, it will have widespread deleterious effects on the authority of courts to implement their interim or interlocutory orders or compel their adherence. Extrapolating this to the courts in our country, it is common knowledge that in cases of matrimonial differences in our country, quite often more than one Family Court has jurisdiction over the subject matter in issue. In such a situation, can a litigant say that he or she will obey the interim or interlocutory

order of a particular Family Court and not that of another? Similarly, can one Family Court hold that an interim or an interlocutory order of another Family Court on the same subject matter may be ignored in the best interests and welfare of the child? We think not. An interim or an interlocutory is precisely what it is - interim or interlocutory – and is always subject to modification or vacation by the court that passes that interim or interlocutory order. There is no finality attached to an interim or an interlocutory order. We may add a word of caution here – merely because a parent has violated an order of a foreign court does not mean that that parent should be penalized for it. The conduct of the parent may certainly be taken into account for passing a final order, but that ought not to have a penalizing result.

59. Finally, this court has accepted the view[34] that in a given case, it might be appropriate to have an elaborate inquiry to decide whether a child should be repatriated to the foreign country and to the jurisdiction of the foreign court or in a given case to have a summary inquiry without going into the merits of the dispute relating to the best interests and welfare of the child and repatriating the child to the foreign country and to the jurisdiction of the foreign court.

60. However, if there is a pre-existing order of a foreign court of competent jurisdiction and the domestic court decides to conduct an elaborate inquiry (as against a summary inquiry), it must have special reasons to do so. An elaborate inquiry should not be ordered as a matter of course. While deciding whether a summary or an elaborate inquiry should be conducted, the domestic court must take into consideration:

(a) The nature and effect of the interim or interlocutory order passed by the foreign court.

(b) The existence of special reasons for repatriating or not repatriating the child to the jurisdiction of the foreign court.

(c) The repatriation of the child does not cause any moral or physical or social or cultural or psychological harm to the child, nor should it cause any legal harm to the parent with whom the child is in India. There are instances where the order of the foreign court may result in the arrest of the parent on his or her return to the foreign country.[35] In such cases, the domestic court is also obliged to ensure the physical safety of the parent.

(d) The alacrity with which the parent moves the concerned foreign court or the concerned domestic court is also relevant. If the time gap is unusually large and is not reasonably explainable and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry.

Discussion on facts

61. The facts in this appeal reveal that Surya and Mayura are citizens of the U.K. and their children are also citizens of the U.K.; they (the parents) have been residents of the U.K. for several years and worked for gain over there; they also own immovable property (jointly) in the U.K.; their children were born and brought up in the U.K. in a social and cultural milieu different from that of India and they have grown up in that different milieu; their elder daughter was studying in a school in the U.K. until she was brought to India and the younger daughter had also joined a school in the U.K. meaning thereby that their exposure to the education system was different

34 L. (Minors), In re,
35 Arathi Bandi

from the education system in India.[36] The mere fact that the children were admitted to a school in India, with the consent of Surya is not conclusive of his consent to the permanent or long term residence of the children in India. It is possible, as explained by his learned counsel, that he did not want any disruption in the education of his children and that is why he consented to the admission of the children in a school in India. This is a possible explanation and cannot be rejected outright.

62. Mayura has not taken any steps to give up her foreign citizenship and to acquire Indian citizenship. She has taken no such steps even with respect to her children. Clearly, she is desirous of retaining her foreign citizenship at the cost of her Indian citizenship and would also like her children to continue with their foreign citizenship, rather than take Indian citizenship. That being the position, there is no reason why the courts in India should not encourage her and the children to submit to the jurisdiction of the foreign court which has the most intimate contact with them and closest concern apart from being located in the country of their citizenship. The fact that Mayura is of Indian origin cannot be an overwhelming factor.

63. Though Mayura filed proceedings for divorce in India way back in August 2012, she made no serious effort to obtain any interim order in her favour regarding the custody of the children, nor did she persuade the trial court for more than two years to pass an interim order for the custody of the children. On the other hand, the foreign court acted promptly on the asking of Surya and passed an interim order regarding the custody of the children, thereby making the first strike principle applicable.

64. It would have been another matter altogether if the Family Court had passed an effective or substantial order or direction prior to 13th November, 2012 then, in our view, the foreign court would have had to consider exercising self-restraint and abstaining from disregarding the direction or order of the Family Court by applying the principle of comity of courts. However, since the first effective order or direction was passed by the foreign court, in our opinion, principle of comity of courts would tilt the balance in favour of that court rather than the Family Court. We are assuming that the Family Court was a court of competent jurisdiction although we must mention that according to Surya, the Family Court has no jurisdiction over the matter of the custody of the two children of the couple since they are both British citizens and are ordinarily residents of the U.K. However, it is not necessary for us to go into this issue to decide this because even on first principles, we are of the view that the orders or directions passed by the foreign court must have primacy on the facts of the case, over the Family Court in Coimbatore. No specific or meaningful reason has been given to us to ignore or bypass the direction or order of the foreign court.

65. We have gone through the orders and directions passed by the foreign court and find that there is no final determination on the issue of custody and what the foreign court has required is for Mayura to present herself before it along with the two children who are wards of the foreign court and to make her submissions. The foreign court has not taken any final decision on the custody of the children. It is quite possible that the foreign court may come to a conclusion, after hearing both parties that the custody of the children should be with Mayura and that they should be with her in India. The foreign court may also come to the conclusion that the best interests and welfare of the children requires that they may remain in the U.K. either under the

36 In our order dated 9th July, 2014 we have noted that according to Mayura the children are attending some extra classes. This is perhaps to enable them to adjust to the education system and curriculum in India.

custody of Surya or Mayura or their joint custody or as wards of the court during their minority. In other words, there are several options before the foreign court and we cannot jump the gun and conclude that the foreign court will not come to a just and equitable decision which would be in the best interests and welfare of the two children of the couple.

66. The orders passed by the foreign court are only interim and interlocutory and no finality is attached to them. Nothing prevents Mayura from contesting the correctness of the interim and interlocutory orders and to have them vacated or modified or even set aside. She has taken no such steps in this regard for over two years. Even the later order passed by the foreign court is not final and there is no reason to believe that the foreign court will not take all relevant factors and circumstances into consideration before taking a final view in the matter of the custody of the children. The foreign court may well be inclined, if the facts so warrant, to pass an order that the custody of the children should be with Mayura in India.

67. There is also nothing on the record to indicate that any prejudice will be caused to the children of Mayura and Surya if they are taken to the U.K. and subjected to the jurisdiction of the foreign court. There is nothing to suggest that they will be prejudiced in any manner either morally or physically or socially or culturally or psychologically if they continue as wards of the court until a final order is passed by the foreign court. There is nothing to suggest that the foreign court is either incompetent or incapable of taking a reasonable, just and fair decision in the best interests of the children and entirely for their welfare.

68. There is no doubt that the foreign court has the most intimate contact with Mayura and her children and also the closest concern with the well being of Mayura, Surya and their children. That being the position even though Mayura did not violate any order of the foreign court when she brought her children to India, her continued refusal to abide by the interim and interlocutory order of the foreign court is not justified and it would be certainly in the best interests and welfare of the children if the foreign court, in view of the above, takes a final decision on the custody of the children at the earliest. The foreign court undoubtedly has the capacity to do so.

69. We have considered the fact that the children have been in Coimbatore since August 2012 for over two years. The question that arose in our minds was whether the children had adjusted to life in India and had taken root in India and whether, under the circumstances, it would be appropriate to direct their repatriation to the U.K. instead of conducting an elaborate inquiry in India. It is always difficult to say whether any person has taken any root in a country other than that of his or her nationality and in a country other than where he or she was born and brought up. From the material on record, it cannot be said that life has changed so much for the children that it would be better for them to remain in India than to be repatriated to the U.K. The facts in this case do not suggest that because of their stay in India over the last two years the children are not capable of continuing with their life in the U.K. should that become necessary. However, this can more appropriately be decided by the foreign court after taking all factors into consideration.

70. It must be noted at this stage that efforts were made by this court to have the matter of custody settled in an amicable manner, including through mediation, as recorded in a couple of orders that have been passed by this court. Surya had also agreed to and did temporarily shift his residence to Coimbatore and apparently met the children. However, in spite of all efforts, it was not possible to amicably settle the issue and the mediation centre attached to this court gave a

report that mediation between the parties had failed. This left us with no option but to hear the appeal on merits.

71. Given these facts and the efforts made so far, in our opinion, there is no reason to hold any elaborate inquiry as postulated in L. (Minors) - this elaborate inquiry is best left to be conducted by the foreign court which has the most intimate contact and the closest concern with the children. We have also noted that Surya did not waste any time in moving the foreign court for the custody of the children. He moved the foreign court as soon as he became aware (prior to the efforts made by this court) that no amicable solution was possible with regard to the custody of the children.

72. We are conscious that it will not be financially easy for Mayura to contest the claim of her husband Surya for the custody of the children. Therefore, we are of the opinion that some directions need to be given in favour of Mayura to enable her to present an effective case before the foreign court.

73. Accordingly, we direct as follows:-

(1) Since the children Sneha Lakshmi Vadanan and Kamini Lakshmi Vadanan are presently studying in a school in Coimbatore and their summer vacations commence (we are told) in May, 2015 Mayura Vadanan will take the children to the U.K. during the summer vacations of the children and comply with the order dated 29th November, 2012 and participate (if she so wishes) in the proceedings pending in the High Court of Justice. Surya Vadanan will bear the cost of litigation expenses of Mayura Vadanan.

(2) Surya Vadanan will pay the air fare or purchase the tickets for the travel of Mayura Vadanan and the children to the U.K. and later, if necessary, for their return to India. He shall also make all arrangements for their comfortable stay in their matrimonial home, subject to further orders of the High Court of Justice.

(3) Surya Vadanan will pay maintenance to Mayura Vadanan and the children at a reasonable figure to be decided by the High Court of Justice or any other court having jurisdiction to take a decision in the matter. Until then, and to meet immediate out of pocket expenses, Surya Vadanan will give to Mayura Vadanan prior to her departure from India an amount equivalent to £1000 (Pounds one thousand only).

(4) Surya Vadanan shall ensure that all coercive processes that may result in penal consequences against Mayura Vadanan are dropped or are not pursued by him.

(5) In the event Mayura Vadanan does not comply with the directions given by us, Surya Vadanan will be entitled to take the children with him to the U.K. for further proceedings in the High Court of Justice. To enable this, Mayura Vadanan will deliver to Surya Vadanan the passports of the children Sneha Lakshmi Vadanan and Kamini Lakshmi Vadanan.

74. The appeal is disposed of on the above terms.

(Madan B. Lokur)
(Uday Umesh Lalit)

New Delhi; February 27, 2015

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MOHAN KUMAR RAYANA VERSUS KOMAL MOHAN RAYANA

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Bench: Hon'ble Mr. Justice Altamas Kabir, Hon'ble Mr. Justice G.S. Singhvi & Hon'ble Mr. Justice Cyriac Joseph

Mohan Kumar Rayana … Petitioner
Vs.
Komal Mohan Rayana … Respondent

SPECIAL LEAVE PETITION (C) NOs.9821-9822 OF 2009

These petitions involve the final stage of a custody battle on account of disruption and finally a break down of the marriage ties between the petitioner and the respondent.

The High Court, after carefully considering the various other aspects conducive to the child's welfare, and despite the interim order of custody in favour of the petitioner-husband, chose not to interfere with the order of the Family Court and directed that the custody of minor Anisha should continue to be with her mother, the respondent herein, and that sufficient access provided to the petitioner-father would meet the ends of justice. The petitioner's prayer for Anisha's custody, therefore, was rejected and being aggrieved thereby, the petitioner-husband has filed the instant Special Leave Petition.

From the various questions which we put to Anisha, who, in our view, is an extremely intelligent and precocious child, she wanted to enjoy the love and affection both of her father as well as her mother and even in our presence expressed the desire that what she wanted most was that they should come together again. However, Anisha seems to prefer her mother's company as the bonding between them is greater than the bonding with her father. Anisha is a happy child, the way she is now and having regard to her age and the fact that she is a girl child, we are of the view that she requires her mother's company more at this stage of her life.

There is no doubt that the petitioner is very fond of Anisha and is very concerned about her welfare and future, but in view of his business commitments it would not be right or even practicable to disturb the status quo prevailing with regard to Anisha's custody.

The conditions laid down by the High Court regarding visitation rights to the petitioner are,in our view, sufficient for Anisha to experience the love and affection both of her father and mother. There is no reason why the petitioner, who will have access to Anisha on holidays and weekends, cannot look after her welfare without having continuous custody of her person. As has repeatedly been said, in these matters the interest of the minor is of paramount importance to the Court which stands in loco parentis to the minor. Of course, the wishes of the minor are to be given due weightage, and, in the instant case, the same has been done.

JUDGMENT

Hon'ble Mr. Justice Altamas Kabir :—

1. These petitions involve the final stage of a custody battle on account of disruption and finally a break down of the marriage ties between the petitioner and the respondent.

2. The petitioner and the respondent got married in Hyderabad on 11th August, 2000. A girl child, Anisha, was born on 2nd March, 2002. The nuclear family, along with the mother of the petitioner husband, resided together at Chamboor, Mumbai till July, 2004 when, for whatever reason, the respondent-wife left the matrimonial home to stay with her parents at Bandra. On 24th November, 2005, with the help of police personnel from Chamboor Police Station, she took away Anisha from the custody of the petitioner's mother. The petitioner recovered the custody of the daughter on 30th November, 2005 and this resulted in both the husband as well as the wife filing separate Custody Petitions before the Family Court in December, 2005. On 20th December, 2005, the Family Court granted weekend access/visitation right to the respondent-wife and by a subsequent order dated 15th September, 2006. the Family Court granted interim custody of the child to the petitioner-husband pending hearing and final disposal of the Custody Petition. The child remained in custody of the petitioner-father between November, 2005 and 2nd February, 2007, when the husband was directed to make over the custody of the child to the respondent-wife and since then she has been in the custody of the respondent-wife.

3. Two appeals being Family Court Appeal No.29 of 2007 and Family Court Appeal No.61 of 2007 were filed by the petitioner-husband and the respondent wife respectively. The Family Court Appeal No.29 of 2007, which was filed by the petitioner-husband, was directed against the judgment and order of the Family Court directing that custody of the minor child be made over to the respondent-wife. Despite the finding that during the period when Anisha was in the petitioner's custody she had been well looked after and cared for and the petitioner had dutifully discharged his parental responsibility towards her. In the other appeal, the respondent wife challenged the order of access made in favour of the petitioner-husband on every alternate weekend and to share 50% of the School Vacations with the petitioner. In fact, at one stage this matter also once appeared before us and certain specific directions were given regarding the manner of access of the petitioner-husband to Anisha. While disposing of the pending appeals, the Division Bench of the High Court had occasion to consider the legal and practical approach regarding custody of the minor in the light of the well established doctrine that in these cases, the welfare and interest of the minor was the paramount consideration. Having dealt with the relevant provisions of the Hindu Minority and Guardianship Act, 1956, since the parents as also the minor is a Hindu and while passing the final order the Division Bench was fully alive to the fact that under Section 6 of the above Act the father is the natural guardian of the person of the minor during his minority. Despite the said legal position, the High Court, after carefully considering the various other aspects conducive to the child's welfare, and despite the interim order of custody in favour of the petitioner-husband, chose not to interfere with the order of the Family Court and directed that the custody of minor Anisha should continue to be with her mother, the respondent herein, and that sufficient access provided to the petitioner-father would meet the ends of justice. The petitioner's prayer for Anisha's custody, therefore, was rejected and being aggrieved thereby, the petitioner-husband has filed the instant Special Leave Petition.

4. On behalf of the petitioner-husband it was urged that the judgment and order of the High Court suffered from various infirmities. It was submitted that having found that Anisha had been well looked after during the period of petitioner's custody and the respondent-wife was trying to poison the child's mind against the petitioner and having also held that from the psychiatric evaluation made that the respondent-wife had a manipulative personality, apart from having a tendency towards psychosis which needed medical attention, the High Court erroneously chose note to interfere with the order of the Family Court directing custody of minor Anisha to be made over to the respondent-wife. It was further urged that the High Court had not properly appreciated the fact that when the respondent-wife left the matrimonial home in July, 2004 to pursue film and television career, she left Anisha behind when she was only 2 years and 4 months old, thereby virtually abandoning the child when she needed her mother's care the most. For more than 2 years she did not have any contact with Anisha till in May, 2005 she forcibly removed Anisha from her paternal grandmother's custody. It was submitted that the respondent-wife was so bent upon pursuing a career in films and television that she had no qualms about leaving a 2½ year old baby girl who needed her attention and motherly affection.

5. Mr. Shyam Divan, learned Senior Advocate, who appeared with Dr. A.M. Singhvi, learned Senior Advocate, for the appellant, submitted that the final conclusion of the judgment and order of the High Court was against the grain of the findings therein regarding the petitioner's ability to look after the welfare of the minor child. Mr. Divan urged that both the parties were subjected to psychiatric evaluation on the directions of the High Court and in all the reports, and, in particular, in the report dated 20th September, 2007, submitted by Dr. Haridas, who was the Head of Department of Psychiatry, JJ Hospital, Mumbai, the respondent was diagnosed with a histrionic personality disorder of a nature that rendered her unfit for having custody of the child. It was pointed out that in the said report it was also mentioned that the respondent-wife was highly manipulative and readily spoke lies even for trivial matters and showed trends of psychosis. On a comparative assessment of both the parties, the report concluded that it would not be in the interest of the child to keep her in the custody of respondent-mother and that, on the contrary, the petitioner-father was more fit and capable to undertake the upbringing of the child. Mr. Divan submitted that even in the second report submitted on 22nd November, 2008, it was stated that there was no evidence to revise the recommendations made in the earlier report. Mr. Divan submitted that despite the opinion of the medical experts and the Court's own findings that the child was being manipulated, tutored and poisoned against the petitioner-husband by the respondent-wife, the High Court, as mentioned earlier, had erroneously chosen not to interfere with the order of the Family Court and in the ultimate analysis allowed the custody of the minor child to remain with the respondent-wife.

6. It was also submitted that in the face of the opinion of experts, the Family Court ought not to have relied upon the statements made by the Counsellors appointed by it or on the evidence of Shridhar Khochare, the Secretary of the Society where the parents of the respondent resided, or the evidence of Dr. Vivek Hebar who had also seen the respondent-wife at the school where Anisha was studying. It was submitted that as against the opinion of Dr. Anjali Chhabaria, wherein it was clearly stated that Anisha had confided in her that the respondent was mad and was not good, the Family Court ought not to have given undue importance to the report of Mrs. A.R. Tulalwar who had interviewed Anisha on 13th January, 2006. It was also submitted that the attitude of the respondentwife to block all interaction between the petitioner and the child in

order to alienate the child completely from the petitioner and to deprive her of the petitioner's love and affection as a father, was also a factor which went against the respondent being given custody of the minor. Mr. Divan submitted that obsession of the respondentwife for exclusive custody of the minor child was commented upon by the High Court and the very fact that she has also filed an appeal only with regard to 50% access given to the petitioner-husband during the minor's school vacations, also made her obsession for exclusive custody, to the detriment of the child's interest, very clear. It was submitted that a parent who poisons the child's mind against her father does not act in the child's welfare and should not, therefore, be entrusted with the custody of the child. Mr. Divan submitted that the minor child requires love and care of both the parents and even if the relationship between the two are disrupted, the child should not be deprived of a meaningful relationship with both the parents. It was urged that while the wishes of the minor are to be considered seriously in deciding a matter of custody, the same was not the sole criteria and it would have to be seen as to who would be more suitable for the upbringing of the child, who, till November, 2005, when the child was about 3½ years' old, did not even make an attempt to meet the child and was prepared to sacrifice the welfare of the child in order to pursue a film and television career. Mr. Divan submitted that in view of the conduct of the respondent and her denial of access to the minor despite the orders of this Court, the respondent should not be allowed to enjoy the fruits of her conduct.

7. In this regard, Mr. Divan referred to the decision of this Court in Gaurav Nagpal vs. Sumedha Nagpal [(2009) 1 SCC 42], wherein this Court, inter alia, held that the paramount consideration of the Court in determining the question as to who should be given the custody of a minor child, is the "welfare of the child" and not rights of the parents under the statute for the time being in force or what the parties say. The Court has to give due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings, but over and above physical comforts, the moral and ethical values should also be noted. They are equal, if not more important than the other. When the Court is confronted with conflicting statements made by the parents, each time it has to justify the demands and has not only to look at the issue on a legalistic basis but human angles are also to be considered as relevant for deciding the issues. In the facts of the said case where the father had flouted the orders of the Court in keeping the custody of the minor child with him, this Court observed that he cannot be a beneficiary of his own wrongs and the said fact cannot be ignored while considering the father's claim that the child had not been living with him since a long time. It was also observed that in child custody matters there should be a proper balance between the rights of the parents and the welfare of the child and in such circumstances, the choice of the minor is also an important consideration. Mr. Divan submitted that in the face of overwhelming evidence that the respondent should not be entrusted with the custody of the minor child, both the Family Court as well as the High Court quite inexplicably decided that the interest of the minor would be best served if custody was given to the respondent. It was submitted that if the welfare and future interest of the minor was to be taken into consideration, the order of the Family Court as affirmed by the High Court, was liable to be set aside and the custody of the minor child should be made over to the petitioner.

8. The submissions made by Mr. Shyam Divan were firmly opposed by Ms. Meenakshi Lekhi, learned Advocate, who appeared for the respondent-wife. Learned counsel submitted that the allegation that the respondent-wife had abandoned her minor child was incorrect, since in March, 2005, when she left her matrimonial home, she took Anisha with her in terms of

an arrangement between the petitioner and herself. Ms. Lekhi submitted that this aspect of the matter had been examined at some length by the learned Judge, Family Court, Mumbai at Bandra in his judgment dated 2nd February, 2007 and the allegation of the petitioner-husband that there was no communication between the respondent and the minor daughter stood contradicted by the evidence on record. In fact, the learned Judge, Family Court had gone on to observe that the contrary stand taken by the petitioner-husband and the positive statement brought out in his crossexamination was sufficient to dislodge his case that the respondent-wife had abandoned the child.

9. Ms. Lekhi also submitted that Mrs. A.R. Tulalwar, Marriage Counsellor appointed by the Principal Judge, Family Court, to ascertain the wishes of the minor child for the purpose of access by the respondent-wife, had in her final report indicated that the child shared a normal relationship with the respondent-wife and considering her age she needed her mother's company to strengthen the bond between them. It was also observed that the child was familiar with the mother and access would have to be worked out even outside the Court. In her second interview report, Mrs. Tulalwar further observed that Anisha share a very good relationship with her mother and was willing to spend time with her mother, and, in fact, this was her need at her age. Ms. Lekhi also referred to the interview which the Court had had with the child on 15th November, 2006, whereupon the Court concluded that as far as the wishes of the child were concerned, she did not want to leave her father as well as her mother, as she loved both of them very dearly and wanted them to reunite.

10. Ms. Lekhi submitted that the allegations regarding abandonment of the child by the respondent-wife were not, therefore, believed by the learned Principal Judge, Family Court, which ultimately felt that it would be in the best interest of the minor if her custody was made over to the respondent-wife.

11. As far as the allegations regarding denial of access by the respondent-wife to the petitioner to meet Anisha is concerned, it was urged that between 2007 till January, 2009, the petitioner made no attempt to exercise visitation rights given to him and did not make any attempt to meet the child. On the other hand, the petitioner who is very successful businessman and who has to go abroad very often, was not really interested in the welfare of the child since a suggestion had also been made by Dr. Haridas that if the petitionerhusband was not willing to accept custody of the child, she could always be sent to a boarding school.

12. Ms. Lekhi submitted that the order passed by the learned Principal Judge, Family Court, Mumbai at Bandra, as affirmed by the High Court, did not warrant any interference and the Special Leave Petitions were liable to be dismissed.

13. Having the interest of the minor in mind, we decided to meet her separately in order to make an assessment of her behavioural pattern towards both the petitioner as well as the respondent. Much against the submissions which have been made during the course of hearing of the matter, Anisha appeared to have no inhibitions in meeting the petitioner-father with whom she appeared to have an excellent understanding. There was no evidence of Anisha being hostile to her father when they met each other in our presence. From the various questions which we put to Anisha, who, in our view, is an extremely intelligent and precocious child, she wanted to enjoy the love and affection both of her father as well as her mother and even in our presence expressed the desire that what she wanted most was that they should come together again. However, Anisha

seems to prefer her mother's company as the bonding between them is greater than the bonding with her father. Anisha is a happy child, the way she is now and having regard to her age and the fact that she is a girl child, we are of the view that she requires her mother's company more at this stage of her life. There is no doubt that the petitioner is very fond of Anisha and is very concerned about her welfare and future, but in view of his business commitments it would not be right or even practicable to disturb the status quo prevailing with regard to Anisha's custody. The conditions laid down by the High Court regarding visitation rights to the petitioner are, in our view, sufficient for Anisha to experience the love and affection both of her father and mother. There is no reason why the petitioner, who will have access to Anisha on holidays and weekends, cannot look after her welfare without having continuous custody of her person. As has repeatedly been said, in these matters the interest of the minor is of paramount importance to the Court which stands in loco parentis to the minor. Of course, the wishes of the minor are to be given due weightage, and, in the instant case, the same has been done.

14. We, therefore, see no reason to interfere with the order passed by the learned Principal Judge, Family Court, Mumbai at Bandra, as affirmed by the Bombay High Court.

15. The Special Leave Petitions are, accordingly, dismissed and all interim orders are hereby dissolved.

(ALTAMAS KABIR)
(G.S. SINGHVI)
(CYRIAC JOSEPH)

New Delhi

Dated:06.04.2010.

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DR. V. RAVI CHANDRAN VERSUS UNION OF INDIA & ORS.

IN THE SUPREME COURT OF INDIA
CRIMINAL ORIGINAL JURISDICTION

Bench: Hon'ble Mr. Justice Tarun Chatterjee, Hon'ble Mr. Justice R. M. Lodha & Hon'ble Dr. Justice B.S. Chauhan

Dr. V. Ravi Chandran ..Petitioner
Versus
Union of India & Ors. ..Respondents

WRIT PETITION (CRL.) NO.112/2007

Adithya is a boy of seven, born on July 1, 2002, in the United States of America. He is a foreign national. The petition before us is by the father – Dr. V . Ravi Chandran—praying for a writ of habeas corpus for the production of his minor son Adithya and for handing over the custody and his passport to him.

Dr. V. Ravi Chandran - petitioner – is an American citizen. He and respondent no. 6 got married on December 14, 2000 at Tirupathi, Andhra Pradesh according to Hindu rites. On July 1, 2002, Adithya was born in United States of America. In the month of July 2003, respondent no. 6 approached the New York State Supreme Court for divorce and dissolution of marriage. A consent order governing the issues of custody and guardianship of minor Adithya was passed by the New York State Supreme Court on April 18, 2005. The Court granted joint custody of the child to the petitioner and respondent no. 6 and it was stipulated in the order to keep the other party informed about the whereabouts of the child. On July 28, 2005, a Separation Agreement was entered between the petitioner and respondent no.6 for distribution of marital property, spouse maintenance and child support. As regards custody of the minor son Adithya and parenting time, the petitioner and respondent no. 6 consented to the order dated April 18, 2005. On September 8, 2005, the marriage between the petitioner and respondent no.6 was dissolved by the New York State Supreme Court. Child custody order dated April 18, 2005 was incorporated in that order.

Upon the petition for enforcement filed by respondent no.6 before the Family Court of the State of New York, on June 18, 2007, upon the consent of both parties, inter – alia, the following order came to be passed:

"ORDERED, the parties shall share joint legal and physical custody of the minor child; and it is further ORDERED, that commencing during August 2007, Adithya shall reside in Allen,Texas.

On June 28, 2007 respondent no.6 brought minor Adithya to India informing the petitioner that she would be residing with her parents in Chennai. On August 08, 2007, the petitioner filed the petition for modification (Custody) and Violation Petition (Custody) before the Family Court of the State of New York on which a show cause notice came to be issued to respondent no.6. On that very day, the petitioner was granted temporary sole legal and physical custody of Adithya and respondent no. 6 was directed to immediately turn over the minor child and his passport.

While dealing with a case of custody of a child removed by a parent from one country to another in contravention to the orders of the court where the parties had set up their matrimonial home, the court in the country to which child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to child's welfare be investigated in a court in his own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of child including stability and security, loving and understanding care and guidance and full development of the child's character, personality and talents. While doing so, the order of a foreign court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case. However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the Court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interest of the child.

JUDGMENT

Hon'ble Mr. Justice R.M. Lodha :—

Adithya is a boy of seven, born on July 1, 2002, in the United States of America. He is a foreign national. The petition before us is by the father – Dr. V . Ravi Chandran—praying for a writ of habeas corpus for the production of his minor son Adithya and for handing over the custody and his passport to him.

2. On August 28, 2009, this Court passed an order requesting Director, Central Bureau of Investigation (CBI) to trace minor Adithya and produce him before this Court. The necessity of such order arose as despite efforts made by the police officers and officials of different states, Adithya and his mother – respondent no. 6—Vijayasree Voora—could not be traced and their whereabouts could not be found for more than two years since the notice was issued by this Court. In pursuance of the order dated August 28, 2009, CBI issued look out notices on all India basis through heads of police of States, Union Territories and Metropolitan Cities and also alert notices through Deputy Director, Bureau of Immigration (Immigration), Ministry of Home Affairs, New Delhi and flashed photographs of the child Adithya and his mother Vijayasree Voora. Ultimately with its earnest efforts, CBI traced Adithya and his mother Vijayashree Voora in Chennai on October 24, 2009 and brought them to Delhi and produced the child along with his mother at the residential office of one of us (Tarun Chatterjee, J.) on October 25, 2009. On that day, the CBI authorities were directed to keep the child under their custody and produce him before the Court on October 27, 2009. Respondent no. 6 was also directed to be produced on that date. On October 27, 2009, the matter was adjourned for November 4, 2009 since respondent no.6 wanted to engage a lawyer and file a counter affidavit. On November 4, 2009, matter was adjourned to November 10, 2009 and then to November 12, 2009. The petitioner was permitted to meet the child for one hour on November 10, 2009 and November 12, 2009. In the meanwhile, respondent no. 6 has filed counter affidavit in opposition to the habeas corpus petition and petitioner has filed rejoinder affidavit to the counter affidavit filed by respondent no.6.

3. We heard Ms. Pinky Anand, learned senior counsel for the petitioner and Mr. T.L.V. Iyer, learned senior counsel for respondent no. 6. Now since minor Adithya has been produced, the only question that remains to be considered is with regard to the prayer made by the petitioner for handing over the custody of minor Adithya to him with his passport.

4. But before we do that, it is necessary to notice few material facts. Dr. V. Ravi Chandran – petitioner – is an American citizen. He and respondent no. 6 got married on December 14, 2000 at Tirupathi, Andhra Pradesh according to Hindu rites. On July 1, 2002, Adithya was born in United States of America. In the month of July 2003, respondent no. 6 approached the New York State Supreme Court for divorce and dissolution of marriage. A consent order governing the issues of custody and guardianship of minor Adithya was passed by the New York State Supreme Court on April 18, 2005. The Court granted joint custody of the child to the petitioner and respondent no. 6 and it was stipulated in the order to keep the other party informed about the whereabouts of the child. On July 28, 2005, a Separation Agreement was entered between the petitioner and respondent no.6 for distribution of marital property, spouse maintenance and child support. As regards custody of the minor son Adithya and parenting time, the petitioner and respondent no. 6 consented to the order dated April 18, 2005. On September 8, 2005, the marriage between the petitioner and respondent no.6 was dissolved by the New York State Supreme Court. Child custody order dated April 18, 2005 was incorporated in that order.

5. Upon the petition for modification of custody filed by the petitioner and the petition for enforcement filed by him and upon the petition for enforcement filed by respondent no.6 before the Family Court of the State of New York, on June 18, 2007, upon the consent of both parties, inter – alia, the following order came to be passed:

> *"ORDERED, the parties shall share joint legal and physical custody of the minor child; and it is further*
>
> *ORDERED, that commencing during August 2007, Adithya shall reside in Allen, Texas; and it is further*
>
> *ORDERED, that the parties acknowledge that it is the intention of the parties to reside within the same community. As such, it is the mother's current intention to relocate to Texas, within a forty (40) mile radius of the father's residence. If the mother does relocate to a forty (40) mile radius of the father's residence (which shall be within a twenty (20) mile radius from the child's school),, the parties shall equally share physical custody of Adithya. The parties shall alternate physical custody on a weekly basis, with the exchange being on Friday, at the end of the School day, or at the time when school would ordinarily let out in the event that there is no school on Friday;*
>
> *ORDERED, that in the event that the mother does not relocate within forty (40) miles from the father's residence located in Allen, Texas (and within twenty (20) miles of Adithya's school), the mother shall have custodial time with the minor child, as follows:*
>
> *A. On Alternating weekends from Friday, at the end of the school day until Monday, prior to the beginning of school, commencing during the first week of September, 2007. Such periods of custodial time shall take place within forty (40) miles from the father's residence located in Allen, Texas. In the event that there is no school on the Friday of the mother's weekend, she shall have custodial time with the*

child beginning at 7.00 a.m. on Friday morning, and, in the event that there is no school on Monday of the mother's custodial weekend, she shall have custodial time until 5.00 p.m. on Monday, and

B. For ten (10) consecutive days during Spring vacation from school; and

C. For the entirety of the Christmas recess from School, except for Christmas Eve and Christmas day, which shall be with the father. In the event that the school recess is prior to Christmas Eve, the mother shall have the right to have custodial time during those recessed days to long as she produces the child at the father's residence for Christmas Eve and Christmas day ; and

D. During the following holidays:

i) Mother's birthday, which is on April 25;

ii) Mother's Day;

iii) Hindu Festival of Diwali and Deepavali;

iv) Adithya's birthday (July 1) in alternating years;

v) Thanks giving in alternating years (so that the mother has custodial time during even – numbered years and the father has custodial time during odd – numbered years);

vi) New Year's Day in alternating years (so that the mother has custodial time during even – numbered years and the father has custodial time during odd –numbered years) ;

ORDERED, that the parties shall share the summer recess from school so that the mother has custodial time for a total of up to fifty (50) days on a schedule so that each party has custodial time for 4 consecutive weeks, with the mother's custodial time commencing on the Monday following the final day of school…….

ORDERED, for the summer of 2007, the mother shall have custodial time from June 18 until June 20; the father shall have custodial time from June 20 until June 24; the mother shall have custodial time from June 25 until July 1; the father shall have custodial time from July 1 until July 6; and the mother shall then have custodial time from July 6 until August 3 and she shall be solely responsible for transporting the child to the father's residence in Allen, Texas on August 3. The father shall have custodial time until the commencement of school.

Thereafter the father shall continue to have custodial time until such time as the mother either a) returns from India and/or begins her alternating weekly schedule as set froth herein, or b) moves within 40 miles of the father's residence in Allen, Texas and commences her custodial time during alternating weeks;

ORDERED, that each party agrees that they shall provide the other parent with a phone number and address where the child will be located at all time, and that the other parent shall have reasonable and regular telephone communication with the minor child; and it is further

ORDERED, that each party agrees to provide the other party with the child's passport during each custodial exchange of the minor child, and that each party shall sign and deliver to the other, whatever written authorization may be necessary for travel with the child within the Continental United States or abroad;"

6. On June 28, 2007 respondent no.6 brought minor Adithya to India informing the petitioner that she would be residing with her parents in Chennai. On August 08, 2007, the petitioner filed the petition for modification (Custody) and Violation Petition (Custody) before the Family Court of the State of New York on which a show cause notice came to be issued to respondent no.6. On that very day, the petitioner was granted temporary sole legal and physical custody of Adithya and respondent no. 6 was directed to immediately turn over the minor child and his passport to the petitioner and further her custodial time with the minor child was suspended and it was ordered that the issue of custody of Adithya shall be heard in the jurisdiction of the United States Courts, specifically, the Albany County Family Court.

7. It transpires that the Family Court of the State of New York has issued child abuse non-bailable warrants against respondent no.6.

8. In the backdrop of the aforenoticed facts, we have to consider—now since the child has been produced—what should be the appropriate order in the facts and circumstances keeping in mind the interest of the child and the orders of the courts of the country of which the child is a national.

9. In re B—'s Settlement,[1] Chancery Division was concerned with an application for custody by the father of an infant who had been made a ward of court. The father was a Belgian national and the mother a British national who took Belgian nationality on marriage to him. The infant was born in Belgium. The mother was granted a divorce by a judgment of the Court in Belgium, but the judgment was reversed and the father became entitled to custody by the common law of Belgium. The mother, who had gone to live in England, visited Belgium and was by arrangement given the custody of the infant for some days. She took him to England and did not return him. The infant had been living with mother in England for nearly two years. The father began divorce proceedings in Belgium, and the Court appointed him guardian. Pending the proceedings, the Court gave him the custody and ordered the mother to return the infant within twenty-four hours of service of the order on her. She did not return the infant. The Correctional Court in Brussels fined her for disobedience and sentenced her to imprisonment should the fine be not paid. The Correctional Court also confirmed the custody order. In the backdrop of these facts, the summons taken out by the father that custody of the infant be given to him came up before Morton, J. who after hearing the parties and in view of the provisions of the Guardianship of Infants Act, 1925 observed thus:

"…At the moment my feeling is very strong that, even assuming in the father's favour that there is nothing in his character or habits which would render him unfitted to have the custody of the child, the welfare of the child requires, in all the circumstances as they exist, that he should remain in England for the time being In the present case the position is that nearly two years ago, when the child was already in England, an interlocutory order was made by the Divorce Court in Belgium giving the custody of the child to the father I do not know how far, if at all, the matter was considered on the footing of what was best for the child at that time, or whether it was regarded as a matter of course

1 {1940} Ch. 54

that the father, being the guardian by the common law of Belgium and the applicant in the divorce proceedings and the only parent in Belgium, should be given the custody. I cannot regard that order as rendering it in any way improper or contrary to the comity of nations if I now consider, when the boy has been in this country for nearly two years, what is in the best interests of the boy. I do not think it would be right for the Court, exercising its jurisdiction over a ward who is in this country, although he is a Belgian national, blindly to follow the order made in Belgium on October 5, 1937. I think the present case differs from Nugent v. Vetzera {FN10}, the case that was before Page Wood V.-C., and it is to be observed that even in that case, and in the special circumstances of that case, the Vice-Chancellor guarded himself against anything like abdication of the control of this Court over its wards. It does not appear what the Vice-Chancellor's view would have been if there had been evidence, for example, that it would be most detrimental to the health and well-being of the children if they were removed from England and sent to Austria ……..I ought to give due weight to any views formed by the Courts of the country whereof the infant is a national. But I desire to say quite plainly that in my view this Court is bound in every case, without exception, to treat the welfare of its ward as being the first and paramount consideration, whatever orders may have been made by the Courts of any other country."……

10. In Mark T. Mc.Kee vs. Eyelyn McKee[2], the Privy Council was concerned with an appeal from the Supreme Court of Canada. That was a case where the parents of the infant were American citizens. They were married in America and to whom a son was born in California in July 1940. They separated in December 1940 and on September 4, 1941, executed an agreement which provided, inter- alia, that neither of them should remove the child out of the United States without the written permission of the other. By a judgment of December 17, 1942, in divorce proceedings before the Superior Court of the State of California, the custody of the child was awarded to the father. On August 1, 1945, following applications by the father and the mother, the previous order as to custody was modified to provide full custody of the child to the mother with right of reasonable visitation to the father. Thereafter, and without the consent or knowledge of the mother, the father went from the United States of America with the child into the Province of Ontario. The mother thereupon instituted habeas corpus proceedings in the Supreme Court of Ontario seeking to have the child delivered to her.

Wells, J., before whom the matter came held that infant's best interests would be served in the custody of his father. The Court of Appeal for Ontario dismissed the appeal preferred by the mother. However, the Supreme Court of Canada by majority judgment allowed the appeal of the mother and set aside the order of custody of child to the father. On appeal from the Supreme Court of Canada at the instance of the father, the Privy Council held as follows:

"…….For, after reaffirming "the well established general rule that in all questions relating to the custody of an infant the paramount consideration is the welfare of the infant",

he observed that no case had been referred to which established the proposition that, where the facts were such as he found them to exist in the case, the salient features of which have been stated, a parent by the simple expedient of taking the child with him across the border into Ontario for the sole purpose of avoiding obedience to the judgment of the court, whose

2 {1951} A.C. 352

jurisdiction he himself invoked, becomes "entitled as of right to have the whole question retried in our courts and to have them reach a anew and independent judgment as to what is best for the infant". and it is, in effect, because he held that the father had no such right that the judge allowed the appeal of the mother, and that the Supreme Court made the order already referred to. But with great respect to the judge, this was not the question which had to be determined. It is possible that a case might arise in which it appeared to a court, before which the question of custody of an infant came, that it was in the best interests of that infant that it should not look beyond the circumstances in which its jurisdiction was invoked and for that reason give effect to the foreign judgment without further inquiry. But it is the negation of the proposition, from which every judgment in this case has proceeded, namely, that the infant's welfare is the paramount consideration, to say that where the trial judge has in his discretion thought fit not to take the drastic course above indicated, but to examine all the circumstances and form an independent judgment, his decision ought for that reason to be overruled. Once it is conceded that the court of Ontario had jurisdiction to entertain the question of custody and that it need not blindly follow an order made by a foreign court, the consequence cannot be escaped that it must form an independent judgment on the question, though in doing so it will give proper weight to the foreign judgment. What is the proper weight will depend on the circumstances of each case. It may be that, if the matter comes before the court of Ontario within a very short time of the foreign judgment and there is no new circumstance to be considered, the weight may be so great that such an order as the Supreme Court made in this case could be justified. But if so, it would be not because the court of Ontario, having assumed jurisdiction, then abdicated it, but because in the exercise of its jurisdiction it determined what was for the benefit of the infant.

It cannot be ignored that such consequences might follow as are suggested by Cartwright, J. The disappointed parent might meet stratagem by stratagem and, taking the child into the Province of Manitoba, invoke the protection of its courts, whose duty it would then be to determine the question of custody. That is a consideration which, with others, must be weighed by the trial judge. It is not, perhaps, a consideration which in the present case should have weighed heavily.

It has been said that the weight or persuasive effect of a foreign judgment must depend on the circumstances of each case. In the present case there was ample reason for the trial judge, in the first place, forming the opinion that he should not take the drastic course of following it without independent inquiry and, in the second place, coming to a different conclusion as to what was for the infant's benefit."……..

11. The aforesaid two cases came up for consideration in Harben vs. Harben[3], wherein Sachs J. observed as follows:

> *"It has always been the practice of this court to ensure that a parent should not gain advantage by the use of fraud or force in relation to the kidnapping of children from the care of the other spouse, save perhaps where there is some quite overwhelming reason in the children's interest why the status quo should not be restored by the court before deciding further issues. In the present case I am concerned with three young children, two of whom are girls and the youngest is aged only three. It is a particularly wicked thing to snatch such children from the care of a mother, and, in saying that, I have in mind not merely the mother's position but the harm that can be done to the children. No affidavit of the husband tendering either his regrets or any vestige of excuse for his*

3 {1957} 1. W.L.R. 261

action has been proffered. Further, as I have already mentioned, when first I asked Mr. Syms what was the nature of the case which he might wish to make, if so minded, for depriving these children of a mother's care, he only spoke of her association with a certain man and never suggested that she had in any way whatsoever failed to look after the children properly."

12. In Kernot vs. Kernot[4] , the facts were thus: In May 1961, the plaintiff mother, an Italian lady, married an English man in Italy where both were residents. A boy was born there on March 29, 1962.

On October 19, 1963, they obtained in Italian Court a separation order by consent providing therein that custody of the child would remain with father, with rights of access to the mother . On October 29, 1963, the father brought the infant to England with intention to make England his home. The mother commenced wardship proceedings in which she brought a motion for an order that the father return the infant to her in Italy. She also prayed for restraint order against him from taking the infant out of her care. Buckley, J. in these facts held thus:

"So that even where a foreign court has made an order on the merits – which is not the present case, because the only order which has been made was a consent order without any investigation of the merits by the Italian court – that domestic court before whom the matter comes (the Ontario court in the case to which I have just referred, or this court in the case before me) is bound to consider what is in the best interests of the infant; and although the order of the foreign court will be attended to as one of the circumstances to be taken into account it is not conclusive one way or the other. How much stronger must the duty of this court be to entertain the case where the foreign court has not made any order based on any investigation of the case on its merits."

13. In re H. (Infants)[5], the Court of Appeal was concerned with two American boys whose divorced parents were both citizens of United States of America. On December 11, 1964, the Supreme Court of New York State made a consent order directing that the two boys whose custody had been given to the mother should be maintained in her apartment in New York and not be removed from a 50 miles' radius of Peekskill without the prior written consent of the father. However, the mother in March 1965 brought these boys to England and bought a house for herself and children in June 1965. On June 15, 1965, the New York Court ordered the children to be returned to New York. The mother started wardship proceedings in the English court. The father took out motion asking the mother that the two children should be delivered into his care, that he should be at liberty to convey them to New York and that the wardship of the children should be discharged. The Trial Judge held that the justice of the case required the children to be returned without delay to the jurisdiction of the New York court, so that the question of where and with whom they should live might be decided as soon as possible by that court. The mother appealed to the Court of Appeal. Willmer L.J. and Harman L.J. by their separate judgments affirmed the view of the Trial Judge and held that the proper order was to send these two boys back to their State of New York, where they belong (and where the Supreme Court is already seized of their case), and more especially so having regard to the fact that they have been kept in flagrant contempt of New York Court's order.

Willmer L.J. agreed with the remark of Cross J. where he said:

4 {1965} Ch.217
5 (1966) 1 W.L.R. 381 = (1966) 1 All.E.R. 886

"The sudden and unauthorized removal of children from one country to another is far too frequent nowadays, and as it seems to me it is the duty of all courts in all countries to do all they can to ensure that the wrongdoer does not gain an advantage by his wrongdoing."

Willmer L.J. went on to hold:

"The judge took the view (and I think it was the right view) that in a case such as the present it was not necessary to go into all the disputed questions between the parents, but that he ought to send these boys back to their own country to be dealt with by the court of their own country, provided that he was satisfied (as he was satisfied, having seen the father himself, and having had the benefit of the view expressed on behalf of the Official Solicitor) that they would come to no harm if the father took them back to the United States; and that this was so, even though it might subsequently turn out, after all the merits of the case had been thoroughly thrashed out in the court in New York, that it would perhaps be better after all for the boys to reside in England and see little or nothing of their father."

Harman L.J. in his separate judgment held thus:

".....But if he chose to take the course which the judge here took in the interests of the children , as he thought, of sending them back to the United States with no more inquiry into the matter than to ensure, so far as he could, that there was no danger to their moral or physical health in taking that course, I am of opinion that he was amply justified, and that that was the right way in which to approach the issue. These children had been the subject of an order (it is true made by consent) made in the courts of their own country in December, 1964. It was only three months later that the mother flouted that order, deceived her own advisers and deceived the court , and brought the children here with the object of taking them right out of their father's life and depriving him altogether of their society. The interval is so short that it seems to me that the court inevitably was bound to view the matter through those spectacles; that is to say, that the order having been made so shortly before, and there being no difference in the circumstances in the three months which had elapsed , there was no justification for the course which the mother had taken, and that she was not entitled to seek to bolster her own wrong by seeking the assistance of this court in perpetuating that position, and seeking to change the situation to the father's disadvantage."

14. In re. L (minors)[6], the Court of Appeal was concerned with the custody of the foreign children who were removed from foreign jurisdiction by one parent. That was a case where a German national domiciled and resident in Germany married an English woman. Their matrimonial home was Germany and the two children were born out of the wedlock and brought up in Germany. The lady became unhappy in her married life and in August, 1972, she brought her children to England with an intention of permanently establishing herself and the children in England. She obtained residential employment in the school in England and the children were accommodated at the school. The children not having returned to Germany, the father came to England to find them. On October 25, 1972, the mother issued an originating summons making them wards of court. The trial judge found that the children should be brought up by their mother and treating the case as a 'kidnapping' class of case, approached the matter by observing

6 (1974) 1 All ER 913

that in such a case where the children were foreign children, who had moved in a foreign home, their life should continue in what were their natural surroundings, unless it appeared to the court that it would be harmful to the children if they were returned. He concluded that in view of the arrangements which their father could make for them, the children would not be harmed by being returned. He, accordingly, ordered that they be returned to Germany and that they remain in their father's custody until further order. The mother appealed, contending that in every case the welfare of the child was the first and paramount consideration and that the welfare of the children would be best served by staying with their mother in England. Buckley, LJ in his detailed consideration of the matter, wherein he referred to the aforenoticed decisions and few other decisions as well, held as follows :

> *".....Where the court has embarked on a full-scale investigation of that facts, the applicable principles, in my view, do not differ from those which apply to any other wardship case. The action of one party in kidnapping the child is doubtless one of the circumstances to be taken into account, any may be a circumstance of great weight; the weight to be attributed to it must depend on the circumstances of the particular case. The court may conclude that notwithstanding the conduct of the 'kidnapper' the child should remain in his or her care (McKee v. McKee, Re E (an infant) and Re. T.A. (infants), where the order was merely interim); or it may conclude that the child should be returned to his or her native country or the jurisdiction from which he or she has been removed. Where a court makes a summary order for the return of a child to a foreign country without investigating the merits, the same principles, in my judgment apply, but the decision must be justified on somewhat different grounds.*
>
> *The judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country than that he should spend in this country the period which must necessarily elapse before all the evidence can be assembled for adjudication here. Anyone who has had experience of the exercise of this delicate jurisdiction knows what complications can result from a child developing roots in new soil, and what conflicts this can occasion in the child's own life. Such roots can grow rapidly. An order that the child should be returned forthwith to the country from which he has been removed in the expectation that any dispute about his custody will be satisfactorily resolved in the courts of that country may well be regarded as being in the best interests of the child....."*

15. In re. L. (minors)[6], the Court of Appeal has made a distinction between cases, where the court considers the facts and fully investigates the merits of a dispute, in a wardship matter in which the welfare of the child concerned is not the only consideration but is the first and paramount consideration, and cases where the court do not embark on a full-scale investigation of the facts and make a summary order for the return of a child to a foreign country without investigating the merits. In this regard, Buckley, L.J. noticed what was indicated by the Privy Council in McKee v. McKee[2] that there may be cases in which it is proper for a court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interest of the child.

16. This Court in Smt. Surinder Kaur Sandhu v. Harbax Singh Sandhu and Another[7] was concerned with the custody of a child— British citizen by birth—to the parents of Indian citizens, who after their marriage settled in England. The child was removed by the husband from the house when the wife was in the factory where she was working and brought him to India. The wife obtained an order under Section 41(English) Supreme Court Act, 1981 whereby the husband was directed to handover the custody of the boy to her. The said order was later on confirmed by the High Court in England. The wife then came to India and filed a writ petition under Article 226 in the High Court praying for production and custody of the child. The High Court dismissed her writ petition against which the wife appealed before this Court. Y.V. Chandrachud, C.J. (as he then was) speaking for the Court held thus :

> *"The modern theory of Conflict of Laws recognises and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged. To allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum-shopping. Ordinarily, jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offsprings of marriage. The spouses in this case had made England their home where this boy was born to them. The father cannot deprive the English Court of its jurisdiction to decide upon his custody by removing him to India, not in the normal movement of the matrimonial home but, by an act which was gravely detrimental to the peace of that home. The fact that the matrimonial home of the spouses was in England, establishes sufficient contacts or ties with that State in order to make it reasonable and just for the courts of that State to assume jurisdiction to enforce obligations which were incurred therein by the spouses. (See International Shoe Company v. State of Washington which was not a matrimonial case but which is regarded as the fountainhead of the subsequent developments of jurisdictional issues like the one involved in the instant case.) It is our duty and function to protect the wife against the burden of litigating in an inconvenient forum which she and her husband had left voluntarily in order to make their living in England, where they gave birth to this unfortunate boy."*

17. In Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw and Another[8], this Court held that it was the duty of courts in all countries to see that a parent doing wrong by removing children out of the country does not gain any advantage by his or her wrongdoing. In para 9 of the report, this Court considered the decision of the Court of Appeal in re H.5 and approved the same in the following words:

> *"9. In Re H. (infants) [(1966) 1 All ER 886] the Court of Appeal in England had occasion to consider a somewhat similar question. That case concerned the abduction to England of two minor boys who were American citizens. The father was a naturalborn American citizen and the mother, though of Scottish origin, had been resident for 20 years in the United States of America. They were divorced in 1953 by a decree in Mexico, which embodied provisions entrusting the custody of the two boys to the mother with*

7 (1984) 3 SCC 698
8 (1987) 1 SCC 42

liberal access to the father. By an amendment made in that order in December 1964, a provision was incorporated that the boys should reside at all times in the State of New York and should at all times be under the control and jurisdiction of the State of New York. In March 1965, the mother removed the boys to England, without having obtained the approval of the New York court, and without having consulted the father; she purchased a house in England with the intention of remaining there permanently and of cutting off all contacts with the father. She ignored an order made in June 1965, by the Supreme Court of New York State to return the boys there. On a motion on notice given by the father in the Chancery Division of the Court in England, the trial Judge Cross, J. directed that since the children were American children and the American court was the proper court to decide the issue of custody, and as it was the duty of courts in all countries to see that a parent doing wrong by removing children out of their country did not gain any advantage by his or her wrongdoing, the court without going into the merits of the question as to where and with whom the children should live, would order that the children should go back to America. In the appeal filed against the said judgment in the Court of Appeal, Willmer, L.J. while dismissing the appeal extracted with approval the following passage from the judgment of Cross, J. [(1965) 3 All ER at p. 912. (Ed. : Source of the second quoted para could not be traced.)]:

"The sudden and unauthorised removal of children from one country to another is far too frequent nowadays, and as it seems to me, it is the duty of all courts in all countries to do all they can to ensure that the wrongdoer does not gain an advantage by his wrongdoing. The courts in all countries ought, as I see it, to be careful not to do anything to encourage this tendency. This substitution of self-help for due process of law in this field can only harm the interests of wards generally, and a Judge should, as I see it, pay regard to the orders of the proper foreign court unless he is satisfied beyond reasonable doubt that to do so would inflict serious harm on the child."

10. With respect we are in complete agreement with the aforesaid enunciation of the principles of law to be applied by the courts in situations such as this."

18. In the case of Dhanwanti Joshi v. Madhav Unde[9], this Court was again concerned with the matter relating to removal of a child from one country to another contrary to custody order of the court from where the child was removed. This court considered English decisions, inter alia, McKee v. McKee[2] and H. (infants), re.[5] and also noticed the decision of this Court in Mrs. Elizabeth Dinshaw[8] and observed as follows :

"28. The leading case in this behalf is the one rendered by the Privy Council in 1951, in McKee v. McKee [(1951) AC 352]. In that case, the parties, who were American citizens, were married in USA in 1933 and lived there till December 1946. But they had separated in December 1940. On 17-12-1941, a decree of divorce was passed in USA and custody of the child was given to the father and later varied in favour of the mother. At that stage, the father took away the child to Canada. In habeas corpus proceedings by the mother, though initially the decisions of lower courts went against her, the Supreme Court of Canada gave her custody but the said Court held that the father could not have the question of custody retried in Canada once the question was adjudicated in favour of the mother in the USA earlier. On appeal to the Privy Council, Lord

9 (1998) 1 SCC 112

Simonds held that in proceedings relating to custody before the Canadian Court, the welfare and happiness of the infant was of paramount consideration and the order of a foreign court in USA as to his custody can be given due weight in the circumstances of the case, but such an order of a foreign court was only one of the facts which must be taken into consideration. It was further held that it was the duty of the Canadian Court to form an independent judgment on the merits of the matter in regard to the welfare of the child. The order of the foreign court in US would yield to the welfare of the child. "Comity of courts demanded not its enforcement, but its grave consideration". This case arising from Canada which lays down the law for Canada and U.K. has been consistently followed in latter cases. This view was reiterated by the House of Lords in J v. C (1970 AC 668). This is the law also in USA (see 24 American Jurisprudence, para 1001) and Australia. (See Khamis v. Khamis [(1978) 4 Fam LR 410 (Full Court) (Aus)].

29. However, there is an apparent contradiction between the above view and the one expressed in H. (infants), Re[(1966) 1 All ER 886] and in E. (an infant), Re [(1967) 1 All ER 881] to the effect that the court in the country to which the child is removed will send back the child to the country from which the child has been removed. This apparent conflict was explained and resolved by the Court of Appeal in 1974 in L. (minors) (wardship : jurisdiction), Re [(1974) 1 All ER 913, CA] and in R. (minors) (wardship : jurisdiction), Re [(1981) 2 FLR 416 (CA)]. It was held by the Court of Appeal in L., Re [(1974) 1 All ER 913, CA] that the view in McKee v. McKee [1951 A.C. 352 : (1951) All ER 942] is still the correct view and that the limited question which arose in the latter decisions was whether the court in the country to which the child was removed could conduct (a) a summary inquiry or (b) an elaborate inquiry on the question of custody. In the case of (a) a summary inquiry, the court would return custody to the country from which the child was removed unless such return could be shown to be harmful to the child. In the case of (b) an elaborate inquiry, the court could go into the merits as to where the permanent welfare lay and ignore the order of the foreign court or treat the fact of removal of the child from another country as only one of the circumstances. The crucial question as to whether the Court (in the country to which the child is removed) would exercise the summary or elaborate procedure is to be determined according to the child's welfare. The summary jurisdiction to return the child is invoked, for example, if the child had been removed from its native land and removed to another country where, maybe, his native language is not spoken, or the child gets divorced from the social customs and contacts to which he has been accustomed, or if its education in his native land is interrupted and the child is being subjected to a foreign system of education, — for these are all acts which could psychologically disturb the child. Again the summary jurisdiction is exercised only if the court to which the child has been removed is moved promptly and quickly, for in that event, the Judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country on the expectation that an early decision in the native country could be in the interests of the child before the child could develop roots in the country to which he had been removed. Alternatively, the said court might think of conducting an elaborate inquiry on merits and have regard to the other facts of the case and the time that has lapsed after the removal of the child and consider if it would be in the interests of the child not to have it returned to the country from which it had been removed. In that event, the unauthorised removal of the child from the native country would not come in the way of the court in the country to which the child has been removed, to ignore the removal and independently consider whether the sending back of the child to its native country would be in the paramount interests of the child. (See Rayden & Jackson, 15th Edn., 1988, pp. 1477-79;

Bromley, Family law, 7th Edn., 1987.) In R. (minors) (wardship : jurisdiction), Re [(1981) 2 FLR 416 (CA)] it has been firmly held that the concept of forum conveniens has no place in wardship jurisdiction.

30. We may here state that this Court in Elizabeth Dinshaw v. Arvand M. Dinshaw [(1987) 1 SCC 42 : 1987 SCC (Crl.) 13] while dealing with a child removed by the father from USA contrary to the custody orders of the US Court directed that the child be sent back to USA to the mother not only because of the principle of comity but also because, on facts, — which were independently considered — it was in the interests of the child to be sent back to the native State. There the removal of the child by the father and the mother's application in India were within six months. In that context, this Court referred to H. (infants), Re which case, as pointed out by us above has been explained in L. Re as a case where the Court thought it fit to exercise its summary jurisdiction in the interests of the child. Be that as it may, the general principles laid down in McKee v. McKee and J v. C and the distinction between summary and elaborate inquiries as stated in L. (infants), Re are today well settled in UK, Canada, Australia and the USA. The same principles apply in our country. Therefore nothing precludes the Indian courts from considering the question on merits, having regard to the delay from 1984 — even assuming that the earlier orders passed in India do not operate as constructive res judicata."

However, in view of the fact that the child had lived with his mother in India for nearly twelve years, this Court held that it would not exercise a summary jurisdiction to return the child to United States of America on the ground that its removal from USA in 1984 was contrary to orders of U.S. Courts. It was also held that whenever a question arises before a court pertaining to the custody of a minor child, matter is to be decided not on considerations of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest of the minor.

19. In the case of Sarita Sharma v. Sushil Sharma[10], this Court was seized with a matter where the mother had removed the children from U.S.A. despite the order of the American Court. It was held :

> *"6. Therefore, it will not be proper to be guided entirely by the fact that the appellant Sarita had removed the children from U.S.A. despite the order of the Court of that country. So also, in view of the facts and circumstances of the case, the decree passed by the American Court though a relevant factor, cannot override the consideration of welfare of the minor children. We have already stated earlier that in U.S.A. respondent Sushil is staying along with his mother aged about 80 years. There is no one else in the family. The respondent appears to be in the habit of taking excessive alcohol. Though it is true that both the children have American citizenship and there is a possibility that in U.S.A they may be able to get better education, it is doubtful if the respondent will be in a position to take proper care of the children when they are so young. Out of them, one is a female child. She is aged about 5 years. Ordinarily, a female child should be allowed to remain with the mother so that she can be properly looked after. It is also not desirable that two children are separated from each other. If a female child has to stay with the mother, it will be in the interest of both the children that they both stay with the mother. Here in India also proper care of the children is taken and they are at present studying in good schools. We have not found the appellant wanting in taking*

10 (2000) 3 SCC 14

proper care of the children. Both the children have a desire to stay with the mother. At the same time it must be said that the son, who is elder then the daughter, has good feelings for his father also. Considering all the aspects relating to the welfare of the children, we are of the opinion that in spite of the order passed by the Court in U.S.A. it was not proper for the High Court to have allowed the habeas corpus writ petition and directed the appellant to hand over custody of the children to the respondent and permit him to take them away to U.S.A. What would be in the interest of the children requires a full and thorough inquiry and, therefore, the High Court should have directed the respondent to initiate appropriate proceedings in which such an inquiry can be held. Still there is some possibility of the mother returning to U.S.A. in the interest of the children. Therefore, we do not desire to say anything more regarding entitlement of the custody of the children. The chances of the appellant returning to U.S.A. with the children would epend upon the joint efforts of the appellant and the respondent to get the arrest warrant cancelled by explaining to the Court in U.S.A. the circumstances under which she had left U.S.A. with the children without taking permission of the Court. There is a possibility that both of them may thereafter be able to approach the Court which passed the decree to suitably modify the order with respect to the custody of the children and visitation rights."

20. While dealing with a case of custody of a child removed by a parent from one country to another in contravention to the orders of the court where the parties had set up their matrimonial home, the court in the country to which child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to child's welfare be investigated in a court in his own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of child including stability and security, loving and understanding care and guidance and full development of the child's character, personality and talents. While doing so, the order of a foreign court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case. However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the Court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interest of the child. The indication given in McKee v. McKee[2] that there may be cases in which it is proper for a court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interest of the child has been explained in re. L (minors)6 and the said view has been approved by this Court in Dhanwanti Joshi[9]. Similar view taken by the Court of Appeal in re. H5 has been approved by this Court in Elizabeth Dinshaw[8].

21. Do the facts and circumstances of the present case warrant an elaborate enquiry into the question of custody of minor Adithya and should the parties be relegated to the said procedure before appropriate forum in this country in this regard? In our judgment, this is not required.

Admittedly, Adithya is an American citizen, born and brought up in United States of America. He has spent his initial years there. The natural habitat of Adithya is in United States of America. As a matter of fact, keeping in view the welfare and happiness of the child and in his best interest, the parties have obtained series of consent orders concerning his custody/parenting rights, maintenance etc. from the competent courts of jurisdiction in America. Initially, on April 18, 2005, a consent order governing the issues of custody and guardianship of minor Adithya was passed by the New York State Supreme Court whereunder the court granted joint custody of the child to the petitioner and respondent no. 6 and it was stipulated in the order to keep the other party informed about the whereabouts of the child. In a separation agreement entered into between the parties on July 28, 2005, the consent order dated April 18, 2005 regarding custody of minor son Adithya continued. In September 8, 2005 order whereby the marriage between the petitioner and respondent no. 6 was dissolved by the New York State Supreme Court, again the child custody order dated April 18, 2005 was incorporated. Then the petitioner and respondent no. 6 agreed for modification of the custody order and, accordingly, the Family Court of the State of New York on June 18, 2007 ordered that the parties shall share joint legal and physical custody of the minor Adithya and, in this regard, a comprehensive arrangement in respect of the custody of the child has been made. The fact that all orders concerning the custody of the minor child Adithya have been passed by American courts by consent of the parties shows that the objections raised by respondent no. 6 in counter affidavit about deprivation of basic rights of the child by the petitioner in the past; failure of petitioner to give medication to the child; denial of education to the minor child; deprivation of stable environment to the minor child; and child abuse are hollow and without any substance. The objection raised by the respondent no. 6 in the counter affidavit that the American courts which passed the order/decree had no jurisdiction and being inconsistent to Indian laws cannot be executed in India also prima facie does not seem to have any merit since despite the fact that the respondent no. 6 has been staying in India for more than two years, she has not pursued any legal proceeding for the sole custody of the minor Adithya or for declaration that the orders passed by the American courts concerning the custody of minor child Adithya are null and void and without jurisdiction. Rather it transpires from the counter affidavit that initially respondent no. 6 initiated the proceedings under Guardianship and Wards Act but later on withdrew the same. The facts and circumstances noticed above leave no manner of doubt that merely because the child has been brought to India by respondent no. 6, the custody issue concerning minor child Adithya does not deserve to be gone into by the courts in India and it would be in accord with principles of comity as well as on facts to return the child back to the United States of America from where he has been removed and enable the parties to establish the case before the courts in the native State of the child, i.e. United States of America for modification of the existing custody orders. There is nothing on record which may even remotely suggest that it would be harmful for the child to be returned to his native country.

22. It is true that child Adithya has been in India for almost two years since he was removed by the mother—respondent no. 6 —contrary to the custody orders of the U.S. court passed by consent of the parties. It is also true that one of the factors to be kept in mind in exercise of summary jurisdiction in the interest of child is that application for custody/return of the child is made promptly and quickly after the child has been removed. This is so because any delay may result in child developing roots in the country to which he has been removed. From the counter affidavit that has been filed by respondent no. 6, it is apparent that in last two years child Adithya did not have education at one place. He has moved from one school to another. He was

admitted in school at Dehradun by respondent no. 6 but then removed within few months. In the month of June, 2009, the child has been admitted in some school at Chennai. As a matter of fact, the minor child Adithya and respondent no. 6 could not be traced and their whereabouts could not be found for more than two years since the notice was issued by this Court. The respondent no. 6 and the child has been moving from one State to another. The parents of respondent no. 6 have filed an affidavit before this Court denying any knowledge or awareness of the whereabouts of respondent no. 6 and minor child Adithya ever since they left in September, 2007. In these circumstances, there has been no occasion for the child developing roots in this country. Moreover, the present habeas corpus petition has been filed by the petitioner promptly and without any delay, but since the respondent no. 6 has been moving from one State to another and her whereabouts were not known, the notice could not be served and child could not be produced for more than two years.

23. In a case such as the present one, we are satisfied that return of minor Adithya to United States of America, for the time being, from where he has been removed and brought here would be in the best interest of the child and also such order is justified in view of the assurances given by the petitioner that he would bear all the traveling expenses and make living arrangements for respondent no. 6 in the United Sates of America till the necessary orders are passed by the competent court; that the petitioner would comply with the custody/parenting rights as per consent order dated June 18, 2007 till such time as the competent court in United States of America takes a further decision; that the petitioner will request that the warrants against respondent no. 6 be dropped; that the petitioner will not file or pursue any criminal charges for violation by respondent no. 6 of the consent order in the United States of America and that if any application is filed by respondent no. 6 in the competent court in United States of America, the petitioner shall cooperate in expeditious hearing of such application. The petitioner has also stated that he has obtained confirmation from Martha Hunt Elementary School, Murphy, Texas, 75094, that minor son Adithya will be admitted to school forthwith.

24. The learned Senior Counsel for respondent no. 6 sought to raise an objection regarding the maintainability of habeas corpus petition under Article 32 of the Constitution before this Court but we are not persuaded to accept the same. Suffice it to say that in the peculiar facts and circumstances of the case which have already been noticed above and the order that we intend to pass, invocation of jurisdiction of this Court under Article 32 cannot be said to be inappropriate.

25. We record our appreciation for the work done by the concerned officers/officials of CBI in tracing the minor child Adithya and producing him in less than two months of the order passed by this Court, although, the Police Officers and Officials of different States failed in tracing the child Adithya and respondent no. 6 for more than two years. But for the earnest efforts on the part of the CBI authorities, it would not have been possible for this Court to hear and decide this habeas corpus petition involving the sensitive issue concerning a child of seven years who is a foreign national.

26. In the result and for the reasons stated, we pass the following order :

(i) The respondent no. 6 shall act as per the consent order dated June 18, 2007 passed by the Family Court of the State of New York till such time any further order is passed on the petition that may be moved by the parties henceforth and, accordingly, she will take the

child Adithya of her own to the United States of America within fifteen days from today and report to that court.

(ii) The petitioner shall bear all the traveling expenses of the respondent no. 6 and minor child Adithya and make arrangements for the residence of respondent no. 6 in the United States of America till further orders are passed by the competent court.

(iii) The petitioner shall request the authorities that the warrants against respondent no. 6 be dropped. He shall not file or pursue any criminal charges for violation by respondent no. 6 of the consent order in the United States of America.

(iv) The respondent no. 6 shall furnish her address and contact number in India to the CBI authorities and also inform them in advance the date and flight details of her departure along with child Adithya for United States of America.

(v) In the event of respondent no. 6 not taking the child Adithya of her own to United States of America within fifteen days from today, child Adithya with his passport shall be restored to the custody of the petitioner to be taken to United States of America. The child will be a ward of the concerned court that passed the consent order dated June 18, 2007. It will be open to respondent no. 6 to move that court for a review of the custody of the child, if so advised.

(vi) The parties shall bear their own costs.

Tarun Chatterjee, J.
R. M. Lodha, J.
Dr. B.S. Chauhan, J.

New Delhi

November 17, 2009.

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SHEILA B. DAS VERSUS P.R. SUGASREE

Bench: Hon'ble Mr. Justice B.P. Singh & Hon'ble Mr. Justice Altamas Kabir

Petitioner: Sheila B. Das
Vs.
Respondent: P.r. Sugasree

Appeal (Civil) 6626 of 2004

DATE OF JUDGMENT: 17/02/2006

The appellant, who appeared in person, urged that both the Family Court and the High Court had erred in law in removing the minor child from the custody of the mother to the father's custody, having particular regard to the fact that the minor girl was still of tender age and had attained the age when a mother's care and counseling was paramount for the health and well-being of the minor girl child. The appellant submitted that the minor child would soon attain puberty when she would need the guidance and instructions of a woman to enable her to deal with both physical and emotional changes which take place during such period. Apart from the above, the appellant, who, as stated hereinbefore, is a doctor by profession, claimed to be in a better position to take care of the needs of the minor in comparison to the respondent who, it was alleged, had little time at his disposal to look after the needs of the minor child.

We, therefore, feel that the interest of the minor will be best served if she remains with the respondent but with sufficient access to the appellant to visit the minor at frequent intervals but so as not to disturb and disrupt her normal studies and other activities.

Ordered :

1. **The respondent shall make arrangements for Ritwika to continue her studies in her present school and to ensure that she is able to take part in extra-curricular activities as well.**
2. **The respondent shall meet all the expenses of the minor towards her education, health, care, food and clothing and in the event the appellant also wishes to contribute towards the upbringing of the child, the respondent shall not create any obstruction to and/or prevent the appellant from also making such contribution.**
3. **The appellant will be at liberty to visit the minor child either in the respondent's house or in the premises of a mutual friend as may be agreed upon on every second Sunday of the month. To enable the appellant to meet the child, the respondent shall ensure the child's presence either in his house or in the house of the mutual friend agreed upon at 10.00 A.M. The appellant will be entitled to take the child out with her for the day, and to bring her back to the respondent's house or the premises of the mutual friend within 7.00 P.M. in the evening.**
4. **In the event the appellant shifts her residence to the same city where the minor child will be staying, the appellant will, in addition to the above, be entitled to meet the minor on every second Saturday of the month, and, if the child is willing, the appellant will also be entitled**

to keep the child with her overnight on such Saturday and return her to the respondent's custody by the following Sunday evening at 7.00 P.M.

5. **The appellant, upon prior intimation to the respondent, will also be entitled to meet the minor at her school once a week after school hours for about an hour.**

6. **The appellant will also be entitled to the custody of the minor for 10 consecutive days during the summer vacation on dates to be mutually settled between the parties.**

7. **The aforesaid arrangement will continue for the present, but the parties will be at liberty to approach the Family Court at Thrissur for fresh directions should the same become necessary on account of changed circumstances.**

JUDGMENT

Hon'ble Mr. Justice Altamas Kabir :—

The appellant, who is a paediatrician by profession, was married to the respondent, who is a lawyer by profession, on 29th March, 1989, at Thrissur in Kerala under the provisions of the Special Marriage Act. A girl child, Ritwika, was born of the said marriage on 20th June, 1993.

As will appear from the materials on record, the appellant, for whatever reason, left her matrimonial home at Thrissur on 26th February, 2000, alongwith the child and went to Calicut without informing the respondent.

Subsequently, on coming to learn that the appellant was staying at Calicut, the respondent moved an application in the High Court at Kerala for a writ in the nature of Habeas Corpus, which appears to have been disposed of on 24th March, 2000 upon an undertaking given by the appellant to bring the child to Thrissur.

On 24th March, 2000, the respondent, alleging that the minor child had been wrongfully removed from his custody by the appellant, filed an application before the Family Court at Thrissur under Sections 7 and 25 of the Guardians and Wards Act, 1890, and also Section 6 of the Hindu Minority and Guardianship Act, 1956, which came to be numbered as OP 193 of 2000 and OP 239 of 2000.

Before taking up the said two applications for disposal, the learned Judge of the Family Court at Thrissur took up the respondent's application for interim custody of the minor child and on 27th April, 2000 interviewed the minor child in order to elucidate her views with regard to the respondent's prayer for interim custody. No order was made at that time on the respondent's application for interim custody. On 20th March, 2001, the learned Judge of the Family Court at Thrissur took up the two applications filed by the respondent under Sections 7 and 25 of the Guardians and Wards Act and under Section 6 of the Hindu Minority and Guardianship Act for final disposal. While disposing of the matter the learned Judge had occasion to interview the minor child once again before delivering judgment and ultimately by his order of even date the learned Judge of the Family Court at Thrissur allowed the applicati16ons filed by the respondent by passing the following order:-

> *"1. The respondent is directed to give custody of the child to the petitioner the father of the child, the natural guardian immediately after closing of the schools for summer vacation.*
>
> *2. The father shall take steps to continue the study of the minor child in CSM Central School Edaserry and steps to restore all the facilities to the minor child to enjoy her extra curricular activities and studies also.*

3. The respondent mother is at liberty to visit the child either at the home of the petitioner or at school at any time.

4. If the mother respondent shifts her residence to a place within 10 kms. radius of the school where the child is studying the child can reside with the mother for not less than three days in a week. The petitioner father shall not, object to taking of the child by the mother to her own house in such condition.

5. The father the petitioner shall meet all the expenses for the education, food and cloths etc. of the minor child and the mother of her own accord contribute to the same anything for the child and the father should not prohibit the mother from giving the child anything for her comfort and pleasant living.

6. If the mother the respondent fails to stay within 10 kms. radius of the CSM central School, Edasserry however she is entitled to get custody of the child for 2 days in any of the weekend in a month and 10 days during the Summer vacation and 2 days during the Onam hoilidays excluding the Thiruvonam day.

7. This arrangement for custody is made on the basis of the prime consideration for the welfare of the minor child and in case there is any change in the situation or circumstance affecting the welfare of the minor child, both of the parties are at liberty to approach this court for fresh directions on the basis of the changed circumstance.

OP 239/2000 is partly allowed prohibiting the respondent husband by a permanent injunction from removing or taking forcefully the "B" schedule articles mentioned in the plant. The parties in both these cases are to suffer their costs."

Being dissatisfied with the order of the Family Court, the appellant herein filed an appeal in the High Court of Kerala, being M.F.A.No.365/01, wherein by an order dated 21st May, 2001, the order of the Family Court was stayed. The respondent thereupon filed an application before the High Court for review of the said order and in the pending proceedings, a direction was given by the High Court to the Family Court at Calicut to interview the minor child. The report of the Family Court was duly filed before the High Court on 5th July, 2001.

From the said report, a copy of which has been included in the paperbook, it is evident that the minor child preferred to stay with her father and ultimately by its order dated 25th July, 2001 the High Court vacated the stay granted by it on 21st May, 2001.

On the application of the appellant herein, one Dr. S.D. Singh, Psychiatrist, was also appointed by the High Court on 14th September, 2001, to interview the appellant and the respondent in order to make a psychological evaluation and to submit a report. On such report being filed, the High Court by its order dated 31st May, 2002, granted custody of the minor child to the respondent till the disposal of the appeal.

Soon thereafter, in June 2002, the respondent filed an application for divorce before the Family Court at Thrissur. While the same was pending, the appellant filed a Special Leave Petition being S.L.P.(C)\005 C.C.No.6954/2002 against the order of the High Court granting custody of the minor child to the respondent till the disposal of the appeal. The said Special Leave Petition was dismissed on 9th September, 2002. The appeal filed by the appellant before the High Court against the order of the learned Judge of the Family Court allowing the respondent's application under Sections 7 and 25 of the Guardians and Wards Act, being M.F.A. No.365/01, was also dismissed on 16th June, 2003. Immediately, thereafter, on 28th June, 2003, the Family Court granted divorce to the parties. Being

aggrieved by the dismissal of her appeal, being M.F.A.No.365/01, the appellant herein filed the instant Special Leave Petition, being SLP) No.18961/2003, which after admission was renumbered as Civil Appeal No.6626/2004. On 20th July, 2004, the appellant herein filed a petition in the pending Special Leave Petition for interim visitation rights in respect of her minor child for the months of August and September, 2004. After considering the submissions made by the appellant, who was appearing in person, and the learned counsel for the respondent, this Court passed the following order:-

> *"This petition has been filed by the mother of minor girl-Ritwika, aged about 12 years, challenging the impugned order of the High Court dated 16th June, 2003. By the impugned order the High Court confirmed the order of the Family Court holding that it is in the best interest of the child that she be in the custody of the father. The High Court, however, permitted the petitioner to visit the child at the house of the father once in a month, that is, first Sunday of every month and spend the whole day with the child there with a further stipulation that she will not be removed from the father's house. The petitioner and the respondent have not been living together since February, 2000. The divorce between them took place by order dated 26th June, 2003. On question of interim custody, in terms of the order dated 30th April, 2003, the Family Court Trichur, was directed to make an order regarding the visitation rights of the petitioner for the months of May, June and July, 2004 so that the petitioner may meet her daughter at the place of some neutral person and, if necessary, in the presence of a family counsellor or such other person deemed just, fit and proper by the Family Court. The Family Court was directed to fix any two days, in months of May, June and July of 2004, considering the convenience of the parties, when the petitioner may be in a position to spend entire day with her child. Pursuant to the above said order the Family Court had fixed two days in the months of May, June and July, 2004 so that the petitioner could meet her daughter on those days. The Family Court directed that the said meeting shall take place in the room of family counsellor in Court precincts. According to the petitioner the said arrangement was not satisfactory, so much so that ultimately she made a request to the Family Court that instead of meeting her daughter in the room of the family counsellor, the earlier arrangement of meeting her at father's house was may be restored. The Family Court, however, did not modify the order having regard to the orders passed by this Court on 30th April, 2004. It is, however, not necessary at this stage to delve any further on this aspect.*
>
> *Ritwika is studying in 7th class in a school in Trichur. Having heard petitioner-in-person and learned counsel for the respondent and on perusal of record, we are of the view that without prejudice to parties' rights and contentions in Special Leave Petition, some interim order for visitation rights of the petitioner for the months of August and September, 2004 deserves to be passed. Accordingly, we direct as under:*
>
> *(1)The petitioner can visit the house of the respondent at Trichur on every Sunday commencing from 1st August, 2004 and be with Ritwika from 10.00 a.m. to 5.00 p.m. During the stay of the petitioner at the house of the respondent, only the widowed sister of the respondent can remain present. The respondent shall not remain present in the house during the said period. It would be open to the petitioner to take Ritwika for outing, subject to the condition that Ritwika readily agrees for it. We also hope that*

when at the house of the respondent, the petitioner would be properly looked after, insofar as, normal facilities and courtesies are concerned;

(2) We are informed that the school in which Ritwika is studying shall be closed for 7 days in the month of August, 2004 during Onam festival. It would be open to the petitioner to take the child for outing during those holidays for a period of three days. After the expiry of three days, it will be the responsibility of the petitioner to leave the child at the house of the respondent.

The arrangement about meeting on every Sunday would also continue in the month of September, 2004.

List the matter on 5th October, 2004"

The question relating to the appellant's visitation rights pending decision of the Special Leave Petition came up for consideration before this Court again on 5th October, 2004, when on a reference to its earlier order dated 20th July, 2004, this Court further directed that the appellant would be at liberty to move appropriate applications in M.F.A.No.365/01, which had been decided by the High Court on 16th June, 2003, and the High Court on hearing the parties or their counsel would pass such orders as it considered appropriate in respect of the interim custody of Ritwika during the Christmas Holidays. It was also clarified that till the matter was finally decided by this Court, it would be open to the appellant to make similar applications before the High Court which would have to be considered on its own merits, since it was felt that the High Court would be in a better position to consider the local conditions and pass interim orders including conditions, if any, required to be placed on the parties.

As mentioned hereinbefore, on leave being granted, the Special Leave Petition was renumbered as Civil Appeal No.6626/04, which has been taken up by us for final hearing and disposal.

The appellant, who appeared in person, urged that both the Family Court and the High Court had erred in law in removing the minor child from the custody of the mother to the father's custody, having particular regard to the fact that the minor girl was still of tender age and had attained the age when a mother's care and counseling was paramount for the health and well-being of the minor girl child. The appellant submitted that the minor child would soon attain puberty when she would need the guidance and instructions of a woman to enable her to deal with both physical and emotional changes which take place during such period.

Apart from the above, the appellant, who, as stated hereinbefore, is a doctor by profession, claimed to be in a better position to take care of the needs of the minor in comparison to the respondent who, it was alleged, had little time at his disposal to look after the needs of the minor child.

From the evidence adduced on behalf of the parties, the appellant tried to point out that from morning till late at night, the respondent was busy in court with his own work and activities which left the minor child completely alone and uncared for. According to the appellant, the respondent who had a farm house some distance away from Thrissur, spent his week- ends and even a major part of the week days in the said farm house. The appellant urged, that as a mother, she knew what was best for the child and being a professional person herself she was in a position to provide the minor not only with all such comforts as were necessary for her proper and complete upbringing, but also with a good education and to create in her an interest in extracurricular activities such as music and dancing. The appellant strongly urged that the respondent had never had any concern for the minor child since her birth and till the time when the appellant left with her for Calicut. The appellant contended that for 7

years after the birth of the minor child, the appellant had single-handedly brought up the minor since the respondent was too preoccupied with other activities to even notice her.

According to the appellant, the minor child was extremely happy to be with her till the respondent began to claim custody of the minor and soon after obtaining such custody, he was able to influence the minor to such an extent that she even went to the extent of informing the learned Judge of the Family Court that she preferred to stay with her father.

On this aspect of the matter, the appellant urged that the minor had been exposed by the respondent to what she termed as "Parental Alienation Syndrome". She urged that such a phenomenon was noticeable in parents who had been separated and who are bent upon poisoning the mind of their minor children against the other party. According to the appellant, there could otherwise be no other explanation as to why even after being with the appellant for 7 years, the minor child had expressed a preference to be with her father after she was placed in his custody. The appellant laid stress on her submissions that not only till the age of 8 years, when custody of the minor child was given to him, but even thereafter the respondent had all along been an absentee father taking little or no interest in the affairs and upbringing of the minor child. According to the appellant, in view of the peculiar habits of the respondent, the minor child was left on her own much of the time, which was neither desirable nor healthy for a growing adolescent girl child.

Urging that she had the best interest of the minor child at heart, the appellant submitted that although under the provisions of Hindu Law by which the parties were governed, the father is accepted as the natural guardian of a minor, there were several instances where the courts had accepted the mother as the natural guardian of a minor in preference to the father even when he was available. Referring to Section 6 of the Hindu Minority and Guardianship Act, 1956, which provides that the natural guardian of a Hindu minor in the case of a boy or an unmarried girl is the father and after him the mother; provided that the custody of a minor who has not completed the age of 5 years shall ordinarily be with the mother, the appellant submitted that the aforesaid provision had recognized the mother also as the natural guardian of a minor. It was urged that in various cases the Courts had considered the said provision and had opined that there could be cases where in spite of the father being available, the mother should be treated to be the natural guardian of a minor having regard to the incapacity of the father to act as the natural guardian of such minor.

In support of her aforesaid submission, the appellant referred to and relied on the decision of this Court in Hoshie Shavaksha Dolikuka vs. Thirty Hoshie Dolikuka, reported in AIR 1984 SC 410, wherein having found the father of the minor to be disinterested in the child's welfare this Court held that the father was not entitled to the custody of the child.

The appellant also referred to and relied on a Division Bench decision of the Kerala High Court in the case of Kurian C. Jose vs. Meena Jose, reported in 1992 (1) KLT 818, wherein having regard to the fact that the father was living with a concubine who was none else than the youngest sister of the mother, it was held that the father was not entitled to act as the guardian of the minor. On a consideration of the provisions of Section 17 (3) of the Guardians and Wards Act, 1890, it was also held that a minor's preference need not necessarily be decisive but is only one of the factors to be taken into consideration by the court while considering the question of custody.

Reference was also made to another decision of this Court in the case of Kumar V. Jahgirdar vs. Chethana Ramatheertha, (2004) 2 SCC 688, wherein in consideration of the interest of the minor child, the mother, who had re-married, was given custody of the female child who was on the advent of puberty,

on the ground that at such an age a female child primarily requires a mother's care and attention. The Court was of the view that the absence of female company in the house of the father was a relevant factor in deciding the grant of custody of the minor female child. The appellant urged that the courts in the aforesaid cases had considered the welfare of the minor to be of paramount importance in deciding the question of grant of custody. The appellant urged that notwithstanding the fact that the minor child had expressed before the learned Judge of the Family Court that she preferred to be with the father, keeping in mind the fact that the welfare of the minor was of paramount importance, the court should seriously consider whether the minor child should be deprived of her mother's company during her period of adolescence when she requires her mother's counselling and guidance. The appellant submitted that while the respondent had indulged Ritwika so as to win over her affection, the appellant had tried to instill in her mind a sense of discipline which had obviously caused a certain amount of resentment in Ritwika. The appellant submitted that the court should look behind the curtain to see what was best for the minor girl child at this very crucial period of her growing up In support of her aforesaid submission, the appellant referred to and relied on a decision of the Bombay High Court in the case of Saraswatibai Shripad Ved vs. Shripad Vasanji Ved, AIR 1941 Bombay 103, wherein in a similar application under the Guardians and Wards Act, it was held that since the minor's interest is the paramount consideration, the mother was preferable to the father as a guardian. The appellant emphasized the observation made in the judgment that if the mother is a suitable person to take charge of the child, it is quite impossible to find an adequate substitute for her for the custody of a child of tender years notwithstanding the fact that the father remains as the natural guardian of the minor.

A similar view was expressed by this Court in the case of Rosy Jacob vs. Jacob A. Chakramakkal, AIR 1973 SC 2090, wherein in the facts and circumstance of the case, the custody of the daughter (even though she was more than 13 years of age) and that of the youngest minor son, was considered to be more beneficial with the wife rather than with the husband. The appellant submitted that during the child's growing years, she had from out of her own professional income, provided her with amenities which a growing child needs, including admission and tuition fees for the child's schooling in a good school and for extracurricular activities. The appellant submitted that she had made fixed deposits for the benefit of the minor and had even taken out life insurance policies where the minor child had been made the nominee. The appellant submitted that apart from the above, she had also made various financial investments for the benefit of the minor so that the minor child would not be wanting in anything if she was allowed to remain with the appellant. The appellant submitted that although she had been granted visitation rights by the different interim orders, since she was residing in Calicut and the respondent was residing in Thrissur, she was unable to remain in contact with her minor daughter on account of the distance between Calicut and Thrissur. In fact, the appellant complained of the fact that on several occasions when she had gone to meet her minor child at the residence of the respondent, she had not been allowed to meet the child or to spend sufficient time with her. The appellant submitted that the interest of the minor child would be best served if her custody was given to the appellant.

The claim of custody of the minor child made by the appellant was very strongly resisted by the respondent who denied all the various allegations levelled against him regarding his alleged apathy towards the minor and her development. It was submitted on his behalf that till the age of 7 years, the child had been living with both the parents, and was well cared for and looked after during this period. The minor child was suddenly and surreptitiously removed from the respondent's custody by the appellant who left her matrimonial home on 26th February, 2000 without informing the appellant who had gone out of Thrissur on his professional work. It was submitted that only after coming to learn

that the appellant had removed the child to Calicut that the respondent was compelled to file a Habeas Corpus Petition in the Kerala High Court which ended upon an undertaking given by the appellant to bring the minor child to Thrissur. It was only thereafter that the respondent was compelled to file the application under Sections 7 and 25 of the Guardians and Wards Act and under Section 6 of the Hindu Minority and Guardianship Act,1956.

According to the respondent, even though the appellant had forcibly removed the minor to Calicut, thereby depriving the respondent of the minor child's company, the said minor during her interview by the learned Judge of the Family Court at Thrissur made her preference to be with the father known to the learned Judge.

On behalf of the respondent, it was also submitted that keeping in mind the fact that the girl child was attaining the age of puberty, the respondent had arranged with his elder sister, who was a retired headmistress of a school, to come and stay with him and to attend to the minor's needs during her growing years when she required the guidance and counselling of a woman. It was submitted that the said aspect of the matter was duly considered by the Family Court as well as by the High Court on the basis of an affidavit filed by the respondent's sister expressing her willingness to stay with the respondent to look after the minor child. In addition to the above, it was submitted on behalf of the respondent that the Court had found on evidence that he had sufficient finances to look after and provide for all the needs of the minor child. In any event, what was of paramount importance was the welfare of the minor and the court had also taken into consideration the preference expressed by the minor in terms of Section 17 (3) of the Guardians and Wards Act, 1890. On behalf of the respondent it was submitted that the respondent was quite alive to the fact that the minor child should not be deprived of her mother's company and that for the said purpose, the appellant was welcome to visit the minor child either at the respondent's house or in some neutral place and to even keep the child with her on specified days if she was ready and willing to stay with the appellant. What was sought to be emphasized on behalf of the respondent was that in the interest of the child she should be allowed to remain with him since he was better equipped to look after the minor, besides being her natural guardian and also having regard to the wishes of the minor herself.

Having regard to the complexities of the situation in which we have been called upon to balance the emotional confrontation of the parents of the minor child and the welfare of the minor, we have given anxious thought to what would be in the best interest of the minor. We have ourselves spoken to the minor girl, without either of the parents being present, in order to ascertain her preference in the matter. The child who is a little more than 12 years of age is highly intelligent, having consistently done extremely well in her studies in school, and we were convinced that despite the tussle between her parents, she would be in a position to make an intelligent choice with regard to her custody. From our discussion with the minor, we have been able to gather that though she has no animosity as such towards her mother, she would prefer to be with the father with whom she felt more comfortable. The minor child also informed us that she had established a very good relationship with her paternal aunt who was now staying in her father's house and she was able to relate to her aunt in matters which would concern a growing girl during her period of adolescence.

We have also considered the various decisions cited by the appellant which were all rendered in the special facts of each case. In the said cases the father on account of specific considerations was not considered to be suitable to act as the guardian of the minor. The said decisions were rendered by the Courts keeping in view the fact that the paramount consideration in such cases was the interest and well-being of the minor. In this case, we see no reason to consider the respondent ineligible to look

after the minor. In fact, after having obtained custody of the minor child, the respondent does not appear to have neglected the minor or to look after all her needs. The child appears to be happy in the respondent's company and has also been doing consistently well in school. The respondent appears to be financially stable and is not also disqualified in any way from being the guardian of the minor child. No allegation, other than his purported apathy towards the minor, has been levelled against the respondent by the appellant. Such an allegation is not borne out from the materials before us and is not sufficient to make the respondent ineligible to act as the guardian of the minor.

We, therefore, feel that the interest of the minor will be best served if she remains with the respondent but with sufficient access to the appellant to visit the minor at frequent intervals but so as not to disturb and disrupt her normal studies and other activities. We, accordingly dispose of this appeal by retaining the order passed by the learned Judge of the Family Court at Thrissur on 20.3.2001 while disposing of O.P.No.193/2000 filed by the respondent herein under Sections 7 and 25 of the Guardians and Wards Act, 1890 with the following modifications:-

1. The respondent shall make arrangements for Ritwika to continue her studies in her present school and to ensure that she is able to take part in extra-curricular activities as well.

2. The respondent shall meet all the expenses of the minor towards her education, health, care, food and clothing and in the event the appellant also wishes to contribute towards the upbringing of the child, the respondent shall not create any obstruction to and/or prevent the appellant from also making such contribution.

3. The appellant will be at liberty to visit the minor child either in the respondent's house or in the premises of a mutual friend as may be agreed upon on every second Sunday of the month. To enable the appellant to meet the child, the respondent shall ensure the child's presence either in his house or in the house of the mutual friend agreed upon at 10.00 A.M. The appellant will be entitled to take the child out with her for the day, and to bring her back to the respondent's house or the premises of the mutual friend within 7.00 P.M. in the evening.

4. In the event the appellant shifts her residence to the same city where the minor child will be staying, the appellant will, in addition to the above, be entitled to meet the minor on every second Saturday of the month, and, if the child is willing, the appellant will also be entitled to keep the child with her overnight on such Saturday and return her to the respondent's custody by the following Sunday evening at 7.00 P.M.

5. The appellant, upon prior intimation to the respondent, will also be entitled to meet the minor at her school once a week after school hours for about an hour.

6. The appellant will also be entitled to the custody of the minor for 10 consecutive days during the summer vacation on dates to be mutually settled between the parties.

7. The aforesaid arrangement will continue for the present, but the parties will be at liberty to approach the Family Court at Thrissur for fresh directions should the same become necessary on account of changed circumstances.

The parties will each bear their own costs.

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SANTA SHARMA VERSUS SUSHIL SHARMA

Bench: Hon'ble Mr. Justice G.T.Nanavati & Hon'ble Mr. Justice S.N.Phukan

Petitioner: Santa Sharma
Vs.
Respondent: Sushil Sharma

Writ Petition (Cri.) No. 656 of 1997

DATE OF JUDGMENT: 16/02/2000

This appeal is filed against the judgment and order of the High Court of Delhi in Writ Petition (Cri.) No. 656 of 1997. Sushil Sharma had filed the writ petition seeking a writ of Habeas Corpus in respect of two minor children Nell and Monica, aged 7 and 3 years respectively. It was alleged that the children are in illegal custody of Sarita Sharma, whom he had married on 23.12.1988. The High Court allowed the petition and directed Sarita to restore the custody of two children to Sushil Sharma. The passports of the two children were also ordered to be handed over to Sushil Sharma and it was also dedared that it was open to Sushil Sharma to take the children to U.S.A. without any hindrance

"Section 6 of the Hindu Minority and Guardianship Act, 1956 constitutes the father as the natural guardian of aminor son. But that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor,"

Ordinarily, a female child should be flowed to remaln with the mother so that she can be properly locked after. It is also not desirable that two children are separate from each other. If a female child has to stay with the mother it will be in the interest of both the children that they both stay with the mother. Here In India also proper care of the children is taken and they are at present studying in good schools. We have not found the appellant wanting in taking proper care of the children. Both the children have a desire to stay with the mother. At the same time if must be said that the son, who is elder than daughter, has good feelings for his father also. Considering all the aspects relating to the welfare of the chiidren, we are of the opinion that in spite of the order passed by the Court in U.S.A. it was not proper for the High Court to have. allowed the Habeas Corpus writ petition and directed the appellant to hand over custody of the children to the respondent and permit him to take them away to U.S.A. What would be in the interest of the children requires a full and thorough inquiry and, therefore, the High Court should have erected the respondent to initiate appropriate proceedings in which such an inquiry can be held. Still there is some possibility of mother returning to U.S.A. in the interest of the children. Therefore, we do not desire to say anything more regarding entitlement of the custody of the children. The chances of the appellant returning to U.S.A. with the children would depend upon the joint efforts of the appellant and the respondent to get the arrest warrant cancelled by explaining to the court in U.S.A. the circumstances under which she had left U.S.A. with the children without taking permission of the Court. There is a possibility that both of them may thereafter be able to approach

the Court which passed the decree to suitably modify the order with respect to the custody of the children and visitation rights.

JUDGMENT

Hon'ble Mr. Justice G.T. Nanavati :—

This appeal is filed against the judgment and order of the High Court of Delhi in Writ Petition (Cri.) No. 656 of 1997. Sushil Sharma had filed the writ petition seeking a writ of Habeas Corpus in respect of two minor children Nell and Monica, aged 7 and 3 years respectively. It was alleged that the children are in illegal custody of Sarita Sharma, whom he had married on 23.12.1988. The High Court allowed the petition and directed Sarita to restore the custody of two children to Sushil Sharma. The passports of the two children were also ordered to be handed over to Sushil Sharma and it was also dedared that it was open to Sushll Sharma to take the children to U.S.A. without any hindrance. Sarita has., therefore, filed this appeal.

Sushil initiated proceedings .for dissolution of his marriage in the District Court of Tarrant County, Texas, U.SA.m 1995. In the said proceedings interim orders were passed from time to time with resped: to the care and custody of the children and visitation rights of Sushii :and Sarita. Even while the divorce proceedings were pending Sushii and Sarita lived together, from November, 1996.to Marth, 1997. They again separated. This time Sarita had taken the children along with her. It was stated in the writ petition that the Associate Judge, taking note of the fact that Sarita had gone away with the children, passed an order for putting the chhdren in the care of Sushii and Sarita was only given visitation rights. On 7.5.1997 Sarita had picked up the children from Sushll residence in exercise of her visitation rights. She was to leave the children in the school the next day morning. Sushii got the information from the school that the children were not brought back to the school. On making inquiries he came to know that Sarita had vacated her apartment and gone away somewhere. He had, therefore, inforrned the police and a warrant for her arrest was also issued.

It was further stated in the petition that his further inquiries revealed that Sarita had, without obtaining any order from the American Court, flown away to India with the children It was further stated in the petition that on 12.8.1997 a divorce decree was passed by the Associate Judge and In view of the conduct of Sarita he has also passed an order declaring that the sole custody of the children shall be of Sushll. She had been denied even the visitation rights. Sushll then filed a writ petition in the Delhi High Court on 9.9.1997. Sarita's contention In the reply to the petition was that by virtue of the orders dated 5.2.1996 and 2.4.1997 she and Sushil were both appointed as Possessory Conservators and, therefore, on 7.5.1997 both the children were in her lawful custody. It was also her contention that she had brought the children to India with full knowledge of Sushil. It was also her contention that Sushil is not a person fit to be given physical custody of the children as he is alcoholic and violent as disclosed by the material on record of the divorce proceeding. The High Court held that in view of the Interim orders passed by the American Court Sarita committed a wrong in not informing that Court and taking its permission to remove the children from out of the jurisdiction of that Court. The High Court took note of the fact that s competent Court having territorial jurisdiction has now passed a decree of divorce and ordered that only the father. i.e. Sushil, shall have the custody of the children. The High Court rejected the contention of Santa that the decree of divorce and the order for the custody of the children were obtained by Sushi'l by practicing fraud on the Court and further observed that even If that Is so, she should approach the American Court for revocation of that order. Taking this view the High Court allowed the writ petition and gave the directions referred to above.

The learned counsel appearing for the appellant submitted that In a Habeas Corpus petition what a Court should consider Is whether the person,. In respect of whom a writ of Habeas Corpus is sought, is kept in illegal custody or is detained against his wish. He further submitted that a Habeas Corpus petition is not an appropriate proceeding for securing custody of minor chlidren staying with the mother. He further submitted that when she came to India with the children she was the natural lawful guardian of the children and also managing conservator of the children. With respect to the decree of divorce and order for custody of the children, he submitted that the said decree and order ware obtained by the respondent by suppressing material facts from the Court and the said decree and order, even otherwise, should not be taken as binding on 'the Courts in India, as they are not consistent with the law applicable to the parties. He lastly submitted that even if the said decree and order are treated as valid for the present the High court should not have allowed the writ petition without considering the welfare of the children.

The record of the divorce proceeding which has come on the record of this case disdoses that prior to their separation Sushil and Sarita with their two children and Sushil's mother were staying together in U.S.A. The record further discloses that there were serious differences between the two. Sushil was alcoholic and had used violence against Sarita. Sarita's conduct was also not very satisfactory. Before she came to India with the children she was in lawful custody of the children. The question is whether the custody became illegal as she had committed a breach of the order of the American Court directing her not to remove the children from the jurisdiction of that Court without its permission. After she came to India a decree of divorce and the order for the custody of the children have been passed. Therefore, it is also required to be considered whether her custody of the children became legal thereafter.

Mr. R.K. Jain, teamed senior counsel appearing for the respondent submitted that the facts of this case are simllar to the facts of Surinder Kaur Sandhu v. Harbax Sinah Sandhu [(1984) 3 SCC 698] and following the decision in that case this appeal should be dismissed. In that case this Court after referring to the facts observed as under:

> *"We may add that the spouses had set up their matrimonial home in England where the wife was working as a clerk and the husband as a bus driver. The boy is a British citizen, having been born in England, and he holds a British passport. It cannot be controverted that, in these circumstances, the English Court had jurisdiction to decide the question of has custody. The modern theory of conflict of Laws recognises and, In any event,prefers the jurisdiction of the State which has the most intimate contact with the issues arising In the case. Jurisdiction Is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for She time being lodged. To allow the assumption of jurisdiction by another State in such circumstances will only resuit in encouraging forum-shopping. Ordinarily, jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating to matrimony and custody, the law or that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offsprings of marriage. The spouses in this case had made England their home where this boy was born to them. The father cannot deprive the English Court of its jurisdiction to decide upon his custody by removing him to India, not in the normal movement of the matrimonial home but. by an act which was gravely detrimental to the peace of that home. The fact that the matrimonial home of the spouses was in England, establishes sufficient contacts or the with that State in order*

to make it reasonable and just for the courts of that State to assume jurisdiction to enforce obligations which were incurred therein by the spouses. (See International Shoe Company v. State of Washington [90 L Ed 95 (1945): 326 US 310], which was not a matrimonial case but which is regarded as the fountainhead of the subsequent developments of jurisdictional issues like the one involved in the instant case.) It is our duty and function to protect the wife against the burden of litigating in an inconvenience forum which she and her husband had left voluntarily in order to make their living in England, where they gave birth to this unfortunate boy."

In that case the huband had removed the boy from England and brought him to India and the wife after obtaining an order of the English Court, whereby- the boy became the Ward of the Court, came to India and filed a petition in she High Court Punjab and Haryana seeking a writ of Habeas Corpus. The High Court rejected the wfre's petition on the grounds, inter alla that her status in England is that of a foreigner, a factory worker and a wife living separately from the husband; that she had no relatives in England; and that, the child would have to h've in lonely and dismal surroundings in England. It was also dismissed on the ground that the husband had gone through a traumatic experience of a conviction on a criminal charge; that he was back home in an atmosphere which welcomed him; that his parents were in affluent circumstances; and that, the child would grow in an atmosphere of self-confidence and self-respect if he was permitted to live with them. After considering the legal position this Court observed.' "Section 6 of the Hindu Minority and Guardianship Act, 1956 constitutes the father as the natural guardian of aminor son. But that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor,"

in Phanwaii Joahi v. Madhav Umie [(1998) I SCC 112J, this Court after referring to the decision of the Privy Council in Mckee v. McKee [1951 AC 352: (1951) I All ER 942] and that of House of Lords in J v.C (1970 AC 668: (1969) I All ER 788], the two decisions 'in which contrary view was taken,, namely, H (Infacnts). Re ((1966) I All ER 886: (1966) I WLR 381, CA] and E f Infants). Re [(1967) I All ER 8813, also the decision of this Court in Elizabeth Dinshaw v. Aryand M Pinshaw [(1987) I SCC 423 and also the Hague Convention of 1900 observed as under:

"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 unless the Court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare. as explained In 1., Re. As recently as 1996-97, it has been held In P (A minor) (Child Abduction: Non-Convention Country), Re: 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' 10 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."

Therefore, it will not be proper to be guided entirely by the fact that the appellant Santa 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 citizenship and there is a possibility that in U.S.A. they may be able to get better education, it is doubtful of the respondent will be in a position to take proper care of the children when they are so young. Out of them one Is a female child. She is aged about 5 years. Ordinarily, a female child should be flowed to remain with the mother so that she can be properly locked after. It is also not desirable that two children are separate from each other. If a female child has to stay with the mother it will be in the interest of both the children that they both stay with the mother. Here In India also proper care of the children is taken and they are at present studying in good schools. We have not found the appellant wanting in taking proper care of the children. Both the children have a desire to stay with the mother. At the same time if must be said that the son, who is elder than daughter, has good feelings for his father also. Considering all the aspects relating to the welfare of the children, we are of the opinion that in spite of the order passed by the Court in U.S.A. it was not proper for the High Court to have. allowed the Habeas Corpus writ petition and directed the appellant to hand over custody of the children to the respondent and permit him to take them away to U.S.A. What would be in the interest of the children requires a full and thorough inquiry and, therefore, the High Court should have (erected the respondent to initiate appropriate proceedings in which such an inquiry can be held. Still there is some possibility of mother returning to U,S.A. in the interest of .the children. Therefore, we do not desire to say anything more regarding entitlement of the custody of the children. The chances of the appellant returning to U.S.A, with the children would depend upon the joint efforts of the appellant and the respondent to get the arrest warrant cancelled by explaining to the court in U.S.A. the circumstances under which she had left U.S.A. with the children Without taking permission of the Court. There is a possibility that: both of them may thereafter be able to approach the Court which passed the decree to suitably modify the order with respect to the custody of the children and visitation rights.

For the reasons stated above, we allow this appeal, set aside the judgment and order of the High Court and dismiss the writ petition filed by the respondent.

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LANDMARK JUDGMENTS ON

DOMESTIC VIOLENCE ACT

DEOKI PANJHIYARA VERSUS SHAHSHI BHUSHAN NARAYAN AZAD & ANR

SUPREME COURT OF INDIA

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

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

CRIMINAL APPEAL Nos.2032-2033 of 2012

(Arising out of SLP (Criminal) Nos. 8076-8077 of 2010
Decided on 12 December, 2012

- **The Respondent before us had claimed (before the trial court as well as the High Court) that the marriage between him and the appellant solemnised on 4.12.2006, by performance of rituals in accordance with Hindu Law, was void on account of the previous marriage between the appellant with one Rohit Kumar Mishra. In support thereof, the respondent relied on a marriage certificate dated 18.4.2003 issued under Section 13 of the Special Marriage Act, 1954. Acting solely on the basis of the aforesaid marriage certificate the learned trial court as well as the High Court had proceeded to determine the validity of the marriage between the parties though both the courts were exercising jurisdiction in a proceeding for maintenance. However, till date, the marriage between the parties is yet to be annulled by a competent court. What would be the effect of the above has to be determined first inasmuch as if, under the law, the marriage between the parties still subsists the appellant would continue to be the legally married wife of the respondent so as to be entitled to claim maintenance and other benefits under the DV Act, 2005. Infact, in such a situation there will be no occasion for the Court to consider whether the relationship between the parties is in the nature of a marriage.**
- **Admittedly, both the appellant and the respondent are governed by the provisions of the Hindu Marriage Act, 1955. Section 11 of the Hindu Marriage Act makes it clear that a marriage solemnised after the commencement of the Act "shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions so specified in clauses (i), (iv) and (v) of Section 5."**
- **While considering the provisions of Section 11 of the Hindu Marriage Act, 1955 this Court inYamunabai v. Anantrao[3] has taken the view that a marriage covered by Section 11 is void-ipso-jure, that is, void from the very inception. Such a marriage has to be ignored as not existing in law at all. It was further held by this Court that a formal declaration of the nullity of such a marriage is not a mandatory requirement though such an option is available to either of the parties to a marriage.It must, however, be noticed that in Yamunabai (supra) there was no dispute between the parties either as regards the existence or the validity of the first marriage on the basis of which the second marriage was held to be ipso jure void.**

- **In the present case, however, the appellant in her pleadings had clearly, categorically and consistently denied that she was married to any person known as Rohit Kumar Mishra. The legitimacy, authenticity and genuineness of the marriage certificate dated 18.4.2003 has also been questioned by the appellant. Though Section 11 of the aforesaid Act gives an option to either of the parties to a void marriage to seek a declaration of invalidity/nullity of such marriage,**
- **In the present case, if according to the respondent, the marriage between him and the appellant was void on account of the previous marriage between the appellant and Rohit Kumar Mishra the respondent ought to have obtained the necessary declaration from the competent court in view of the highly contentious questions raised by the appellant on the aforesaid score. It is only upon a declaration of nullity or annulment of the marriage between the parties by a competent court that any consideration of the question whether the parties had lived in a "relationship in the nature of marriage" would be justified. In the absence of any valid decree of nullity or the necessary declaration the court will have to proceed on the footing that the relationship between the parties is one of marriage and not in the nature of marriage.**

JUDGMENT

Hon'ble Mr. Justice Ranjan Gogoi :—

1. Leave granted.

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

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

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

5. The aforesaid order dated 07.08.2009 was challenged by the respondent-husband in a revision application before the High Court which was heard alongwith the writ petition filed earlier. Both the cases were disposed of by the impugned common order dated 09.04.2010 holding that the marriage certificate dated 18.04.2003 issued under Section 13 of the Act of 1954 was conclusive

proof of the first marriage of the appellant with one Rohit Kumar Mishra which had the effect of rendering the marriage between the appellant and the respondent null and void. Accordingly, it was held that as the appellant was not the legally wedded wife of the respondent she was not entitled to maintenance granted by the learned courts below. It is against the aforesaid order of the High Court that the present appeals have been filed by the appellant wife.

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

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

Section 2

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

(b) (c)

(d).

(e).

(f)

(g)

(h).

(i) relative includes any person related by blood, marriage or adoption and living with the respondent. Thereafter, the different clauses of the Bill were considered by a Parliamentary Standing Committee and recommendations were made that having regard to the object sought to be achieved by the proposed legislation, namely, to protect women from domestic violence and exploitation, clause (2)(i) defining relative may be suitably amended to include women who have been living in relationship akin to marriages as well as in marriages considered invalid by law. Pursuant to the aforesaid recommendation made by the Standing Committee, in place of the expression relative appearing in clause 2(i) of the Bill, the expression domestic relationship came be included in clause (f) of Section 2 of the Act. Learned counsel by referring to the definition of aggrieved person and domestic relationship as appearing in the DV Act, 2005 has urged that the legislative intent to include women, living in marriages subsequently found to be illegal or even in relationships resembling a marriage, within the protective umbrella of the DV Act is absolutely clear and the same must be given its full effect. It is submitted that having regard to the above even if the marriage of the appellant and the respondent was void on

account of the previous marriage of the appellant, the said fact, by itself, will not disentitle the appellant to seek maintenance and other reliefs under the DV Act, 2005.

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

Section 2..

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

(b)

(c)

d)

(e)

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

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

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

b) They must be of legal age to marry.

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

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

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

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

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

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

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

14. Admittedly, both the appellant and the respondent are governed by the provisions of the Hindu Marriage Act, 1955. Section 11 of the Hindu Marriage Act makes it clear that a marriage

solemnised after the commencement of the Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions so specified in clauses (i), (iv) and (v) of Section 5.

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

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

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

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

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

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

Though the law specifically does not cast obligation on either party to seek declaration of nullity of marriage and it may be open to the parties even without recourse to the Court to treat the marriage as a nullity, such a course is neither prudent nor intended and a declaration

in terms of Section 11 of the Hindu Marriage Act will have to be asked for, for the purpose of precaution and/or record. Therefore, until the declaration contemplated by Section 11 of the Hindu Marriage Act is made by a competent Court, the woman with whom second marriage is solemnized continues to be the wife within the meaning of Section 494 IPC and would be entitled to maintain a complaint against her husband.

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

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

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

[P. SATHASIVAM] J.

[RANJAN GOGOI] .J.

New Delhi, December 12, 2012

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[1] (2010) 10 SCC 469

[2] AIR 1994 SC 853

[3] AIR 1988 SC 645

[4] 2005 (8) SCC 351

[5] 2011 (7) SCC 616

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

SUPREME COURT OF INDIA

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

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

CIVIL APPEAL NO. 10084 of 2016

(Arising out of SLP (Civil) No. 9132 of 2015)
Decided on 6 October, 2016

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

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

STATEMENT OF OBJECTS AND REASONS

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

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

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

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

of domestic violence, the husbands relatives including mother-in-law and sister-in-law can be arrayed as respondents and effective orders passed against them. But in the case of a mother-in-law or sister-in-law who is an aggrieved person, the respondent can only be an adult male person and since his relatives are not within the main part of the definition of respondent in Section 2(q), residence orders passed by the Magistrate under Section 19(1)(c) against female relatives of such person would be unenforceable as they cannot be made parties to petitions under the Act.

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

JUDGMENT

Hon'ble Mr. Justice R.F. Nariman :—

1. Leave granted.

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

3. On 3.4.2007, Kusum Narottam Harsora and her mother Pushpa Narottam Harsora filed a complaint under the 2005 Act against Pradeep, the brother/son, and his wife, and two sisters/

daughters, alleging various acts of violence against them. The said complaint was withdrawn on 27.6.2007 with liberty to file a fresh complaint.

4. Nothing happened for over three years till the same duo of mother and daughter filed two separate complaints against the same respondents in October, 2010. An application was moved before the learned Metropolitan Magistrate for a discharge of respondent Nos. 2 to 4 stating that as the complaint was made under Section 2(a) read with Section 2(q) of the 2005 Act, it can only be made against an adult male person and the three respondents not being adult male persons were, therefore, required to be discharged. The Metropolitan Magistrate passed an order dated 5.1.2012 in which such discharge was refused. In a writ petition filed against the said order, on 15.2.2012, the Bombay High Court, on a literal construction of the 2005 Act, discharged the aforesaid three respondents from the complaint. We have been informed that this order has since attained finality.

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

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

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

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

7. The present appeal has been filed against this judgment. Shri Harin P. Raval, learned senior advocate appearing on behalf of the appellants, assailed the judgment, and has argued before us that it is clear that the respondent as defined in Section 2(q) of the said Act can only mean an adult male person. He has further argued that the proviso to Section 2(q) extends respondent only in the case of an aggrieved wife or female living in a relationship in the nature of a marriage, in which case even a female relative of the husband or male partner may be arraigned as a respondent. He sought to assail the judgment on the ground that the Court has not read down the provision of Section 2(q), but has in fact read the proviso into the main enacting part of the

said definition, something that was impermissible in law. He has argued before us that the 2005 Act is a penal statute and should be strictly construed in the event of any ambiguity. He further argued that in fact there was no ambiguity because the expression adult male person cannot be diluted in the manner done by the High Court in the impugned judgment. He cited a large number of judgments on the golden rule of literal construction, on how reading down cannot be equated to re-reading in constitutional law, and on how a proviso cannot be introduced into the main part of a provision so as to distort its language.

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

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

a whole, which therefore would include females, as well, as respondents. She also pointed out that, at present, the sweep of the Act was such that if a mother-in-law or sister-in-law were to be an aggrieved person, they could only be aggrieved against adult male members and not against any opposing female member of a joint family for example, a daughter-in-law or a sister-in- law. This will unnecessary stultify what was sought to be achieved by the Act, and would make the Act a dead letter insofar as these persons are concerned. She also argued that the Act would become unworkable in that the reliefs that were to be given would only be reliefs against adult male members and not their abettors who may be females.

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

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

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

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

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

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

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

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

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

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

STATEMENT OF OBJECTS AND REASONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Explanation I.For the purposes of this section,

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

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

(iii) verbal and emotional abuse includes

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

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

(iv) economic abuse includes

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

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

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

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

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

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

(a) committing any act of domestic violence;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) While passing an order under sub-section (1), sub-section (2) or sub- section (3), the court may also pass an order directing the officer-in- charge of the nearest police station to give protection to the aggrieved person or to assist her or the person making an application on her behalf in the implementation of the order.

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

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

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

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

(a) the loss of earnings;

(b) the medical expenses;

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

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

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

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

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

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

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

26. Relief in other suits and legal proceedings.

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

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

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

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

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

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

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

19. When Section 3 of the Act defines domestic violence, it is clear that such violence is gender neutral. It is also clear that physical abuse, verbal abuse, emotional abuse and economic abuse can all be by women against other women. Even sexual abuse may, in a given fact

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

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

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

22. When we come to Section 20, it is clear that a Magistrate may direct the respondent to pay monetary relief to the aggrieved person, of various kinds, mentioned in the Section. If the respondent is only to be an adult male person, and the money payable has to be as a result of domestic violence, compensation due from a daughter-in-law to a mother-in-law for domestic violence inflicted would not be available, whereas in a converse case, the daughter-in-law, being a wife, would be covered by the proviso to Section 2(q) and would consequently be entitled to monetary relief against her husband and his female relatives, which includes the mother-in-law.

23. When we come to Section 26 of the Act, the sweep of the Act is such that all the innovative reliefs available under Sections 18 to 22 may also be sought in any legal proceeding before a civil court, family court or criminal court affecting the aggrieved person and the respondent. The proceeding in the civil court, family court or criminal court may well include female members

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

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

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

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

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

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

    Negativing this contention, this Court held:

    The appellant, admittedly, entered into a live-in relationship with the respondent knowing that he was a married person, with wife and two children, hence, the generic proposition laid down by the Privy Council in Andrahennedige Dinohamy v. Wijetunge Liyanapatabendige Balahamy [(1928) 27 LW 678 : AIR 1927 PC 185] , that where a man and a woman are proved to have lived

together as husband and wife, the law presumes that they are living together in consequence of a valid marriage will not apply and, hence, the relationship between the appellant and the respondent was not a relationship in the nature of a marriage, and the status of the appellant was that of a concubine. A concubine cannot maintain a relationship in the nature of marriage because such a relationship will not have exclusivity and will not be monogamous in character. Reference may also be made to the judgments of this Court in Badri Prasadv. Director of Consolidation [(1978) 3 SCC 527] and Tulsa v. Durghatiya [(2008) 4 SCC 520] .

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

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

Thus, while interpreting a statute the court may not only take into consideration the purpose for which the statute was enacted, but also the mischief it seeks to suppress. It is this mischief rule, first propounded in Heydon case [(1584) 3 Co Rep 7a : 76 ER 637] which became the historical source of purposive interpretation. The court would also invoke the legal maxim construction of ut res magis valeat quam pereatin such cases i.e. where alternative constructions are possible the court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than one which will put a road block in its way. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation should be avoided. We should avoid a construction which would reduce the legislation to futility and should accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result. If this interpretation is not accepted, it would amount to giving a premium to the husband for defrauding the wife. Therefore, at least for the purpose of claiming maintenance under Section 125 Cr.P.C, such a woman is to be treated as the legally wedded wife.[Para 20]

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

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

Constitution and has been described in the same judgment as the positive aspect of equality namely the protection of equal laws. Subba Rao, J. stated:

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

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

32. We have also been referred to D.S. Nakara v. Union of India, (1983) 1 SCC 305. This judgment concerned itself with pension payable to Government servants. An office Memorandum of the Government of India dated 25.5.1979 restricted such pension payable only to persons who had retied prior to a specific date. In holding the date discriminatory and arbitrary and striking it down, this Court went into the doctrine of classification, and cited from Re: Special Courts Bill, (1979) 2 SCR 476 and Maneka Gandhi v. Union of India, (1978) 2 SCR 621, and went on to hold that the burden to affirmatively satisfy the court that the twin tests of intelligible differentia having a rational relation to the object sought to be achieved by the Act would lie on the State, once it has been established that a particular piece of legislation is on its face unequal. The Court further went on to hold that the petitioners challenged only that part of the scheme by which benefits were admissible to those who retired from service after a certain date. The challenge, it was made clear by the Court, was not to the validity of the Scheme, which was wholly acceptable to the petitioners, but only to that part of it which restricted the number of persons from availing of its benefit. The Court went on to hold:

> If it appears to be undisputable, as it does to us that the pensioners for the purpose of pension benefits form a class, would its upward revision permit a homogeneous class to be divided by arbitrarily fixing an eligibility criteria unrelated to purpose of revision, and would such classification be founded on some rational principle? The classification has to be based, as is well settled, on some rational principle and the rational principle must have nexus to the objects sought to be achieved. We have set out the objects underlying the payment of pension. If the State considered it necessary to liberalise the pension scheme, we find no rational principle behind

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

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

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

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

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

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

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

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

54. A reasonable classification is one which includes all who are similarly situated and none who are not. Mathew, J., while explaining the meaning of the words, similarly situated stated that we must look beyond the classification to the purpose of the law. The purpose of a law may be either the elimination of a public mischief or the achievement of some positive public good. The classification made in Section 6-A neither eliminates public mischief nor achieves some positive public good. On the other hand, it advances public mischief and protects the crimedoer. The provision thwarts an independent, unhampered, unbiased, efficient and fearless inquiry/investigation to track down the corrupt public servants. [paras 59 and 60]

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

We are conscious of the principle that the difference which will warrant a reasonable classification need not be great. However, it has to be shown that the difference is real and substantial and there must be some just and reasonable relation to the object of legislation or notification. Classification having regard to microscopic differences is not good. To borrow the phrase from

the judgment in Roop Chand Adlakha v. DDA [1989 Supp (1) SCC 116 : 1989 SCC (L&S) 235 : (1989) 9 ATC 639] :

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

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

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

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

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

clause (a) of Section 32 or exempted under Section 26 of the Act in the areas where the Act is in force will be governed by the Act irrespective of the date of their construction. [para 29]

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

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

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

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

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

2. Definitions.

In this Act, unless the context otherwise requires,- aggrieved person means any woman who is or has been a relative of the respondent and who alleges to have been subjected to acts of domestic violence by the respondent; xxxx

i) relative includes any person related by blood, marriage or adoption and living with the respondent;

j) respondent means any person who is or has been a relative of the aggrieved person and against whom the aggrieved person has sought monetary relief or has made an application for protection order to the Magistrate or to the Protection Officer, as the case may be; and

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

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

44. However, it still remains to deal with the impugned judgment. We have set out the manner in which the impugned judgment has purported to read down Section 2(q) of the impugned Act. The doctrine of reading down in constitutional adjudication is well settled and has been reiterated from time to time in several judgments, the most recent of which is contained in Cellular Operators Association of India v. TRAI, (2016) 7 SCC 703. Dealing with the doctrine of reading down, this Court held:-

But it was said that the aforesaid Regulation should be read down to mean that it would apply only when the fault is that of the service provider. We are afraid that such a course is not open to us in law, for it is well settled that the doctrine of reading down would apply only when general words used in a statute or regulation can be confined in a particular manner so as not to infringe a constitutional right. This was best exemplified in one of the earliest judgments dealing with the doctrine of reading down, namely, the judgment of the Federal Court in Hindu Women's Rights to Property Act, 1937, In re [Hindu Women's Rights to Property Act, 1937, In re, 1941 SCC OnLine FC 3 : AIR 1941 FC 72] . In that judgment, the word property in Section 3 of the Hindu Women's Rights to Property Act was read down so as not to include agricultural land, which would be outside the Central Legislature's powers under the Government of India Act, 1935. This is done because it is presumed that the legislature did not intend to transgress constitutional limitations. While so reading down the word property, the Federal Court held: (SCC OnLine FC)

If the restriction of the general words to purposes within the power of the legislature would be to leave an Act with nothing or next to nothing in it, or an Act different in kind, and not merely in degree, from an Act in which the general words were given the wider meaning, then it is plain that the Act as a whole must be held invalid, because in such circumstances it is impossible to assert with any confidence that the legislature intended the general words which it has used to be construed only in the narrower sense: Owners of SS Kalibia v.Wilson [Owners of SS Kalibia v. Wilson, (1910) 11 CLR 689 (Aust)] , Vacuum Oil Co. Pty. Ltd. v. Queensland [Vacuum Oil Co. Pty. Ltd. v. Queensland, (1934) 51 CLR 677 (Aust)] , R. v. Commonwealth Court of Conciliation and Arbitration, ex p Whybrow & Co. [R. v. Commonwealth Court of Conciliation and Arbitration, ex p Whybrow & Co., (1910) 11 CLR 1 (Aust)] and British Imperial Oil Co. Ltd. v.Federal Commr. of Taxation [British Imperial Oil Co. Ltd. v. Federal Commr. of Taxation, (1925) 35 CLR 422 (Aust)] . (emphasis supplied) This judgment was followed by a Constitution Bench of this Court in DTC v.Mazdoor Congress [DTC v. Mazdoor Congress, 1991 Supp (1) SCC 600 : 1991 SCC (L&S) 1213] . In that case, a question arose as to whether a particular regulation which conferred power on an authority to terminate the services of a permanent and confirmed employee by issuing a notice terminating his services, or by making payment in lieu of such notice without assigning any reasons and without any opportunity of hearing to the employee, could be said to be violative of the appellants' fundamental rights. Four of the learned Judges who heard the case, the Chief Justice alone dissenting on this aspect, decided that the regulation cannot be read down, and must, therefore, be held to be unconstitutional. In the lead judgment on this aspect by Sawant, J., this Court stated: (SCC pp. 728-29, para 255) 255. It is thus clear that the doctrine of reading down or of recasting the statute can be applied in limited situations. It is essentially used, firstly, for saving a statute from being struck down on account of its unconstitutionality. It is an extension of the principle that when two interpretations are possibleone rendering it constitutional and the other making it unconstitutional, the former should be preferred. The unconstitutionality may spring from either the incompetence of the legislature to enact the statute or from its violation of any of the provisions of the Constitution. The second situation which summons its aid is where the provisions of the statute are vague and ambiguous and it is possible to gather the intention of the legislature from the object of the statute, the context in which the provision occurs and the purpose for which it is made. However, when the provision is cast in a definite and unambiguous language and its intention is clear, it is not permissible either to mend or bend it even if such recasting is in accord with good reason and conscience. In such circumstances, it is not possible for the court to remake the statute. Its only duty is to strike it down and leave it to the legislature if it so desires, to amend it. What is further, if the remaking of the statute by the courts is to lead to its distortion that course is to be scrupulously avoided. One of the situations further where the doctrine can never be called into play is where the statute requires extensive additions and deletions. Not only it is no part of the court's duty to undertake such exercise, but it is beyond its jurisdiction to do so. (emphasis supplied) [paras 50 and 51]

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

Section 8(4) opens with the words notwithstanding anything in sub-section (1), sub-section (2) or sub-section (3), and it applies only to sitting members of Legislatures. There is no challenge

to it on the basis that it violates Article 14. If there were, it might be tenable to contend that legislators stand in a class apart from non-legislators, but we need to express no final opinion. In any case, if it were found to be violative of Article 14, it would be struck down in its entirety. There would be, and is no question of so reading it that its provisions apply to all, legislators and non-legislators, and that, therefore, in all cases the disqualification must await affirmation of the conviction and sentence by a final court. That would be reading up the provision, not reading down, and that is not known to the law. [para 39]

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

(Kurian Joseph) J.

(R.F. Nariman) J.

New Delhi;

October 6, 2016.

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MANMOHAN ATTAVAR VERSUS NEELAM MANMOHAN ATTAVAR

SUPREME COURT OF INDIA

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

Manmohan Attavar
Versus
Neelam Manmohan Attavar

Civil Appeal No.2500 of 2017 with Civil Appeal No.2502 of 2017

Decided on 14 July, 2017

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

chooses to file proceedings for transfer whether it be before the 1 (1988) 2 SCC 602 12 MM or before the appellate court. It is submitted that this approach ought not to be encouraged.

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

Hon'ble Mr. Justice Sanjay Kishan Kaul :—

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

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

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

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

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

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

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

The trial went on and at the request of the respondent made under Section 410 of the Cr.P.C., the application was transferred from the Court of the Metropolitan Magistrate-VI to the Court of Metropolitan Magistrate-II at Bangalore. This application was finally dismissed by the learned Metropolitan Magistrate on 30.7.2015.

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

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

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

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

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

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

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

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

13. We may note at this stage itself that it would neither be advisable nor proper to dwell into the controversy on merits because the appeal filed by the respondent is yet to be decided. Any observations by us at this stage could affect either of the parties in the appeal proceedings. The controversy before us is in a very narrow compass. We thus set forth the controversy -

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

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

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

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

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

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

19. Residence orders.-

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

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

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

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

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

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

(f) directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the

shared household or to pay rent for the same, if the circumstances so require:

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

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

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

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

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

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

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

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

The learned Single Judge has expressed the view that the appellate court ought to have called upon the respondent to argue the appeal rather than spend time on interim reliefs, which was not maintainable in the face of the earlier order resulting in a predictable order.

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

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

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

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

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

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

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

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

.....J.
(Rohinton Fali Nariman)

.....J.
(Sanjay Kishan Kaul)

New Delhi; July 14, 2017.

❑❑❑

KUNAPAREDDY @ NOOKALA SHANKA BALAJI VERSUS KUNAPAREDDY SWARNA KUMARI & ANR

SUPREME COURT OF INDIA

Bench : Hon'ble Mr. Justice A.K. Sikri & Hon'ble Mr. Justice R.K. Agrawal

Kunapareddy @ Nookala Shanka Balaji
Versus
Kunapareddy Swarna Kumari & anr.

Criminal Appeal Nos. 516/2016

arising out of SLP (CRL.) No. 1537/2016]

Held that a complaint or petition under Domestic Violence Act can be amended and court is not powerless to allow such amendment applications....

Rejecting the contention that court cannot allow amendment to a complaint under DV Act, the Apex Court held: "it cannot be said that the Court dealing with the application under DV Act has no power and/or jurisdiction to allow the amendment of the said application. If the amendment becomes necessary in view of subsequent events[escalation of prices in the instant case] or to avoid multiplicity of litigation, Court will have power to permit such an amendment. It is said that procedure is the handmaid of justice and is to come to the aid of the justice rather than defeating it. It is nobody's case that respondent no1 was not entitled to file another application claiming the reliefs which she sought to include in the pending application by way of amendment. If that be so, we see no reason, why the applicant be not allowed to incorporate this amendment in the pending application rather than filing a separate application. It is not that there is a complete ban/bar of amendment in the complaints in criminal Courts which are governed by the Code, though undoubtedly such power to allow the amendment has to be exercised sparingly and with caution under limited circumstances."

Referring to S.R.Sukumar vs. S. Sunaad Raghuram (2015) 9 SCC 609, the Court said: "even in criminal cases governed by the Code, the Court is not powerless and may allow amendment in appropriate cases. One of the circumstances where such an amendment is to be allowed is to avoid the multiplicity of the proceedings."

Held : "If the power to amend the complaint/application etc. is not read into the aforesaid provision, the very purpose which the Act attempts to sub-serve itself may be defeated in many cases."

Hon'ble Mr. Justice A.K. Sikri :—

1. Leave granted.

2. Learned counsel for both the parties have been finally heard at this stage.

3. The issue that arises for consideration in the instant case is whether a court dealing with the petition/complaint filed under the provisions of the Domestic Violence Act, 2005 (hereinafter referred to as 'the DV Act') has power to allow amendment to the petition/complaint originally filed. This issue has arisen in the petition/complaint filed by respondent no. 1/wife. Respondent

No. 1 herein, who is the wife of the appellant, has filed a case against the appellant and his family members before the Court of IInd Additional Judicial First Class Magistrate, West Godavari, Eluru under Sections 9B & 37(2)(C) of the DV Act which is registered as Domestic Violence Case No. 20/2008.

It may be mentioned here that the said petition now stands transferred to the Court of Judicial First Class Magistrate (Mobile Court), Eluru and has been renumbered as DV Case No. 29/2012. In this case, respondent no. 1 has leveled various allegations against the appellant and his family members inter alia alleging that the appellant and his family members used to harass her physically as well as mentally and by also demanding dowry. It is further alleged that she was driven out from her matrimonial home in the month of March, 2015 and initially she took shelter at her brother's house along with the children in Eluru.

Thereafter, on the appellant tendering an apology to respondent no. 1 by coming to Eluru they put up their family together in Gadam Ramakrishna's House at Ashok Nagar, Eluru,but the things did not change. The following prayers are made in the said petition:

"a) to provide protection to the life and limb of the complainant in the hands of the respondents;

b) to grant monthly maintenance of Rs. 5,000/- to the complainant and her children each towards her maintenance, medicines etc. and her children education and maintenance;

c) to grant such other relief or reliefs if the Hon'ble Court deems fit and proper in the circumstances of the case."

4. Respondent no.1 has also filed a divorce petition before the Court of Senior Civil Judge, West Godavari, Eluru wherein she has made an application for interim maintenance as well. Thereafter, she also filed a maintenance petition under Sections 23(2) and 24 of the Hindu Marriage Act, 1955 before the Court of Family Judge, Eluru.

5. On receiving notice in DV Petition, family members of the appellant filed a petition under Section 482 Cr.P.C. in the High Court of Judicature at Hyderabad for the States of Telengana and Andhra Pradesh for quashing the proceedings in the said DV Petition. This petition was allowed by the High Court vide order dated 17.04.2009 thereby quashing the domestic violence proceedings against the family members of the appellant on the ground that there was no specific allegations against them.

After the DV Petition was transferred to the Court of Judicial First Class Magistrate, Eluru, respondent no. 1 filed an application seeking amendment of the petition. By way of the said amendment petition, respondent no. 1 wanted to amend the prayer clause by incorporating some more prayers, as is clear from the following amendment in this behalf which was sought by respondent no. 1:

a) To provide protection to life and limb of the complainant in the hands of the respondent.

b) To grant monthly maintenance of Rs. 15,000/- to the complainant and her 2nd child to their maintenance instead of Rs.5000/-

c) Direct the respondent to return the Sridhana amount of Rs.3,00,000/- and 15 sovereigns of gold ornaments and other sari samanas and marriage batuvu presented to the respondent

worth about 2 sovereigns wrist watch, 7 sovereign gold chain presented by the complainant and her parents.

d) Direct the respondent to pay the compensation of Rs.15 lakhs to the complaint for subjecting the compliant to physical and mental harassments besides including acts of Domestic Violence.

e) Direct the respondent to return the sari samans and other goods like worth more than Rs.10,00,000/- as per the list annexed herewith.

f) Direct the respondent to pay the cost of, litigation to the tune of Rs.25,000/- so far spent by the complainant persuing her litigation.

g) Direct the 1st respondent to provide separate residence by taking rent portion with monthly rent of Rs.10,000/-

h) Directing the respondent to return the original study certificates, medical certificates, deposits certificates and receipts etc. in the prayer portion paragraphs the following amendment by deleting the prayer original para b) to grant monthly maintenance of Rs.5,000/- to the complainant and her children each towards her maintenance, medicines etc. and her children education and maintenance."

6. The appellant herein opposed the said application. However, the learned Trail Court after hearing both the parties allowed the amendment. The appellant raised an objection that there was no power with the court to allow amendment of such a petition/complaint in the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code'). This contention was rejected by the trial court on the premise that section 26 of the DV Act, which entitles a civil court, a family court or a criminal court as well to grant any relief which is available to the complainant under Sections 18, 19, 20, 21 & 22 of the said Act, gives an indication that the provisions of the Code of Civil Procedure would squarely apply and, therefore, the court had the power to allow amendment of the petition/complaint, more so, when it was necessary for the purpose of determining the real matter in controversy and to prevent multiplicity of the litigation.

7. This order was challenged by the appellant by filing an appeal before the Court of District and Sessions Judge, Eluru. The District and Sessions Judge, Eluru set aside the order of the Trial Court holding that there was no specific provision for amendment of the complaint and allowed the appeal of the appellant. Aggrieved by that order, respondent no. 1 filed a revision petition in the High Court which has been allowed by the High Court vide impugned judgment permitting respondent no. 1 to amend the petition/complaint, thereby setting aside the order of the District and Sessions Judge and restoring the order of the Trial Court.

8. As mentioned above, in the present appeal preferred by the appellant questioning the validity of the order of the High Court, the contention of the appellant is that there is no such an provision under the DV Act which permits the Trial Court to allow such amendment. On this issue, we have heard the learned counsel for the parties at length.

9. The contention of Mr. G.V.Rao, learned counsel appearing for the appellant was that the proceedings under the DV Act are governed by the provisions of the Code of Criminal Procedure as prescribed under Section 28 of the DV Act and there is no provision for amendment in the Code. He further submitted that the court below was wrong in treating the application for

amendment under Order VI Rule 17 of the Code of Civil Procedure which has no application to the proceedings under the DV Act.

10. In order to decide the aforesaid issue, we may take note of some of the salient provisions of the DV Act as well as relevant Rules framed under the said Act. We have gone through the concerned provisions of the Code. We may start our discussion with Section 28 of the DV Act which reads as under:

> *"28. Procedure.-*
>
> *(1) Save as otherwise provided in this Act, all proceedings under sections 12, 18, 19, 20, 21, 22 and 23 and offences under section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973 (2 of 1974).*
>
> *(2) Nothing in sub-section (1) shall prevent the court from laying down its own procedure for disposal of an application under section 12 or under sub- section (2) of section 23."*

11. No doubt this provision provides that all proceedings under Sections 12, 19 to 23 as well as offences under Section 31 are to be governed by the provisions of the Code. The instant petition, as noted above, is filed under Section 9B and 37(2)(C) of the DV Act. Section 9 enumerates duties and functions of Protection Officer and Clause (b) of sub-Section (1) thereof reads as under:

> *"(b) to make a domestic incident report to the Magistrate, in such form and in such manner as may be prescribed, upon receipt of a complaint of domestic violence and forward copies thereof to the police officer in charge of the police station within the local limits of whose jurisdiction domestic violence is alleged to have been committed and to the service providers in that area;"*

12. We have already mentioned the prayers which were made by respondent no.1 in the original petition and prayer 'A' thereof relates to Section 9. However, in prayer 'B', the respondent no.1 also sought relief of grant of monthly maintenance to her as well as her children. This prayer falls within the ambit of Section 20 of the DV Act. In fact, prayer 'A" is covered by Section 18 which empowers the Magistrate to grant such a protection which is claimed by the respondent no.1.

    Therefore, the petition is essentially under Sections 18 and 20 of the DV Act, though in the heading these provisions are not mentioned. However, that may not make any difference and, therefore, no issue was raised by the appellant on this count. In respect of the petition filed under Sections 18 and 20 of the DV Act, the proceedings are to be governed by the Code, as provided under Section 28 of the DV Act. At the same time, it cannot be disputed that these proceedings are predominantly of civil nature.

13. In fact, the very purpose of enacting the DV Act was to provide for a remedy which is an amalgamation of civil rights of the complainant i.e aggrieved person. Intention was to protect women against violence of any kind, especially that occurring within the family as the civil law does not address this phenomenon in its entirety. It is treated as an offence under Section 498A of the Indian Penal Code.

    The purpose of enacting the law was to provide a remedy in the civil law for the protection of women from being victims of domestic violence and to prevent the occurrence of domestic

violence in the society. It is for this reason, that the Scheme of the Act provides that in the first instance, the order that would be passed by the Magistrate, on a complaint by the aggrieved person, would be of a civil nature and if the said order is violated, it assumes the character of criminality. In order to demonstrate it, we may reproduce the introduction as well as relevant portions of the Statement of Objects and Reasons of the said Act, as follows:

"INTRODUCTION.

The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged that domestic violence is undoubtedly a human rights issue. The United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women in its General Recommendations has recommended that State parties should act to protect women against violence of any kind, especially that occurring within the family. The phenomenon of domestic violence in India is widely prevalent but has remained invisible in the public domain.

The civil law does not address this phenomenon in its entirety. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under Section 498A of the Indian Penal Code. In order to provide a remedy in the civil law for the protection of women from being victims of domestic violence and to prevent the occurrence of domestic violence in the society the protection of Women from Domestic Violence Bill was introduced in the Parliament.

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

xxx xxx xxx

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

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

xxx xxx xxx

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

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

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

14. Procedure for obtaining order of reliefs is stipulated in Chapter IV of the DV Act which comprises Sections 12 to 29. Under Section 12 an application can be made to the Magistrate by the aggrieved person or Protection Officer or any other person on behalf of the aggrieved person.

The Magistrate is empowered, under Section 18, to pass protection order. Section 19 of the DV Act authorizes the Magistrate to pass residence order which may include restraining the respondent from dispossessing or disturbing the possession of the aggrieved person or directing the respondent to remove himself from the shared household or even restraining the respondent or his relatives from entering the portion of the shared household in which the aggrieved person resides etc.

Monetary reliefs which can be granted by the Magistrate under Section 20 of the DV Act include giving of the relief in respect of the loss of earnings, the medical expenses, the loss caused due to destruction, damage or removal of any property from the control of the aggrieved person and the maintenance for the aggrieved person as well as her children, if any.

Custody can be decided by the Magistrate which was granted under Section 21 of the DV Act. Section 22 empowers the Magistrate to grant compensation and damages for the injuries, including mental torture and emotional distress, caused by the domestic violence committed by the appellant. All the aforesaid reliefs that can be granted by the Magistrate are of civil nature. Section 23 vests the Magistrate with the power to grant interim ex-parte orders.

It is, thus, clear that various kinds of reliefs which can be obtained by the aggrieved person are of civil nature. At the same time, when there is a breach of such orders passed by the Magistrate, Section 31 terms such a breach to be a punishable offence.

15. In the aforesaid scenario, merely because Section 28 of the DV Act provides for that the proceedings under some of the provisions including Sections 18 and 20 are essentially of civil nature. We may take some aid and assistance from the nature of the proceedings filed under Section 125 of the Code. Under the said provision as well, a woman and children can claim maintenance. At the same time these proceedings are treated essentially as of civil nature.

16. In Ramesh Chander Kaushal vs. Venna Kaushal (1978) 4 SCC 70, Justice Krishna Iyer, dealing with the interpretation of Section 125 of the Code, observed as follows:

> *"9. This provision is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39. We have no doubt that sections of statutes calling for construction by courts are not petrified print but vibrant words with social functions to fulfill.*

The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social functions to fulfill. The brooding

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

17. We understood in this backdrop, it cannot be said that the Court dealing with the application under DV Act has no power and/or jurisdiction to allow the amendment of the said application. If the amendment becomes necessary in view of subsequent events [escalation of prices in the instant case] or to avoid multiplicity of litigation, Court will the have power to permit such an amendment. It is said that procedure is the handmaid of justice and is to come to the aid of the justice rather than defeating it. It is nobody's case that respondent no. 1 was not entitled to file another application claiming the reliefs which she sought to include in the pending application by way of amendment.

If that be so, we see no reason, why the applicant be not allowed to incorporate this amendment in the pending application rather than filing a separate application. It is not that there is a complete ban/bar of amendment in the complaints in criminal Courts which are governed by the Code, though undoubtedly such power to allow the amendment has to be exercised sparingly and with caution under limited circumstances. The pronouncement on this is contained in the recent judgment of this Court in S.R.Sukumar vs. S. Sunaad Raghuram (2015) 9 SCC 609 in the following paras:

> "*17. Insofar as merits of the contention regarding allowing of amendment application, it is true that there is no specific provision in the Code to amend either a complaint or a petition filed under the provisions of the Code, but the Courts have held that the petitions seeking such amendment to correct curable infirmities can be allowed even in respect of complaints. In U.P. Pollution Control Board vs. Modi Distillery And Ors., (1987) 3 SCC 684, wherein the name of the company was wrongly mentioned in the complaint that is, instead of Modi Industries Ltd. The name of the company was mentioned as Modi Distillery and the name was sought to be amended. In such factual background, this Court has held as follows:-*
>
> *"...The learned Single Judge has focused his attention only on the [pic]technical flaw in the complaint and has failed to comprehend that the flaw had occurred due to the recalcitrant attitude of Modi Distillery and furthermore the infirmity is one which could be easily removed by having the matter remitted to the Chief Judicial Magistrate with a direction to call upon the appellant to make the formal amendments to the averments contained in para 2 of the complaint so as to make the controlling company of the industrial unit figure as the concerned accused in the complaint.*
>
> *All that has to be done is the making of a formal application for amendment by the appellant for leave to amend by substituting the name of Modi Industries Limited, the company owning the industrial unit, in place of Modi Distillery.... Furthermore, the legal infirmity is of such a nature which could be easily cured..."*
>
> *18. What is discernible from the U.P. Pollution Control Board's case is that easily curable legal infirmity could be cured by means of a formal application for amendment.*

If the amendment sought to be made relates to a simple infirmity which is curable by means of a formal amendment and by allowing such amendment, no prejudice could be caused to the other side, notwithstanding the fact that there is no enabling provision in the Code for entertaining such amendment, the Court may permit such an amendment to be made. On the contrary, if the amendment sought to be made in the complaint does not relate either to a curable infirmity or the same cannot be corrected by a formal amendment or if there is likelihood of prejudice to the other side, then the Court shall not allow such amendment in the complaint.

19. In the instant case, the amendment application was filed on 24.05.2007 to carry out the amendment by adding paras 11(a) and 11 (b). Though, the proposed amendment was not a formal amendment, but a substantial one, the Magistrate allowed the amendment application mainly on the ground that no cognizance was taken of the complaint before the disposal of amendment application.

Firstly, Magistrate was yet to apply the judicial mind to the contents of the complaint and had not taken cognizance of the matter.

Secondly, since summons was yet to be ordered to be issued to the accused, no prejudice would be caused to the accused.

Thirdly, the amendment did not change the original nature of the complaint being one for defamation.

Fourthly, the publication of poem 'Khalnayakaru' being in the nature of subsequent event created a new cause of action in favour of the respondent which could have been prosecuted by the respondent by filing a separate complaint and therefore to avoid multiplicity of proceedings, the trial court allowed the amendment application.

Considering these factors which weighed in the mind of the courts below, in our view, the High Court rightly declined to interfere with the order passed by the Magistrate allowing the amendment application and the impugned order does not suffer from any serious infirmity warranting interference in exercise of jurisdiction under Article 136 of the Constitution of India."

18. What we are emphasis1 ing is that even in criminal cases governed by the Code, the Court is not powerless and may allow amendment in appropriate cases. One of the circumstances where such an amendment is to be allowed is to avoid the multiplicity of the proceedings. The argument of the learned counsel for the appellant, therefore, that there is no power of amendment has to be negated.

19. In this context, provisions of Sub-Section(2) of Section 28 of the DV Act gain significance. Whereas proceedings under certain sections of the DV Act as specified in sub-Section (1) of Section 28 are to be governed by the Code, the Legislature at the same time incorporated the provisions like sub - Section (2) as well which empowers the Court to lay down its own procedure for disposal of the application under Section 12 or Section 23(2) of the DV Act.

This provision has been incorporated by the Legislature keeping a definite purpose in mind. Under Section 12, an application can be made to a Magistrate by an aggrieved person or a

Protection Officer or any other person on behalf of the aggrieved person to claim one or more reliefs under the said Act. Section 23 deals with the power of the Magistrate to grant interim and ex-parte orders and sub-Section (2) of Section 23 is a special provision carved out in this behalf which is as follows:

> *"(2).If the Magistrate is satisfied that an application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an ex parte order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under section 18, section 19, section 20, section 21 or, as the case may be, section 22 against the respondent.*

20. The reliefs that can be granted by the final order or an by interim order, have already been pointed out above wherein it is noticed that most of these reliefs are of civil nature. If the power to amend the complaint/application etc. is not read into the aforesaid provision, the very purpose which the Act attempts to sub-serve itself may be defeated in many cases.

21. We, thus, are of the opinion that the amendment was rightly allowed by the Trial Court and there is no blemish in the impugned judgment of the High Court affirming the order of the Trial Court. This appeal is, thus, devoid of any merits and is, accordingly, dismissed with costs.

.....J.
[A.K. SIKRI]

.....J.
[R.K.AGRAWAL]

NEW DELHI; APRIL 18, 2016.

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SHALU VERSUS PRASHANT OJHA

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

Bench : Hon'ble Mr. Justice J. Chelameswar & Hon'ble Mr. Justice A.K. Sikri

Shalu Ojha Appellant
Versus
Prashant Ojha Respondent

CRIMINAL APPEAL NO.2070 OF 2014

(Arising out of Special Leave Petition (Crl.) No.6220 OF 2014)

- **In a matter arising under a legislation meant for protecting the rights of the women, the High Court should have been slow in granting interim orders, interfering with the orders by which maintenance is granted to the appellant. No doubt, such interim orders are now vacated. In the process the appellant is still awaiting the fruits of maintenance order even after 2 years of the order.**
- **We find it difficult to accept that in a highly contested matter like this the appellant would have instructed her counsel not to press her claim for maintenance. In our view, the High Court ought not to have accepted the statement of the counsel without verification. The impugned order is set aside.**
- **We are of the opinion that the conduct of the respondent is a gross abuse of the judicial process. We do not see any reason why the respondent's petition Crl.MC No. 1975 of 2013 should be kept pending. Whatever be the decision of the High Court, one of the parties will (we are sure) approach this Court again thereby delaying the conclusion of the litigation. The interests of justice would be better served if the respondent's appeal before the Sessions Court is heard and disposed of on merits instead of going into the residuary questions of the authority of the appellate Court to grant interim orders or the legality of the decision of the Sessions Court to dismiss the appeal only on the ground of the non-compliance by the respondent with the conditions of the interim order. The Criminal Appeal No. 23/2012 stands restored to the file of the Sessions Court. 35. We also direct that the maintenance order passed by the magistrate be executed forthwith in accordance with law. The executing court should complete the process within 8 weeks and report compliance in the High Court. We make it clear that such hearing of the Sessions Court should only be after the execution of the order of maintenance passed by the Magistrate.**
- **In the event of the respondent's success in the appeal, either in full or part, the Sessions Court can make appropriate orders regarding the payments due to be made by the respondent in the execution proceedings."**

JUDGMENT

Hon'ble Mr. Justice J. Chelameswar :—

1. Leave granted.

2. This is an unfortunate case where the provisions of the Protection of Women from Domestic Violence Act, 2005 are rendered simply a pious hope of the Parliament and a teasing illusion for the appellant.

3. The appellant is a young woman who got married to the respondent on 20.04.2007 in Delhi according to Hindu rites and customs, pursuant to certain information placed by the respondent on the website known as Sycorian Matrimonial Services Ltd..

4. According to the appellant, she was thrown out of the matrimonial home within four months of the marriage on 14.8.2007. Thereafter, the respondent started pressurizing the appellant to agree for dissolution of marriage by mutual consent. As the appellant did not agree for the same, the respondent filed a petition for divorce being H.M.A. No.637 of 2007 under Section 13(1) of the Hindu Marriage Act, 1955 on 17.10.2007 before the Additional District Judge, Tis Hazari Courts, Delhi. The said petition was dismissed by an order dated 03.10.2008. Within four months, the respondent filed another petition on 08.04.2009 once again invoking Section 13(1) of the Hindu Marriage Act, 1955 before the Additional District Judge, Patiala House Courts, Delhi being H.M.A. No.215 of 2009 and the same on being transferred is pending before the Family Court, Saket and renumbered as H.M.A. No.266 of 2009.

5. On 04.06.2009, the appellant filed a complaint case No.120/4/09 under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the DV Act).

6. The said complaint case came to be disposed of by the learned Metropolitan Magistrate, New Delhi by his order dated 05.07.2012. By the said order, the Magistrate granted an amount of Rs.2.5 lacs towards monthly maintenance of the appellant which included rental charges for alternative accommodation. The respondent was made liable to pay such monthly maintenance from the date of filing of the petition, i.e. from 04.06.2009. The monthly maintenance was made payable on or before 10th of each succeeding month. The learned Magistrate further directed that the arrears of the maintenance be cleared by 05.12.2012.

7. Aggrieved by the above order, the respondent carried the matter in appeal under Section 29 of the DV Act in Criminal Appeal No.23 of 2012 before the learned Additional Sessions Judge, Rohini, New Delhi. On 10.01.2013, the learned Additional Sessions Judge while granting stay of the execution of the order under appeal passed an order directing the respondent to pay the entire arrears of the maintenance due to the appellant till the presentation of the appeal within a period of two months.

8. Since the respondent did not pay the arrears, the appellant moved an application for execution of the order dated 10.01.2013.

9. By an order dated 07.05.2013, Criminal Appeal No.23 of 2013 preferred by the respondent was dismissed by the learned Sessions Judge for non- compliance of the interim directions dated 10.01.2013.

10. Aggrieved by the order dated 07.05.2013, the respondent filed Crl. Misc. Case No.1975 of 2013 and Crl. Misc. Application No.78-34 of 2013 for interim directions in the High Court of Delhi on 08.05.2013. The High Court initially declined to pass an interim order in the said appeal. Aggrieved by the same the respondent approached this Court in SLP (Crl.) No.6509-6510 of 2013 which was dismissed in limine on 13.08.2013 with a direction to the parties to apply for mediation.

11. Pursuant to the said direction, the respondent filed Crl. Misc. Application No.12547 of 2013 in Crl. Misc. Case No.1975 of 2013 for direction to refer the matter to Mediation. The matter was referred accordingly. Eventually the mediation failed. On receipt of such failure report, the appeal was again listed before the High Court on 10.09.2013. The High Court directed the respondent to pay an amount of Rs.10 lakhs in two instalments and that the execution petition filed by the appellant for the recovery of the arrears be kept in abeyance.

12. Thereafter, an application was filed by the appellant before the High Court seeking direction to the respondent for the payment of monthly maintenance (current period) in terms of order dated 05.7.2012 of the learned Metropolitan Magistrate (supra). It appears that the matter underwent number of adjournments but no orders have been passed by the High Court.

13. In the said background, the appellant filed Special Leave Petition (Crl.) No.2210 of 2014 in this Court. The said petition came to be disposed of on 31.03.2014 by setting aside the interim stay Shalu Ojha vs Prashant Ojha on 18 September, 2014 granted by the High Court on the execution petition filed by the appellant. This Court categorically observed that - it is open to the petitioner to execute the order of maintenance passed by the learned Metropolitan Magistrate and requested the High Court to dispose of the appeal of the respondent expeditiously.

14. Strangely, when the appellants application for the payment of current maintenance in C.M. No.18869 of 2013 was listed on 27.5.2014 before the High Court along with other connected matters in Appeal (Crl. Misc. Case No.1975 of 2013) preferred by the respondent, the application of the appellant was dismissed as not pressed on representation made by the counsel appearing for the appellant. The appellant appeared in person before us and made a statement that such instructions not to press the application were never given to the counsel who appeared in the High Court and hence the present appeal.

15. We have heard the appellant-in-person and learned counsel appearing on behalf of the respondent.

16. The learned counsel appearing on behalf of the respondent pleaded inability to make the payment of the arrears and the current maintenance due to the appellant in terms of the order passed by the learned Metropolitan Magistrate on 05.07.2012 on the ground that the respondents annual income as can be seen from his income-tax returns for the last two years is only around Rs.2.50 lakhs per annum.

17. The appellant submitted that the income-tax returns of the respondent do not reflect the true picture of the income of the respondent. The appellant pointed out the profile of the respondent placed on the website of Sycorian Matrimonial Services Ltd. wherein the respondents personal income is shown as Rs.50 lakhs to Rs.1 crore per annum and monthly income of Rs.5 lakhs. He was shown to be a Managing Director or Director of four companies, the details of which are as under:

Sr. No.	Organization	Designation
1	M/s Utkarsh Art Press Pvt. Ltd.	Managing Director/Share Holder
2	M/s Empress Infonet Pvt. Ltd.	Director/Share Holder
3	Hotel Urban Pind	Director
4	M/s Brahmani Apparel Pvt. Ltd.	Director/Share Holder

18. Apart from that, the appellant also placed reliance on a article published in weekly magazine Business World (Issue dated 10.03.2014) wherein some information regarding a posh restaurant known as Zerruco by Zilli at The Ashok, New Delhi was published. The article named the respondent along with one Kashif Farooq as the restaurateurs. According to the article, the restaurant was set up at astounding cost of Rs.7 crore. The relevant portion of the article reads as follows: If chef Back has been feeding American entertainment industry stars. London-based Aldo Zilli is well-known for his celeb-patronised Italian bites. He has just made his Asian foray with Zerruco by Zilli, set in the partly al fresco-partly indoors space at The Ashoka New Delhi that used to house Mashrabiya. The menu is simple, fresh and Med salads, grills, the occasional show-offy gelato ravioli but this is one of those big lifestyle restaurants that we seem to be losing more recently with the spurt in made-to-look-like-mom-and-pop places.

    Restaurateurs Kashif Farooq and Prashant Ojha known in the clubbing/partying circuits have brought in Zilli as part of their ambitious plans to grow and get taken seriously in the F&B realm. The restaurant (that will turn into a lounge/club in the evenings) has been set up at astounding Rs.7 crore cost. You can look to this one as an alternate to the upscale, casual, Olive-like spaces.

19. Before we proceed to take any decision in the matter, we deem it appropriate to make a brief survey of the DV Act insofar as it is relevant for the present purpose. The preamble of the Act states that this is an Act to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected or incidental thereto.

20. Domestic violence is defined under Section 3 as any act, omission or commission or conduct of any adult male who is or has been in domestic relationship. Section 3. Definition of domestic violence.For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it harms or injures or endangers the health, safety, life, limb or well-being whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or harasses, harms, injures or endangers the aggrieved person with a view to coerce her r any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

21. The expression domestic relationship is defined under Section 2(f)[1]. The expressions physical abuse, sexual abuse, verbal and emotional abuse and economic abuse are explained in Explanation-1 to Section 3.

22. Section 12 of the Act recognizes the right of an aggrieved person[2] (necessarily a woman by definition) to present application to the Magistrate seeking one or more reliefs under the Act. The reliefs provided under the Act are contained in Sections 17 to 22. Section 17 creates a right in favour of a woman/aggrieved person to reside in a shared household defined under Section 2(s)[3].

23. Section 18 deals with various orders that can be passed by the Magistrate dealing with the application of an aggrieved person under Section 12. Section 19 provides for various kinds of residence orders which a Magistrate dealing with an application under Section 12 can pass in favour of a woman. Section 20 authorizes the Magistrate dealing with an application under

Section 12 to direct the respondent to pay monetary relief to the aggrieved person. Section 20 reads as follows:

> Section 20. Monetary reliefs.(1) While disposing of an application under sub-section (1) of section 12, the Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include, but is not limited to, ...
>
> the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force.

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

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

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

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

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

24. Section 21 deals with the jurisdiction of the Magistrate to pass orders relating to custody of children of the aggrieved person. Section 22 deals with compensation orders which authorizes the Magistrate to pass an order directing the respondent to pay compensation and damages for the injuries including mental torture and emotional distress caused by the act of domestic violence committed by the respondent. The Magistrate receiving a complaint under Section 12 is authorized under the Act to pass anyone of the orders under the various provisions discussed above appropriate to the facts of the complaint.

25. Section 29 provides for an appeal to the Court of Session against any order passed by the Magistrate under the Act either at the instance of the aggrieved person or the respondent.

26. One important factor to be noticed in the context of the present case is that while Section 23 expressly confers power on the Magistrate to grant interim orders, there is no express provision conferring such power on the Sessions Court in exercise of its appellate jurisdiction. Section 23 reads as follows:

> Section 23. Power to grant interim and ex parte orders.(1) In any proceeding before him under this Act, the Magistrate may pass such interim order as he deems just and proper. (2) If the Magistrate is satisfied that an application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an ex parte order on the basis of the

affidavit in such form, as may be prescribed, of the aggrieved person under section 18, section 19, section 20, section 21 or, as the case may be, section 22 against the respondent.

27. It can be seen from the DV Act that no further appeal or revision is provided to the High Court or any other Court against the order of the Sessions Court under Section 29.

28. It is in the background of the abovementioned Scheme of the DV Act this case is required to be considered. The appellant made a complaint under Section 12 of the DV Act. The Magistrate in exercise of his jurisdiction granted maintenance to the appellant. The Magistrates legal authority to pass such an order is traceable to Section 20(1)(d) of the DV Act.

29. Questioning the correctness of the Magistrates order in granting the maintenance of Rs.2.5 lakhs per month the respondent carried the matter in appeal under Section 29 to the Sessions Court and sought stay of the execution of the order of the Magistrate during the pendency of the appeal. Whether the Sessions Court in exercise of its jurisdiction under Section 29 of the Act has any power to pass interim orders staying the execution of the order appealed before it is a matter to be examined in an appropriate case. We only note that there is no express grant of power conferred on the Sessions Court while such power is expressly conferred on the Magistrate under Section 23.

    Apart from that, the power to grant interim orders is not always inherent in every Court. Such powers are either expressly conferred or implied in certain circumstances. This Court in Super Cassettes Industres Limited v. Music Broadcast Private Limited, (2012) 5 SCC 488, examined this question in detail. At any rate, we do not propose to decide whether the Sessions Court has the power to grant interim order such as the one sought by the respondent herein during the pendency of his appeal, for that issue has not been argued before us.

30. We presume (we emphasize that we only presume for the purpose of this appeal) that the Sessions Court does have such power. If such a power exists then it can certainly be exercised by the Sessions Court on such terms and conditions which in the opinion of the Sessions Court are justified in the facts and circumstances of a given case. In the alternative, if the Sessions Court does not have the power to grant interim orders during the pendency of the appeal, the Sessions Court ought not to have stayed the execution of the maintenance order passed by the Magistrate. Since the respondent did not comply with such conditional order, the Sessions Court thought it fit to dismiss the appeal. Challenging the correctness of the said dismissal, the respondent carried the matter before the High Court invoking Section 482 of the Code of Criminal Procedure, 1973 and Article 227 of the Constitution.

31. The issue before the High Court in Crl. MC. No. 1975 of 2013 is limited i.e. whether the sessions court could have dismissed the respondents appeal only on the ground that respondent did not discharge the obligation arising out of the conditional interim order passed by the sessions court. Necessarily the High Court will have to go into the question whether the sessions court has the power to grant interim stay of the execution of the order under appeal before it.

32. In a matter arising under a legislation meant for protecting the rights of the women, the High Court should have been slow in granting interim orders, interfering with the orders by which maintenance is granted to the appellant. No doubt, such interim orders are now vacated. In the process the appellant is still awaiting the fruits of maintenance order even after 2 years of the order.

33. We find it difficult to accept that in a highly contested matter like this the appellant would have instructed her counsel not to press her claim for maintenance. In our view, the High Court ought not to have accepted the statement of the counsel without verification. The impugned order is set aside.

34. We are of the opinion that the conduct of the respondent is a gross abuse of the judicial process. We do not see any reason why the respondents petition Crl. MC No. 1975 of 2013 should be kept pending. Whatever be the decision of the High Court, one of the parties will (we are sure) approach this Court again thereby delaying the conclusion of the litigation. The interests of justice would be better served if the respondents appeal before the Sessions Court is heard and disposed of on merits instead of going into the residuary questions of the authority of the appellate Court to grant interim orders or the legality of the decision of the Sessions Court to dismiss the appeal only on the ground of the non- compliance by the respondent with the conditions of the interim order. The Criminal Appeal No.23/2012 stands restored to the file of the Sessions Court.

35. We also direct that the maintenance order passed by the magistrate be executed forthwith in accordance with law. The executing court should complete the process within 8 weeks and report compliance in the High Court. We make it clear that such hearing by the Sessions Court should only be after the execution of the order of maintenance passed by the Magistrate.

36. In the event of the respondents success in the appeal, either in full or part, the Sessions Court can make appropriate orders regarding the payments due to be made by the respondent in the execution proceedings.

The appeal is disposed off accordingly.

J. (J. Chelameswar)

New Delhi; ...

September 18, 2014 J. (A.K. Sikri)

[1] Section 2. (f) domestic relationship means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.

[2] Section 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;

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

SHALU OJHA VERSUS PRASHANT OJHA

Supreme Court - Daily Orders

Bench : Hon'ble Mr. Justice A.K. Sikri

Shalu Ojha
Versus
Prashant Ojha

Special Leave Petition (Criminal) No. 3935 of 2016

Decided on 4 September, 2017

- **Notwithstanding the aforesaid judgment, as the respondent did not clear the entire arrears of maintenance, he was sent to judicial custody, where he remained till December 22, 2014. A miscellaneous application was filed by the respondent in this Court in the afore-mentioned disposed of appeal stating that he was in judicial custody due to his inability to pay the entire maintenance and requested that his matter be heard by the Sessions Court on merits. In this application this Court passed orders dated December 18, 2014 directing the Sessions Court to decide the appeal of the respondent within six weeks. He remained in judicial custody till December 22, 2014, on which date he was released. During this period, though the respondent had paid certain amounts towards maintenance, but he did not clear the entire outstanding dues.**
- **Thereafter, on February 13, 2015, the learned ASJ decided the appeal of the respondent reducing the maintenance from Rs.2,50,000/-, as fixed by the Family Court, to Rs.50,000/- per month, from the date of filing of the petition under Section 12 of the DV Act. This order was challenged by the appellant by filing a petition (Crl.MC. No. 850 of 2015) before the High Court under Section 482 read with Section 482 of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.').**
- **The question, therefore, is as to whether the petitioner is entitled to enhancement and whether the learned ASJ rightly reduced the amount of maintenance.**

JUDGMENT

Hon'ble Mr. Justice A.K. Sikri :—

Though this case has a chequered history, only those facts which are very material are taken note of, eschewing other unnecessary details, in order to avoid burdening this judgment with the facts which may not be relevant.

2) The petitioner is the respondents wife. It is unfortunate that after their marriage on April 20, 2007 in Delhi, they stayed together hardly for four months. Thus, for almost ten years they have parted company and are living separately. It is not necessary to go into the reasons which led to the matrimonial discord as in the Signature Not Verified Digitally signed by BALA PARVATHI Date: 2017.09.04 17:53:22 IST present petition this Court is concerned only with the dispute Reason: regarding the rate of maintenance.

3) The petitioner had filed an application sometime in June 2009 claiming maintenance under the provisions of Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the DV Act). In that application, apart from other reliefs, she has

claimed maintenance as well. Order dated July 05, 2012 was passed by the learned Metropolitan Magistrate granting interim maintenance @ Rs.2,50,000/- per month with effect from the date of filing of the complaint as well as compensation of Rs.1,00,000/-. Since the respondent did not honour the said order, the petitioner filed the execution petition for recovery of the arrears of maintenance. In the meantime, the respondent challenged the order of the Metropolitan Magistrate granting maintenance, by filing appeal under Section 29 of the DV Act, in the Court of Additional Sessions Judge, Delhi (for short, the ASJ). In the said appeal, the learned ASJ issued interim directions dated January 10, 2013 for depositing of the entire arrears of maintenance within two months. As this order was not complied with, the appeal filed by the respondent was dismissed on May 07, 2013. This order of dismissal was challenged by the respondent before the High Court. In those proceedings, order dated July 23, 2013 was passed allowing the appellant herein to file the reply, etc. As no stay was granted, order dated July 23, 2013 was challenged by the respondent in this Court by filing a special leave petition. This Court, however, did not entertain the same. At the same time, while disposing of the special leave petition, observations were made to the effect that if the parties apply for mediation, the matter shall be referred to the Delhi High Court Mediation and Conciliation Centre at the earliest. Keeping in view these observations, the High Court referred the dispute to the Mediation Centre at the Delhi High Court and also stayed the execution proceedings in the meantime. Mediation proceedings failed. As a result, the High Court took up the matter on merits and passed orders dated September 10, 2013 directing the respondent to pay Rs.5,00,000/- on or before September 30, 2013 and another sum of Rs.5,00,000/- on or before October 31, 2013. The petitioner filed an application seeking modification of these orders and prayed for the directions to the respondent to pay entire arrears of maintenance as per the order of the Family Court in domestic violence proceedings. In the said application only notice was issued and since interim stay on the execution proceedings continued, the petitioner filed special leave petition in this Court for vacation of the interim order passed by the High Court in the execution proceedings. This special leave petition was converted into appeal on grant of leave, in which judgment was delivered on September 18, 2014 allowing the said appeal.

Operative portion of the said judgment reads as under:

31. The issue before the High Court in Crl.MC. No. 1975 of 2013 is limited i.e. whether the sessions court could have dismissed the respondents appeal only on the ground that respondent did not discharge the obligation arising out of the conditional interim order passed by the sessions court. Necessarily the High Court will have to go into the question whether the sessions court has the power to grant interim stay of the execution of the order under appeal before it.

32. In a matter arising under a legislation meant for protecting the rights of the women, the High Court should have been slow in granting interim orders, interfering with the orders by which maintenance is granted to the appellant. No doubt, such interim orders are now vacated. In the process the appellant is still awaiting the fruits of maintenance order even after 2 years of the order.

33. We find it difficult to accept that in a highly contested matter like this the appellant would have instructed her counsel not to press her claim for maintenance. In our view, the High Court ought not to have accepted the statement of the counsel without verification. The impugned order is set aside.

34. We are of the opinion that the conduct of the respondent is a gross abuse of the judicial process. We do not see any reason why the respondents petition Crl.MC No. 1975 of 2013 should be kept pending. Whatever be the decision of the High Court, one of the parties will (we are sure) approach this Court again thereby delaying the conclusion of the litigation. The interests of justice would be better served if the respondents appeal before the Sessions Court is heard and disposed of on merits instead of going into the residuary questions of the authority of the appellate Court to grant interim orders or the legality of the decision of the Sessions Court to dismiss the appeal only on the ground of the non-compliance by the respondent with the conditions of the interim order. The Criminal Appeal No. 23/2012 stands restored to the file of the Sessions Court.

35. We also direct that the maintenance order passed by the magistrate be executed forthwith in accordance with law. The executing court should complete the process within 8 weeks and report compliance in the High Court. We make it clear that such hearing of the Sessions Court should only be after the execution of the order of maintenance passed by the Magistrate.

36. In the event of the respondents success in the appeal, either in full or part, the Sessions Court can make appropriate orders regarding the payments due to be made by the respondent in the execution proceedings.

4) Notwithstanding the aforesaid judgment, as the respondent did not clear the entire arrears of maintenance, he was sent to judicial custody, where he remained till December 22, 2014. A miscellaneous application was filed by the respondent in this Court in the afore-mentioned disposed of appeal stating that he was in judicial custody due to his inability to pay the entire maintenance and requested that his matter be heard by the Sessions Court on merits. In this application this Court passed orders dated December 18, 2014 directing the Sessions Court to decide the appeal of the respondent within six weeks. He remained in judicial custody till December 22, 2014, on which date he was released. During this period, though the respondent had paid certain amounts towards maintenance, but he did not clear the entire outstanding dues.

5) Thereafter, on February 13, 2015, the learned ASJ decided the appeal of the respondent reducing the maintenance from Rs.2,50,000/-, as fixed by the Family Court, to Rs.50,000/- per month, from the date of filing of the petition under Section 12 of the DV Act. This order was challenged by the appellant by filing a petition (Crl.MC. No. 850 of 2015) before the High Court under Section 482 read with Section 482 of the Code of Criminal Procedure, 1973 (for short, Cr.P.C.).

6) It will also be of interest to note that the maintenance of Rs.50,000/-, as fixed by the learned ASJ, even when reduced significantly from Rs.2,50,000/-, was still not acceptable to the respondent either. Seeking further reduction in the maintenance, the respondent also challenged this order before the High Court by filing petition under Section 482 Cr.P.C. However, his petition was dismissed by the High Court vide order dated April 06, 2015. The special leave petition filed by the respondent there against was also dismissed by this Court on May 11, 2015. In this manner, insofar as maintenance granted by the learned ASJ @ Rs.50,000/- per month is concerned, this order has attained finality qua the respondent. The question, therefore, is as to whether the petitioner is entitled to enhancement and whether the learned ASJ rightly reduced the amount of maintenance.

7) Though the petitioner has filed a petition under Section 482 Cr.P.C., which is registered as Crl. MC. No. 850 of 2015, as pointed out above, and the same is still pending. Notwithstanding, the petitioner has chosen to file the instant special leave petition challenging the order dated February 13, 2015 passed by the ASJ.

8) Normally, when the proceedings are still pending before the High Court, where same order dated February 13, 2015 passed by the ASJ is challenged, this Court should not have entertained the instant petition from the very beginning. However, notice was issued in this petition, keeping in mind the consideration as to whether the dispute can be resolved amicably, suitably and appropriately by this Court. For this purpose, matter was taken up from time to time. Attempts were even made that the parties settle all their disputes amicably. We even called the parties to the Chambers and had discussions with them. However, amicable solution to the problem, acceptable to both the parties, could not be achieved.

9) The petitioner, who appears in person, has submitted that there were no valid reasons for the learned ASJ to reduce the maintenance. In order to prove that the respondent is a man of means who is running number of businesses either as the proprietor or partner of firm(s) or shareholder/director in certain companies and possesses various assets and is also enjoying the life of affluence, she has produced plethora of documents in support. The respondent has refuted the authenticity or the relevance of those documents and his submission is that his stakes in all these businesses are no longer there. According to him, some of the companies/firms mentioned by the petitioner never took off and started any business and in some other companies he no longer enjoys any stakes. Picture painted by the respondent is that he is undergoing very hard times and his financial condition is pathetic. It is also stated that he had to even go behind bars and remain in custody for more than fifty days because of his inability to pay the arrears. We are not giving the details of the properties and businesses as mentioned by the petitioner or the response thereto as given by him. It is because of the reason that after going through these documents, we find that final view thereupon can be taken only after evidence is led by both the parties and the veracity of their respective stands is tested with their cross-examination in the light of material which both the parties want to produce.

10) We, therefore, dispose of this petition with the following directions:

(a) insofar as domestic violence proceedings before the Family Court are concerned, necessary documents shall be filed by both the parties within four weeks from today and evidence led pursuant thereto. The trial court shall endeavour to decide the case finally, within a period of eight months from today, on the basis of evidence and fix the rate of maintenance finally; and

(b) Crl.MC. No. 850 of 2015, pending before the High Court, shall be taken up for hearing immediately and the High Court shall endeavour to dispose of the same as expeditiously as possible and determine at what rate interim maintenance is to be given, i.e. whether order dated February 13, 2015 passed by the learned ASJ need any modification or not.

No costs.

.....J. (A.K. SIKRI)

NEW DELHI; SEPTEMBER 4, 2017 **.....J.(ASHOK BHUSHAN)**

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VAISHALI ABHIMANYU JOSHI VERSUS NANASAHEB GOPAL JOSHI

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

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

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

Civil Appeal No. 6448 of 2017

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

Decided on May 9, 2017

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

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

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

Act, 1887, the Small Causes Court constituted under Act, 1887 cannot entertain and trythe counter claim. Aggrieved by the order of theHigh Court, the appellant has come up in this appeal.

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

The Judgment of the Court was delivered by

Hon'ble Mr. Justice Ashok Bhushan :—

Leave granted.

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

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

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

The appellant got married with one Abhimanyu who is son of the respondent on 10.02.2000 Theappellant started residing in the suit flat No. 4, 45/4, Arati Society Shilavihar Colony, Paud Fata, Pune since 2004 alongwith her husband. The flat was alloted to the respondent by the Society inthe year 1971. On 13th June, 2011, the husbandof appellant left her at the suit flat and shifted to live with his parent at Mrutunjay Society. A daughter, namely, Ishwari was born from

the wedlock ofthe appellant and the Abhimanyu, who was about 9 years in the year 2014. The respondent along with his wife had been residing in another flat nearby. The appellant was treated with cruelty by her husband and other members of the family. A suit for divorce on the basis of cruelty being P.A No. 23/2011 was filed by the appellant against her husband. A notice was sent on behalf of therespondent to the appellant on 23.01.2013 revoking the gratuitous licence and asking theappellant to stop the use and occupation of thesuit flat. The appellant replied the notice. Therespondent filed Suit No. 77/2013 in the Small Causes Court, Pune seeking for following reliefs:

> *"A. By an order of mandatory injunction thedefendant may be directed to stop the use and occupation of the suit flat and remove her belongings therefrom.*
>
> *B. The defendant may be restrained by an orderof perpetual prohibitory injunction fromusing/occupying the suit flat.*
>
> *C. The defendant may be restrained by an orderof perpetual prohibitory injunction fromobstructing the plaintiff and his family members to possess, use and occupy thesuit flat.*
>
> *D. Interim orders in terms of clause A, B, C above may be passed.*
>
> *E. Costs of the suit may be awarded to theplaintiff from the defendant.*
>
> *F. Any other just and other equitable orders inthe interest of justice may please be passed."*

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

> *"i. The suit & injunction application at Exh.5 ofthe plaintiff may kindly be dismissed with heavy costs.*
>
> *ii. It may be declared that the suit flat is theshared household.*
>
> *iii. The plaintiff, his agents, representatives, relatives or anyone claiming through him may kindly be restrained by an injunction fromdispossessing, disturbing the possession ofthe defendant in any manner from the suit flat, as per S.19 of D.V Act.*
>
> *iv. The plaintiff, his agents, representatives, relatives or anyone claiming through him may kindly be restrained by an injunction fromentering in the suit flat as per S.19 of DV Act.*
>
> *v. The plaintiff, his agents, representatives, relatives or anyone claiming through him may kindly be restrained by an injunction from alienating, disposing off, encumbering the suit flat and/or creating any of third party right, title and*

interest in the suit flat, or renouncing therights in the suit flat as per S.19 of DV Act.

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

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

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

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

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

10. Shri Vinay Navare, learned counsel for therespondent refuting the submission of learned counsel for the appellant contends that counter claimof the appellant is clearly barred by Section 15 read with Schedule II of the Act, 1887. He has referred to Item Nos. 11, 17 and 19. He submits that Provincial Small Cause Court is a Court which has limited jurisdiction. Referring to provisions

of Order L of Civil Procedure Code he submits that only limited provisionsof Civil Procedure Code have been made applicable which indicates that no substantive issue can be decided by Provincial Small Cause Court. Learned counsel further made reference to Section 12 and Section 18 of Act, 1887 by which, according to him,the Registrar, who is a Chief Ministerial Officer of theCourt, is empowered to try certain suits which theJudge, Provincial Small Cause Court by general or special order directs. He submits that power given to Registrar to decide certain issues also militate againstthe idea that substantive issues can be decided by a Judge, Small Causes Court.

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

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

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

> *"Section 15. Cognizance of suits by Courtsof Small Causes.—*
>
> *(1) A Court of Small Causes shall not take cognizance of the suits specified in theSecond Schedule as suits expected from thecognizance of a Court of Small Causes.*
>
> *(2) Subject to the exceptions specified in that Schedule and to the provisions of any enactment for the time being in force, all suitsof a civil nature of which the value does not exceed five hundred rupees shall be cognizable by a Court of Small Causes.*
>
> *(3) Subject as aforesaid, the [State Government] may, by order in writing, direct that all suits of a civil nature of which the value does not exceed one thousand rupees shall be cognizable by a Court of Small Causes mentioned in the order."*

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

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

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

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

(17) a suit to obtain in injunction;"

16. The submission which has been pressed by thelearned counsel for the respondent is that the High Court for holding that Judge, Small Causes Court has no jurisdiction has relied on Section 15 read with clause (11) of Second Schedule. In paragraph 14 of thejudgment, the High Court gives the following reasoning for deciding against the appellant:

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

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

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

well as relevant portions of the Statement of Objects and Reasons of the said Act, as follows:

"Introduction

The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged that domestic violence is undoubtedly a human rights issue. The United Nations Committee on Convention on Eliminationof All Forms of Discrimination Against Women in its General Recommendations has recommended that State parties should act to protect womenagainst violence of any kind, especially that occurring within the family. The phenomenon ofdomestic violence in India is widely prevalent but has remained invisible in the public domain. Thecivil law does not address this phenomenon in its entirety. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under Section 498-A of the Indian Penal Code. In order to provide a remedy in the civil law for the protection of women from being victims of domestic violence and to prevent theoccurrence of domestic violence in the societythe Protection of Women from DomesticViolence Bill was introduced in Parliament.

Statement of Objects and Reasons

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

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

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

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

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

(iv) It empowers the Magistrate to passprotection orders in favour of the aggrieved person to prevent the respondent from aiding or committing an act of domestic violence or any other specified act, entering a workplace or any other place frequented by the

aggrieved person, attempting to communicate with her, isolating any assets used by both the parties and causing violence to the aggrieved person, her relatives or others who provide her assistance from the domestic violence."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26. Section 26 sub-Section (1) begins with "notwithstanding anything contained elsewhere in this Act". In the suit which was filed by therespondent before the Judge, Small Causes Court, the

plaintiff (respondent herein) has claimed himself to be licensor and appellant as gratuitous licensee. In paragraph 9 of the plaint following has been pleaded by the plaintiff:

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

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

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

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

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

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

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

to the contrary contained in that Act and as such it must refer to theexempting provisions which would be contrary tothe general applicability of the Act…"

32. Learned counsel for the appellant has placed reliance on a judgment of the Bombay High Court in Writ Petition No. 5648 of 2015, Ambreen Akhoon v.Aditya Aurn Paudwal Decided on 4th August, 2015. Theissue which was involved in the said case has been noted in paragraph 2 which is to the following effect:

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

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

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

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

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

"25. When we come to Section 26 of the Act,the sweep of the Act is such that all theinnovative reliefs available under Sections 18 to 22 may also be sought in any legal proceeding before a civil court, family court or criminal court affectingthe aggrieved person and the respondent. Theproceeding in the civil court, family court or criminal court may well include female members ofa family, and reliefs sought in those legal proceedings would not be restricted by thedefinition of "respondent" in the 2005 Act. Thus, an invidious discrimination will result, depending upon whether the aggrieved person chooses to institute proceedings under the 2005 Act or chooses to add to the reliefs available in either a pending proceeding or a later proceeding in a civil court, family court

or criminal court. It is clear that there is no intelligible differentia between a proceeding initiated under the 2005 Act and proceeding initiated in other fora under other Acts, in which the self-same reliefs grantable under this Act, which are restricted to an adult male person, are grantable by the other fora also against female members of a family…"

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

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

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

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

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LANDMARK JUDGMENTS ON

DUTY OF FAMILY COURT

SANTHINI VERSUS VIJAYA VENKETESH

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

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

Santhini Petitioner(S)
Versus
Vijaya Venketesh Respondent(S)

TRANSFER PETITION (CIVIL) NO. 1278 of 2016

WITH
TRANSFER PETITION (CIVIL) NO. 422 OF 2017

Decided on 9 August, 2017

The Family Courts Act expects the duty-holders like the court, counsellors, welfare experts and any other collaborators to make efforts for reconciliation. Reconciliation is not always the restoration of status quo ante; it can as well be a solution as acceptable to both parties. The principal thrust of the law in family matters is to make an attempt for reconciliation before processing the disputes in the legal framework. The child is of both parents and the child has a right to get the love and affection of both the parents and also has a duty to love and respect both the parents.

ORDER

Hon'ble Mr. Justice Kurian Joseph :—

1. The petitioner has approached this Court seeking for transfer of O.P.(HMA) No.580 of 2015 filed for dissolution of marriage of the respondent and petitioner and O.P. No.1282 of 2012 filed for custody of minor child, from the Court of Family Court, Alappuzha, Kerala to Family Court, Chennai, Tamil Nadu.

2. When the matter came up for consideration before this Court, learned counsel appearing for the respondent brought to our notice a decision rendered by a coordinate Bench of this Court in Krishna Veni Nagam v. Harish Nagam[1] and requested that there is no need to transfer the cases; instead parties can be directed to avail the facility of video conferencing, as suggested by this Court in the case referred to above.

3. In Krishna Veni Nagam (supra) a coordinate Bench of this Court went into the issue of preventing the backlog of transfer petitions before the Courts. It appears that the Court also had the assistance of an amicus. Having heard the learned Counsel on both the sides and learned amicus, the Court finally, at paragraph-18, issued the following directions:-

> "*18. We, therefore, direct that in matrimonial or custody matters or in proceedings between parties to a marriage or arising out of disputes between parties to a marriage, wherever the defendants/respondents are located outside the jurisdiction of the court, the court where proceedings are instituted, may examine whether it is in the interest*

1 (2017) 4 SCC 150

of justice to incorporate any safeguards for ensuring that summoning of defendant/ respondent does not result in denial of justice. Order incorporating such safeguards may be sent along with the summons. The safeguards can be:-

i) Availability of video conferencing facility.

ii) Availability of legal aid service.

iii) Deposit of cost for travel, lodging and boarding in terms of Order XXV CPC.

iv) E-mail address/phone number, if any, at which litigant from out station may communicate."

4. We are informed that not only this Court but the High Courts and even the District Courts are passing orders in the light of the judgment referred to above, relegating the parties to video conferencing even where such facilities are not available. Thus, it is a situation not only of inter State appeal or intra State appeal but also of intra District appeal.

5. Having due regard to the nature of family disputes sought to be addressed by the Parliament, we are afraid, the Court in Krishna Veni Nagam (supra) has not been furnished with the required information, before passing the order.

6. The Family Courts Act, 1984 was introduced with the following purpose:-

"INTRODUCTION

From time to time, it had been urged by several organisations of women, other organisations and individuals that Family Courts be set-up for the settlement of family disputes. The Law Commission in its 59th Report had also stressed that in dealing with disputes concerning the family the court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. In 1976 the Code of Civil Procedure was also amended to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family, but not much change in the attitude of the courts was noticed. Therefore, the need was felt to establish Family Courts for speedy settlement of family disputes. Accordingly the Family Courts Bill was introduced in the Parliament.

STATEMENT OF OBJECTS AND REASONS

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

adversary approach prevails. The need was, therefore, felt, in the public interest, to establish Family Courts for speedy settlement of family disputes.

2. The Bill, inter alia, seeks to-

(a) provide for establishment of Family Courts by the State Government;

(b) make it obligatory on the State Governments to set up a Family Court in every city or town with a population exceeding one million;

(c) enable the State Governments to set up, such courts, in areas other than those specified in (b) above;

(d) exclusively provide within the jurisdication of the Family Courts the matters relating to-

(i) matrimonal relief, including nullity of marriage, judicial separation, divorce, restitution of conjugal rights, or declaration as to the validity of marriage or as to the matrimonial status of any person;

(ii) the property of the spouses or of either of them;

(iii) declaration as to the legitimacy of any person;

(iv) guardianship of a person or the custody of any minor;

(v) maintenance, including proceedings under Chapter IX of the Code of Criminal Procedure;

(e) make it obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or a settlement between the parties to a family dispute. During this stage, the proceedings will be informal and rigid rules of procedure shall not apply;

(f) provide for the association of social welfare agencies, counsellors, etc., during conciliation stage and also to secure the service of medical and welfare experts;

(g) provide that the parties to a dispute before a Family Court shall not be entitled, as of right, to be represented by legal practitioner. However, the court may, in the interest of justice, seek assistance of a legal expert as amicus curiae;

(h) simplify the rules of evidence and procedure so as to enable a Family Court to deal effectively with a dispute;

(i) provide for only one right of appeal which shall lie to the High Court.

3. The Bill seeks to achieve the above objects." (Emphasis supplied)

7. Section 9 of the Family Courts Act, 1984 makes it a mandatory duty of the Family Court to make efforts for settlement. The said provision reads as follows:-

"9. Duty of Family Court to make efforts for settlement. (1) In every suit or proceeding, endeavor shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or

proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit.

(2) If, in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Family Court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement.

(3) The power conferred by sub-section (2) shall be in addition to, and not in derogation of any other power of the Family Court to adjourn the proceedings." (Emphasis supplied)

8. In order to assist the Family Court, the Act has provided for association of social welfare agencies. In Section 6 provision regarding counsellors, officers and other employees of Family Courts is mentioned, which reads as follows:-

"6. Counsellors, officers and other employees of Family Courts. (1)The State Government shall in consultation with the High Court, determine the number and categories of counsellors, officers and other employees required to assist a Family Court in the discharge of its functions and provide the Family Court with such counsellors, officers and other employees as it may think fit.

(2) The terms and conditions of association of the counsellors and the terms and conditions of service of the officers and other employees, referred to in sub-section (1), shall be such as may be specified by rules made by the State Government."

9. Section 12 provides for the assistance of medical and welfare experts, which reads as under:-

"12. Assistance of medical and welfare experts.-In every suit or proceedings, it shall be open to a Family Court to secure the services of a medical expert or such person (preferably a woman where available), whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family as the court may think fit, for the purposes of assisting the Family Court in discharging the functions imposed by this Act."

10. Section 11 provides that "in every suit or proceedings to which this Act applies, the proceedings may be held in camera if the Family Court so desires and shall be so held if either party so desires".

11. Under the Hindu Marriage Act, 1955 also, in respect of the family matters, the Parliament has made several provisions for reconciliation. Under Section 23(2) "before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties".

12. Sub-section (3) of Section 23 of the Hindu Marriage Act further provides for methods to facilitate the process, which reads as follows:-

"23 (3) For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by

the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be and has been effected and the court shall in disposing of the proceeding have due regard to the report." (Emphasis supplied)

13. Section 22 of the Hindu Marriage Act has given a very important safeguard for protecting the privacy of the proceedings or prohibiting the printing and publishing of any proceedings before the Court, except the printed judgment of the High Court or the Supreme Court. The section also provides for the situation where the proceedings are to be held in camera. Section 22 reads as follows:-

"22 Proceedings to be in camera and may not be printed or published.(1) Every proceeding under this Act shall be conducted in camera and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except a judgment of the High Court or of the Supreme Court printed or published with the previous permission of the Court.

(2) If any person prints or publishes any matter in contravention of the provisions contained in sub-section (1), he shall be punishable with fine which may extend to one thousand rupees." (Emphasis supplied)

14. Section 26 of the Hindu Marriage Act deals with the custody of children, wherein it is mandatory for the Court to ascertain the wish of the children as well before taking a decision on the custody. The said section reads as follows:-

"26 Custody of children.- In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made:

Provided that the application with respect to the maintenance and education of the minor children, pending the proceeding for obtaining such decree, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent." (Emphasis supplied)

15. Order XXXIIA of the Code of Civil Procedure was introduced in the year 1976. The same pertains to "suits relating to matters concerning the family". Rule 3 casts a duty on the Court to make every effort for settlement in family matters, the said provision reads as follows:-

"3. Duty of court to make efforts for settlement.-

(1) In every suit or proceeding to which this Order applies, an endeavour shall be made by the court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject-matter of the suit.

(2) If, in any such suit or proceeding, at any stage it appears to the court that there is a reasonable possibility of a settlement between the parties, the court may

adjourn the proceeding for such period as it thinks fit to enable attempts to be made to effect such a settlement.

(3) The power conferred by sub-rule (2) shall be in addition to, and not in derogation of, any other power of the court to adjourn the proceedings."

16. Rule 2 deals with in camera proceedings. Rule 4 provides for the assistance of a welfare expert and Rule 5 casts a duty on the Court to "inquire, so far as it reasonably can, into the facts alleged by the plaintiff and into any facts alleged by the defendant".

17. Unfortunately, it seems, none of these mandatory procedures as laid down by the Parliament have been brought to the notice of the Court while considering the case of Krishna Veni Nagam (supra). The principal thrust of the law in family matters is to make an attempt for reconciliation before processing the disputes in the legal framework. Reconciliation is not mediation. Neither is it conciliation. No doubt, there is conciliation in reconciliation. But the concepts are totally different. Similarly, there is mediation in conciliation but there is no conciliation in mediation. In mediation, the role of the mediator is only to evolve solutions whereas in reconciliation, the duty-holders have to take a proactive role to assist the parties to reach an amicable solution. In conciliation, the conciliator persuades the parties to arrive at a solution as suggested by him in the course of the discussions. In reconciliation, as already noted above, the duty-holders remind the parties of the essential family values, the need to maintain a cordial relationship, both in the interest of the husband and wife or the children, as the case may be, and also make a persuasive effort to make the parties reconcile to the reality and restore the relationship, if possible. The Family Courts Act expects the duty-holders like the court, counsellors, welfare experts and any other collaborators to make efforts for reconciliation. However, reconciliation is not always the restoration of status quo ante; it can as well be a solution as acceptable to both parties. In all these matters, the approaches are different.

18. The role of a counsellor in Family Court is basically to find out what is the area of incompatibility between the spouses, whether the parties are under the influence of anybody or for that matter addicted to anything which affects the normal family life, whether they are taking free and independent decisions, whether the incompatibility can be rectified by any psychological or psychiatric assistance etc. The counsellor also assists the parties to resume free communication. In custody matters also the counsellor assists the child, if he/she is of such age, to accept the reality of incompatibility between the parents and yet make the child understand that the child is of both parents and the child has a right to get the love and affection of both the parents and also has a duty to love and respect both the parents etc. Essentially, the counsellor assists the parents to shed their ego and take a decision in the best interest of the child.

19. To what extent the confidence and confidentiality will be safeguarded and protected in video conferencing, particularly when efforts are taken by the counsellors, welfare experts, and for that matter, the court itself for reconciliation, restitution of conjugal rights or dissolution of marriage, ascertainment of the wishes of the child in custody matters, etc., is a serious issue to be considered. It is certainly difficult in video conferencing, if not impossible, to maintain confidentiality. It has also to be noted that the footage in video conferencing becomes part of the record whereas the reconciliatory efforts taken by the duty-holders referred to above are not meant to be part of the record. All that apart, in reconciliatory efforts, physical presence of the parties would make a significant difference. Having regard to the very object behind the

establishment of Family Courts Act, 1984, to Order XXXIIA of the Code of Civil Procedure and to the special provisions introduced in the Hindu Marriage Act under Sections 22, 23 and 26, we are of the view that the directions issued by this Court in Krishna Veni Nagam (supra) need reconsideration on the aspect of video conferencing in matrimonial disputes.

20. Therefore, we are of the view that the matter requires consideration by a larger Bench. The Registry is directed to place the papers before Hon'ble the Chief Justice of India. We request Hon'ble the Chief Justice of India to expeditiously constitute a Bench havingregard to the urgency of the matter.

.....J.

[KURIAN JOSEPH]

.....J.

[R. BANUMATHI]

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

Bench: Hon'ble Mr. Justice Dipak Misra, CJI, Hon'ble Mr. Justice A.M. Khanwilkar & Hon'ble Dr. Justice D.Y. Chandrachud

Santhini Petitioner(s)
Versus
Vijaya Venketesh Respondent(s)

TRANSFER PETITION (CIVIL) NO.1278 OF 2016
WITH

TRANSFER PETITION (CIVIL) NO. 422 OF 2017

Decided on 9 October, 2017

JUDGMENT

Hon'ble Mr. Justice Dipak Misra, CJI.

[For himself and Khanwilkar, J.] A two-Judge Bench in Krishna Veni Nagam v. Harish Nagam1, while dealing with transfer petition seeking transfer of a case instituted under Section 13 of the Hindu Marriage Act, 1955 (for brevity, the 1955 Act) pending on the file of IInd Signature Not Verified Presiding Judge, Family Court, Digitally signed by CHETAN KUMAR Jabalpur, Madhya Pradesh to the Family Court, Hyderabad, Andhra Date: 2017.10.09 16:22:15 IST Reason:

Pradesh, took note of the grounds of transfer and keeping in view the 1 (2017) 4 SCC 150 approach of the Court to normally allow the transfer of the proceedings having regard to the convenience of the wife, felt disturbed expressing its concern to the difficulties faced by the litigants travelling to this Court and, accordingly, posed the question whether there was any possibility to avoid the same. It also took note of the fact that in the process of hearing of the transfer petition, the matrimonial matters which are required to be dealt with expeditiously are delayed. That impelled the Court to pass an order on 09.01.2017 which enumerated the facts including the plight asserted by the wife, the concept of territorial jurisdiction under Section 19 of the 1955 Act, and reflected on the issues whether transfer of a case could be avoided and alternative mode could be thought of. Dwelling upon the said aspects, the Court articulated:-

> In these circumstances, we are prima facie of the view that we need to consider whether we could pass a general order to the effect that in case where husband files matrimonial proceedings at place where wife does not reside, the court concerned should entertain such petition only on the condition that the husband makes appropriate deposit to bear the expenses of the wife as may be determined by the Court. The Court may also pass orders from time to time for further deposit to ensure that the wife is not handicapped to defend the proceedings. In other cases, the husband may take proceedings before the Court in whose jurisdiction the wife resides which may lessen inconvenience to the parties and avoid delay. Any other option to remedy the situation can also be considered. As the narration would exposit, the pivotal concern of the Court was whether an order could be passed so as to provide a better alternative to each individual who is compelled to move this Court.

2. The observation made in Anindita Das v. Srijit Das to the effect that on an average at least 10 to 15 transfer petitions are on board of each Court on each admission day was noticed. The

learned Judges apprised themselves about the observations made in Mona Aresh Goel v. Aresh Satya Goel, Lalita A. Ranga v. Ajay Champalal Ranga, Deepa v. Anil Panicker, Archana Rastogi v. Rakesh Rastogi, Leena Mukherjee v. Rabi Shankar Mukherjee, Neelam Bhatia v. Satbir Singh Bhatia, Soma Choudhury v. Gourab Choudhaury, Rajesh Rani v. Tej Pal, Vandana Sharma v. Rakesh Kumar Sharma and Anju Ohri v. Varinder Ohri which rest on the principle of expedient for ends of justice to transfer the proceedings. It also adverted to Premlata Singh v. Rita Singh wherein this Court 2 (2006) 9 SCC 197 3 (2000) 9 SCC 255 4 (2000) 9 SCC 355 5 (2000) 9 SCC 441 6 (2000) 10SCC 350 7 (2002) 10 SCC 480 8 (2004) 13 SCC 436 : (2006) 1 SCC (Cri) 323 9 (2004) 13 SCC 462 : (2006) 1 SCC (Cri) 341 10 (2007) 15 SCC 597 11 (2008) 11 SCC 768 12 (2007) 15 SCC 556 13 (2005) 12 SCC 277 had not transferred the proceedings but directed the husband to pay for travelling, lodging and boarding expenses of the wife and/or person accompanying her for each hearing. The said principle was also followed in Gana Saraswathi v. H. Raghu Prasad.

3. The two-Judge Bench, after hearing the learned counsel for the parties, the learned Additional Solicitor General and the learned Senior Counsel who was requested to assist the Court, made certain references to the doctrine of forum non conveniens and held that it can be applied to matrimonial proceedings for advancing the interest of justice. The learned Additional Solicitor General assisting the Court suggested about conducting the proceedings by videoconferencing. In that context, it has been held:-

> 14. One cannot ignore the problem faced by a husband if proceedings are transferred on account of genuine difficulties faced by the wife. The husband may find it difficult to contest proceedings at a place which is convenient to the wife. Thus, transfer is not always a solution acceptable to both the parties. It may be appropriate that available technology of videoconferencing is used where both the parties have equal difficulty and there is no place which is convenient to both the parties. We understand that in every district in the country videoconferencing is now available. In any case, wherever such facility is available, it ought to be fully utilised and all the High Courts ought to issue appropriate administrative instructions to regulate the use of videoconferencing for certain category of cases. Matrimonial cases where one of the parties resides outside courts jurisdiction is one of such 14 (2000) 10 SCC 277 categories. Wherever one or both the parties make a request for use of videoconferencing, proceedings may be conducted on videoconferencing, obviating the needs of the party to appear in person. In several cases, this Court has directed recording of evidence by video conferencing.
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> 16. The advancement of technology ought to be utilised also for service on parties or receiving communication from the parties. Every District Court must have at least one e-mail ID. Administrative instructions for directions can be issued to permit the litigants to access the court, especially when litigant is located outside the local jurisdiction of the Court. A designated officer/manager of a District Court may suitably respond to such e-mail in the manner permitted as per the administrative instructions. Similarly, a manager/information officer in every District Court may be accessible on a notified telephone during notified hours as per the instructions. These steps may, to some extent, take care of the problems of the litigants. These suggestions may need attention of the High Courts. [Emphasis added]

4. After so stating, the two-Judge Bench felt the need to issue directions which may provide alternative to seeking transfer of proceedings on account of inability of a party to contest proceedings at a place away from their ordinary residence which will eventually result in denial of justice. The safeguards laid down in the said judgment are:-

   (i) Availability of videoconferencing facility.

   (ii) Availability of legal aid service.

   State of Maharashtra v. Praful B. Desai, (2003) 4 SCC 601 : 2003 SCC (Cri) 815; Kalyan Chandra Sarkar v. Rajesh Ranjan, (2005) 3 SCC 284 : 2005 SCC (Cri) 705; Budhadev Karmaskar (4) v. State of W.B., (2011) 10 SCC 283 : (2012) 1 SCC (Cri) 285; Malthesh Gudda Pooja v. State of Karnataka, (2011) 15 SCC 330 : (2014) 2 SCC (Civ)

   (iii) Deposit of cost for travel, lodging and boarding in terms of Order 25 CPC.

   (iv) E-mail address/phone number, if any, at which litigant from outstation may communicate. Be it stated, the Court took note of the spirit behind the orders of this Court allowing the transfer petitions filed by wives and opined that the Court almost mechanically allows the petitions so that they are not denied justice on account of their inability to participate in proceedings instituted at a different place. It laid stress on financial or physical hardship. It referred to the authorities in the constitutional scheme that provide for guaranteeing equal access to justice, power of the State to make special provisions for women and children, duty to uphold the dignity of women and various steps that have been taken in the said direction.

5. In the said case, the Court transferred the case as prayed for and further observed that it will be open to the transferee court to conduct the proceedings or record the evidence of the witnesses who are unable to appear in court by way of videoconferencing. The aforesaid decision was brought to the notice of the two-Judge Bench in the instant case by the learned counsel appearing for the respondent who advanced his submission that there is no need to transfer the case and the parties can be directed to avail the facility of videoconferencing. The two-Judge Bench, after referring to the Statement of Objects and Reasons of the Family Courts Act, 1984 (for brevity, the 1984 Act), various provisions of the said Act, Sections 22, 23 and 26 of the 1955 Act, Rules 2, 3 and 4 of Order XXXIIA which were inserted by the 1976 amendment to the Code of Civil Procedure (for short, the CPC), the concept of reconciliation, the role of the counsellors in the Family Court and the principle of confidence and confidentiality, held:-

   19. To what extent the confidence and confidentiality will be safeguarded and protected in video conferencing, particularly when efforts are taken by the counsellors, welfare experts, and for that matter, the court itself for reconciliation, restitution of conjugal rights or dissolution of marriage, ascertainment of the wishes of the child in custody matters, etc., is a serious issue to be considered. It is certainly difficult in video conferencing, if not impossible, to maintain confidentiality. It has also to be noted that the footage in video conferencing becomes part of the record whereas the reconciliatory efforts taken by the duty-holders referred to above are not meant to be part of the record. All that apart, in reconciliatory efforts, physical presence of the parties would make a significant difference. Having regard to the very object behind the establishment of Family Courts Act, 1984, to Order XXXIIA of the Code of Civil Procedure and to the special provisions introduced

in the Hindu Marriage Act under Sections 22, 23 and 26, we are of the view that the directions issued by this Court in Krishna Veni Nagam (supra) need reconsideration on the aspect of video conferencing in 12 matrimonial disputes. Being of this view, it has referred the matter to be considered by a larger Bench. That is how the matter has been placed before us.

6. We have heard Mr. V.K. Sidharthan, learned counsel for the petitioner and Mr. Rishi Malhotra, learned counsel for the respondent. We have also heard Mr. Ajit Kumar Sinha, learned senior counsel who has been requested to assist the Court.

7. Before we refer to the scheme under the 1984 Act and the 1955 Act, we think it apt to refer to the decisions that have been noted in Krishna Veni Nagam (supra). In Mona Aresh Goel (supra), the three-Judge Bench was dealing with the transfer of the matrimonial proceedings for divorce that was instituted by the husband in Bombay. The prayer of the wife was to transfer the case from Bombay to Delhi. The averment was made that the wife had no independent income and her parents were not in a position to bear the expenses of her travel from Delhi to Bombay to contest the divorce proceedings. That apart, various inconveniences were set forth and the husband chose not to appear in the Transfer Petition. The Court, considering the difficulties of the wife, transferred the case from Bombay to Delhi. In Lalita A. Ranga (supra), the Court, taking note of the fact that the husband had not appeared and further appreciating the facts and circumstances of the case, thought it appropriate to transfer the petition so that the wife could contest the proceedings. Be it noted, the wife had a small child and she was at Jaipur and it was thought that it would be difficult for her to go to Bombay to contest the proceedings from time to time. In Deepas case, the stand of the wife was that she was unemployed and had no source of income and, on that basis, the prayer of transfer was allowed. In Archana Rastogi (supra), the Court entertained the plea of transfer and held that the prayer for transfer of matrimonial proceedings taken by the husband in the Court of District Judge, Chandigarh to the Court of District Judge, Delhi deserved acceptance and, accordingly, transferred the case. Similarly, in Leena Mukherjee (supra), the prayer for transfer was allowed. In Neelam Bhatia (supra), the Court declined to transfer the case and directed the husband to bear the to-and-fro travelling expenses of the wife and one person accompanying her by train whenever she actually appeared before the Court. In Soma Choudhury (supra), taking into consideration the difficulties of the wife, the proceedings for divorce were transferred from the Court of District Judge, South Tripura, Udaipur (Tripura) to the Family Court at Alipore (West Bengal). In Anju Ohri (supra), the Court, on the foundation of the convenience of the parties and the interest of justice, allowed the transfer petition preferred by the wife. In Vandana Sharma (supra), the Court, taking note of the fact that the wife had two minor daughters and appreciating the difficulty on the said bedrock, thought it appropriate to transfer the case and, accordingly, so directed.

8. Presently, we think it condign to advert in detail as to what has been stated in Anindita Das (supra). The stand of the wife in the transfer petition was that she had a small child of six years and had no source of income and it was difficult to attend the court at Delhi where the matrimonial proceedings were pending. The two-Judge Bench referred to some of the decisions which we have already referred to and also adverted to Ram Gulam Pandit v. Umesh J. Prasad and Rajwinder Kaur v. Balwinder Singh and opined that all the authorities are based on the facts of the respective cases and they do not lay down any particular law which operates as a precedent. Thereafter, it noted that taking advantage of the leniency shown to the ladies by this

Court, number of transfer petitions are filed by women and, therefore, it is required to consider each petition on merit. Then, the Court dwelled upon the fact situation and directed that the husband shall pay all travel and stay expenses to the wife and her companion for each and every occasion whenever she was required to attend the Court at Delhi. From the aforesaid decision, it is quite vivid that the Court felt that the transfer petitions are to be considered on their own merits and not to be disposed of in a routine manner.

9. Having noted the authorities relating to transfer of matrimonial disputes, we may refer to Section 25 of the CPC which reads as follows:-

Section 25. Power of Supreme Court to transfer suits, etc.- (1) On the application of a party, and after notice to the parties, and after hearing such of them as desire to be heard, the Supreme Court may, at any stage, if satisfied that an order under this section is expedient for the ends of justice, direct that any suit, appeal or other proceedings be transferred from a High Court or other Civil Court in one State to a High Court or other Civil Court in any other State.

(2) Every application under this section shall be made by motion which shall be supported by an affidavit.

(3) The court to which such suit, appeal or other proceeding is transferred shall, subject to any special directions in the order of transfer, either re-try it or proceed from the stage at which it was transferred to it.

(4) In dismissing any application under this section, the Supreme Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum, not exceeding two thousand rupees, as it considers appropriate in the circumstances of the case.

(5) The law applicable to any suit, appeal or other proceeding transferred under this section shall be the law which the court in which the suit, appeal or other proceeding was originally instituted ought to have applied to such Suit, appeal or proceeding.

10. Order XLI Rule 2 of the Supreme Court Rules, 2013 which deals with the application for transfer under Article 139A(2) of the Constitution and Section 25 of the CPC is as follows:-

1. Every petition under article 139A(2) of the Constitution or Section 25 of the Code of Civil Procedure, 1908, shall be in writing. It shall state succinctly and clearly all relevant facts and particulars of the case, the name of the High Court or other Civil Court in which the case is pending and the grounds on which the transfer is sought. The petition shall be supported by an affidavit.

2. The petition shall be posted before the Court for preliminary hearing and orders as to issue of notice. Upon such hearing the Court, if satisfied that no prima facie case for transfer has been made out, shall dismiss the petition and if upon such hearing the Court is satisfied that a prima facie case for granting the petition is made out, it shall direct that notice be issued to the parties in the case concerned to show cause why the case be not transferred. A copy of the Order shall be transmitted to the High Court concerned.

3. The notice shall be served not less than four weeks before the date fixed for the final hearing of the petition. Affidavits in opposition shall be filed in the Registry not later than one week before the date appointed for hearing and the affidavit in reply shall be filed not

later than two days preceding the day of the hearing of the petition. Copies of affidavits in opposition and in reply shall be served on the opposite party or parties and the affidavits shall not be accepted in the Registry unless they contain an endorsement of service signed by such party or parties.

4. The petition shall thereafter be listed for final hearing before the Court.

5. Save as otherwise provided by the rules contained in this Order the provisions of other orders (including Order LI) shall, so far as may be, apply to petition under this Order. The purpose of referring to the same is that this Court has been conferred with the power by the Constitution under Article 139A(2) to transfer the cases and has also been conferred statutory jurisdiction to transfer the cases. The Rules have been framed accordingly. The Court has the power to allow the petition seeking transfer or to decline the prayer and indubitably, it is on consideration of the merits of the case and satisfaction of the Court on that score.

11. Having stated thus, it is necessary to appreciate the legistative purpose behind the 1984 Act. The Family Courts have been established for speedy settlement of family disputes. The Statement of Objects and Reasons reads thus:-

Statement of Objects and Reasons Several associations of women, other organizations and individuals have urged, from time to time, that Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. The Law Commission in its 59th report (1974) had also stressed that in dealing with disputes concerning the family the court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. The Code of Civil Procedure was amended in 1976 to provide for a special family.

However, not much use has been made by the courts in adopting this conciliatory procedure and the courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails. The need was, therefore, felt, in the public interest, to establish Family Courts for speedy settlement of family disputes.

2. The Bill inter alia, seeks to

(a) provide for establishment of Family Courts by the State Governments;

(b) make it obligatory on the State Governments to set up a Family Court in every city or town with a population exceeding one million;

(c) enable the State Governments to set up, such courts, in areas other than those specified in (b) above.

(d) exclusively provide within the jurisdiction of the Family Courts the matters relating to

(i) matrimonial relief, including nullity of marriage, judicial separation, divorce, restitution of conjugal rights, or declaration as to the validity of marriage or as to the matrimonial status of any person;

(ii) the property of the spouses or of either of them;

(iii) declaration as to the legitimacy of any person;

(iv) guardianship of a person or the custody of any minor;

(v) maintenance, including proceedings under Chapter IX of the Code of Criminal Procedure;

(e) Make it obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or a settlement between the parties to a family dispute. During this stage, the proceedings will be informal and rigid rules of procedure shall not apply;

(f) provide for the association of social welfare agencies, counselors, etc., during conciliation stage and also to secure the service of medical and welfare experts;

(g) provide that the parties to a dispute before a Family Court shall not be entitled, as of right, to be represented by legal practitioner. However, the court may, in the interest of justice, seek assistance of a legal expert as amicus curiae,

(h) simplify the rules of evidence and procedure so as to enable a Family Court to deal effectively with a dispute;

(i) provide for only one right of appeal which shall lie to the High Court.

3. The Bill seeks to achieve the above objects.

12. The preamble of the 1984 Act provides for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith.

13. Presently, we may recapitulate how this Court has dealt with the duty and responsibility of the Family Court or a Family Court Judge. In Bhuwan Mohan Singh v. Meena and others, the three-Judge Bench referred to the decision in K.A. Abdul Jaleel v. T.A. Shahida and laid stress on securing speedy settlement of disputes relating to marriage and family affairs. Emphasizing on the role of the Family Court Judge, the Court in Bhuwan Mohan Singh (supra) expressed its anguish as the proceedings before the family court had continued for a considerable length of time in respect of application filed under Section 125 of the Code of Criminal Procedure (CrPC). The Court observed:-

It has come to the notice of the Court that on certain occasions the Family Courts have been granting adjournments in a routine manner as a consequence of which both the parties suffer or, on certain occasions, the wife becomes the worst victim.

When such a situation occurs, the purpose of the law gets totally atrophied. The Family Judge is expected to be sensitive to the issues, for he is dealing with extremely delicate and sensitive issues pertaining to the marriage and issues ancillary thereto.

When we say this, we do not mean that the Family Courts should show undue haste or impatience, but there is a distinction between impatience and to be wisely anxious and conscious about dealing with a situation. A Family Court Judge should remember that the procrastination is the greatest assassin of the lis before it. It not only gives rise to more family problems but also gradually builds unthinkable and Everestine bitterness. It leads to the cold refrigeration

of the hidden feelings, if still left. The delineation of the lis by the Family Judge must reveal the awareness and balance. Dilatory tactics by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive to the fact that the lis before him pertains to emotional fragmentation and delay can feed it to grow.

And again:

We hope and trust that the Family Court Judges shall remain alert to this and decide the matters as expeditiously as possible keeping in view the Objects and Reasons of the Act and the scheme of various provisions pertaining to grant of maintenance, divorce, custody of child, property disputes, etc.

14. The said passage makes it quite clear that a Family Court Judge has to be very sensitive to the cause before it and he/she should be conscious about timely delineation and not procrastinate the matter as delay has the potentiality to breed bitterness that eventually corrodes the emotions. The Court has been extremely cautious while stating about patience as a needed quality for arriving at a settlement and the need for speedy settlement and, if not possible, proceeding with meaningful adjudication. There must be efforts for reconciliation, but the time spent in the said process has to have its own limitation.

15. In Shamima Farooqui v. Shahid Khan, after referring to the earlier decisions, especially the above quoted passages, the Court expressed:-

When the aforesaid anguish was expressed, the predicament was not expected to be removed with any kind of magic. However, the fact remains, these litigations can really corrode the human relationship not only today but will also have the impact for years to come and has the potentiality to take a toll on the society. It occurs either due to the uncontrolled design of the parties or the lethargy and apathy shown by the Judges who man the Family Courts. As far as the first aspect is concerned, it is the duty of the courts to curtail them. There need not be hurry but procrastination should not be manifest, reflecting the attitude of the court. As regards the second facet, it is the duty of the court to have the complete control over the proceeding and not permit the lis to swim the unpredictable grand river of time without knowing when shall it land on the shores or take shelter in a corner tree that stands still on some unknown bank of the river. It cannot allow it to sing the song of the brook. Men may come and men may go, but I go on forever. This would be the greatest tragedy that can happen to the adjudicating system which is required to deal with most sensitive matters between the man and wife or other family members relating to matrimonial and domestic affairs. There has to be a proactive approach in this regard and the said approach should be instilled in the Family Court Judges by the Judicial Academies functioning under the High Courts. For the present, we say no more. [Underlining is ours]

16. The object of stating this is that the legislative intent, the schematic purpose and the role attributed to the Family Court have to be perceived with a sense of sanctity. The Family Court Judge should neither be a slave to the concept of speedy settlement nor should he be a serf to the proclivity of hurried disposal abandoning the inherent purity of justice dispensation system. The balanced perception is the warrant and that is how the scheme of the 1984 Act has to be understood and appreciated.

17. Let us now proceed to analyse the fundamental intent of the scheme of the 1984 Act. Section 4 of the 1984 Act deals with the appointment of the judges. Section 5 provides for association of

social welfare agencies, etc. It engrafts that the State Government may, in consultation with the High Court, provide, by rules, for the association in such manner and for such purposes and subject to such conditions as may be specified in the rules, with a Family Court of institutions or organisations engaged in social welfare or the representatives thereof; persons professionally engaged in promoting the welfare of the family; persons working in the field of social welfare; and any other person whose association with a Family Court would enable it to exercise its jurisdiction more effectively in accordance with the purposes of the 1984 Act. The aforesaid provision, as is evident, conceives involvement of institutions or organizations engaged in social welfare or their representatives and professionals engaged in promoting the welfare of the family for the purpose of effective functioning of the Family Court to sub-serve the purposes of the Act. Thus, the 1984 Act, to achieve its purpose, conceives of involvement of certain categories so that, if required, the Family Court can take their assistance to exercise its jurisdiction in an effective manner.

18. Section 6 provides for counselors, officers and other employees of Family Courts. Section 7 deals with the jurisdiction of the Family Court. The jurisdiction conferred on the Family Court, as we perceive, is quite extensive. It confers power in a Family Court to exercise jurisdiction exercisable by any district court or any subordinate civil court under any law relating to a suit or a proceeding between the parties to a marriage or a decree of a nullity of marriage declaring the marriage to be null and void or annulling the marriage, as the case may be, or restitution of conjugal rights or judicial separation or dissolution of marriage. It has the authority to declare as to the validity of a marriage so as to annul the matrimonial status of any person and also the power to entertain a proceeding with respect to the property of the parties to a marriage or either of them. The Family Court has the jurisdiction to pass an order or injunction in circumstances arising out of a marital relationship, declare legitimacy of any person and deal with proceedings for grant of maintenance, guardianship of the person or the custody of or access to any minor. That apart, it has also been conferred the authority to deal with the applications for grant of maintenance for wife and children and parents as provided under the CrPC.

19. Section 9 prescribes the duty of the Family Court to make efforts for settlement by rendering assistance and persuading the parties for arriving at a settlement in respect of the subject matter of the suit or proceeding. For the said purpose, it may follow the procedure laid down by the High Court. If in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable opportunity of settlement between the parties, it may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement.

20. Section 11 provides for proceedings to be held in camera. The provision, being significant, is reproduced below:-

Section 11. Proceedings to be held in camera.In every suit or proceedings to which this Act applies, the proceedings may be held in camera if the Family Court so desires and shall be so held if either party so desires. On a plain reading of the aforesaid provision, it is limpid that if the Family Court desires, the proceedings should be held in camera and it shall be so held if either of the parties so desires. A reading of the said provision, as it seems to us, indicates that, once one party makes a prayer for holding the proceedings in camera, it is obligatory on the part of the Family Court to do so.

21. Section 12 stipulates for assistance of medical and welfare experts for assisting the Family Court in discharging the functions imposed by the Act.

22. At this juncture, it is profitable to refer to certain provisions of the 1955 Act. Section 22 of the said Act provides for proceedings to be in camera and stipulates that the proceeding may not be printed or published. Section 23(2) of the 1955 Act enjoins that before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible to do so consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties. The said provision is not applicable to any proceeding wherein relief is sought on any of the grounds specified in clause (ii), clause (iii), clause (iv), clause (v), clause (vi) or clause (vii) of sub-section (1) of Section 13. Sub-section (3) of Section 23 permits the Court to take aid of a person named by the parties or of any person nominated by the Court to bring out a resolution. It enables the Court, if it so thinks, to adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be and has been effected and the court shall, in disposing of the proceeding, have due regard to the report.

23. It is worthy to note here that the reconciliatory measures are to be taken at the first instance and emphasis is on efforts for reconciliation failing which the court should proceed for adjudication and the command on the Family Court is to hold it in camera if either party so desires.

24. Section 26 of the 1955 Act deals with custody of children. It empowers the court, from time to time, to pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children consistently with their wishes, wherever possible, and the Government may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceedings for obtaining such decree were still pending, and the court may also, from time to time, revoke, suspend or vary any such orders and provisions previously made. The proviso appended thereto postulates that the application with respect to the maintenance and education of the minor children, pending the proceeding for obtaining such decree, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent.

25. It is to be borne in mind that in a matter relating to the custody of the child, the welfare of the child is paramount and seminal. It is inconceivable to ignore its importance and treat it as secondary. The interest of the child in all circumstances remains vital and the Court has a very affirmative role in that regard. Having regard to the nature of the interest of the child, the role of the Court is extremely sensitive and it is expected of the Court to be pro-active and sensibly objective.

26. In Mausami Moitra Ganguli v. Jayant Ganguli, it has been held that the principles of law in relation to the custody of a minor child are well settled. While determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the rights of the parents under a statute. The provisions contained in the Guardians and Wards Act, 1890 and the Hindu Minority

and Guardianship Act, 1956 hold out the welfare of the child as a predominant consideration because no statute on the subject can ignore, eschew or obliterate the vital factor of the welfare of the minor.

27. In the said case, a passage from Halsburys Laws of England (4 th Edn., Vol. 13) was reproduced which reads thus:-

> 809. Principles as to custody and upbringing of minors. Where in any proceedings before any court, the custody or upbringing of a minor is in question, the court, in deciding that question, must regard the welfare of the minor as the first and paramount consideration, and must not take into consideration whether from any other point of view the claim of the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father. In relation to the custody or upbringing of a minor, a mother has the same rights and authority as the law allows to a father, and the rights and authority of mother and father are equal and are exercisable by either without the other.

28. In Rosy Jacob v. Jacob A. Chakramakkal, the Court ruled that the children are not mere chattels, nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.

29. In Vikram Vir Vohra v. Shalini Bhalla, the Court took note of the fact that the learned Judge of the High Court had personally interviewed the child who was seven years old to ascertain his wishes. The two Judges of this Court also interacted with the child in the chambers in the absence of his parents to find out about his wish and took note of the fact that the child was aged about 10 years and was at an informative and impressionable stage and eventually opined that the order passed by the High Court affirming the order of the trial Court pertaining to visitation rights of the father had been so structured that it was compatible with the educational career of the child and the rights of the father and the mother had been well balanced. It is common knowledge that in most of the cases relating to guardianship and custody, the Courts interact with the child to know her/his desire keeping in view the concept that the welfare of the child is paramount.

30. It is essential to reflect on the reasoning ascribed in Krishna Veni Nagam (supra). As we understand, the two-Judge Bench has taken into consideration the number of cases filed before this Court and the different approaches adopted by this Court, the facet of territorial jurisdiction, doctrine of forum non-conveniens which can be applicable to matrimonial proceedings for advancing the interest of justice, the problems faced by the husband, the recourse taken by this Court to videoconferencing in certain cases and on certain occasions, the advancement of technology, the role of the High Courts to issue appropriate administrative instructions to regulate the use of videoconferencing for certain categories of cases and ruled that the matrimonial cases where one of the parties resides outside the courts jurisdiction do fall in one of such categories.

31. Before we proceed to analyse further, we would like to cogitate on the principles applied in the decisions rendered in the context of videoconferencing. In State of Maharashtra v. Dr. Praful B. Desai, the proceedings related to recording of evidence where the witness was in a foreign

country. In Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav & Anr., the controversy pertained to a criminal trial under Section 302 IPC wherein the Court, in exercise of power under Article 142 of the Constitution, directed shifting of the accused from a jail in Patna to Tihar Jail at Delhi. In that context, the Court permitted conducting of the trial with the aid of videoconferencing.

In Budhadev Karmaskar (4) v. State of West Bengal, the issue of videoconferencing had arisen as the lis related to rehabilitation of sex workers keeping in view the interpretation of this Court of life to mean life of dignity.

32. In Malthesh Gudda Pooja v. State of Karnataka & Ors., the question that fell for consideration was whether a Division Bench of the High Court, while considering a memo for listing an appeal restored for fresh hearing, on grant of application for review by a co-ordinate Bench, could refuse to act upon the order of review on the ground that the said order made by a Bench different from the Bench which passed the original order granting review is a nullity. We need not dilate upon what ultimately the Court said. What is necessary to observe is what arrangement should be made in case of a High Court where there are Principal Seat and Circuit Benches and Judges move from one Bench to another for some time and decide the matters and review is filed. In that context, the Court opined:-

when two Judges heard the matter at a Circuit Bench, the chances of both Judges sitting again at that place at the same time, may not arise. But the question is in considering the applications for review, whether the wholesome principle behind Order 47 Rule 5 of the Code and Chapter 3 Rule 5 of the High Court Rules providing that the same Judges should hear it, should be dispensed with merely because of the fact that the Judges in question, though continue to be attached to the Court are sitting at the main Bench, or temporarily at another Bench. In the interests of justice, in the interests of consistency in judicial pronouncements and maintaining the good judicial traditions, an effort should always be made for the review application to be heard by the same Judges, if they are in the same Court. Any attempt to too readily provide for review applications to be heard by any available Judge or Judges should be discouraged. And further:-

With the technological innovations available now, we do not see why the review petitions should not be heard by using the medium of video conferencing.

33. The aforesaid pronouncements, as we find, are absolutely different from a controversy which is involved in matrimonial proceedings which relate to various aspects, namely, declaration of marriage as a nullity, dissolution of marriage, restitution of marriage, custody of children, guardianship, maintenance, adjudication of claim of stridhan, etc. The decisions that have been rendered cannot be regarded as precedents for the proposition that videoconferencing can be one of the modes to regulate matrimonial proceedings.

34. The two-Judge Bench has also noted the constitutional scheme that provides for guaranteeing equal access to justice and the power of the State to make special provisions for women and children as enshrined under Article 15(3) of the Constitution and the duty to uphold the dignity of women and the various steps taken in the said direction. The Court has also referred to Articles 243-D and 243-T of the Constitution under which provisions have been made for reservation for women in Panchayats and Municipalities by the 1973 and 1974 amendments. It has also taken note of the Convention on the Elimination of All Forms of Discrimination against Women

(CEDAW) that underlines the awareness of the international commitments on the subject. There is also reference to various authorities of the Court that have referred to the international conventions and affirmative facet enshrined under Article 15(3) of the Constitution. We must immediately clarify that these provisions of the Articles of the Constitution and the decisions find place in the footnote of the judgment to highlight the factum that various steps have been taken to uphold the dignity of women.

35. The two-Judge Bench has referred to certain judgments to highlight the affirmative rights conferred on women under the Constitution. We shall refer to them and explain how they are rendered in a different context and how conducting of matrimonial disputes through videoconferencing would scuttle the rights of women and not expand the rights. In Mackinnon Mackenzie & Co. Ltd v. Audrey Dcosta and another, the Court dealt with the principle of applicability of equal pay for equal work to lady stenographers in the same manner as male stenographers. A contention was advanced by the employer that this discrimination between the two categories had been brought out not merely on the ground of sex but the Court found it difficult to agree with the contention and referred to various aspects and, eventually, did not interfere with the judgment of the High Court that had granted equal remuneration to both male and female stenographers. In Vishaka and others v. State of Rajasthan and others, the three-Judge Bench, taking note of Articles 14, 15, 19(1)(g), 21 and 51-A and further highlighting the concept of gender equality and the recommendations of CEDAW and the absence of domestic law, laid down guidelines and norms for observation at work places and other institutions for the purpose of effective enforcement of the basic human right of gender equality and sexual harassment and abuse, more particularly, sexual harassment at work places.

36. In Arun Kumar Agrawal and another v. National Insurance Company Limited and others, the lis arose pertaining to the criteria for determination of compensation payable to the dependants of a woman who died in a road accident and who did not have regular source of income. Singhvi, J. opined that it is highly unfair, unjust and inappropriate to compute the compensation payable to the dependants of a deceased wife/mother who does not have a regular income by comparing her services with that of a housekeeper or a servant or an employee who works for a fixed period. The gratuitous services rendered by the wife/mother to the husband and children cannot be equated with the services of an employee and no evidence or data can possibly be produced for estimating the value of such services. Ganguly, J., in his concurring opinion, said that women make a significant contribution at various levels. He referred to numerous authorities and ruled:-

63. Household work performed by women throughout India is more than US $612.8 billion per year (Evangelical Social Action Forum and Health Bridge, p. 17). We often forget that the time spent by women in doing household work as homemakers is the time which they can devote to paid work or to their education. This lack of sensitiveness and recognition of their work mainly contributes to womens high rate of poverty and their consequential oppression in society, as well as various physical, social and psychological problems. The courts and tribunals should do well to factor these considerations in assessing compensation for housewives who are victims of road accidents and quantifying the amount in the name of fixing just compensation.

64. In this context the Australian Family Property Law has adopted a very gender sensitive approach. It provides that while distributing properties in matrimonial matters, for instance, one has to factor in the contribution made by a party to the marriage to the welfare of the

family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of a homemaker or parent.

37. In Voluntary Health Association of Punjab v. Union of India and others, the two-Judge Bench which was dealing with the sharp decline in female sex ratio and mushrooming of various sonography centers, issued certain directions keeping in view the provisions of the Medical Termination of Pregnancy Act, 1971 and the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996. The concurring opinion adverted to the direction contained in point 9.8 of the main judgment which related to the steps taken by the State Government and the Union Territory to educate the people of the necessity of implementing the provisions of the said Act by conducting workshops as well as awareness camps at the State and district levels. In the concurring opinion, reference was made to the authority in State of H.P. v. Nikku Ram and M.C. Mehta v. State of T.N. and it was stated:-

    A woman has to be regarded as an equal partner in the life of a man. It has to be borne in mind that she has also the equal role in the society i.e. thinking, participating and leadership. The legislature has brought the present piece of legislation with an intention to provide for prohibition of sex selection before or after conception and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide. The purpose of the enactment can only be actualised and its object fruitfully realised when the authorities under the Act carry out their functions with devotion, dedication and commitment and further there is awakened awareness with regard to the role of women in a society.

38. In Charu Khurana and others v. Union of India and others, the controversy arose about the prevalence of discrimination of gender equality in the film industry where women were not allowed to become make-up artists and only allowed to work as hair-dressers. Referring to various earlier judgments and Article 51-A(e), the Court observed:-

    On a condign understanding of clause (e), it is clear as a cloudless sky that all practices derogatory to the dignity of women are to be renounced. Be it stated, dignity is the quintessential quality of a personality and a human frame always desires to live in the mansion of dignity, for it is a highly cherished value. And again: The sustenance of gender justice is the cultivated achievement of intrinsic human rights. Equality cannot be achieved unless there are equal opportunities and if a woman is debarred at the threshold to enter into the sphere of profession for which she is eligible and qualified, it is well-nigh impossible to conceive of equality. It also clips her capacity to earn her livelihood which affects her individual dignity.

39. Eventually, directions were issued that women were eligible to become make-up artists. The aforesaid decisions unequivocally lay stress and emphasis on gender equality and dignity of women.

40. In Voluntary Health Association of Punjab v. Union of India and Ors, while dealing with female foeticide, it has been observed:-

    It needs no special emphasis that a female child is entitled to enjoy equal right that a male child is allowed to have. The constitutional identity of a female child cannot be mortgaged to any kind of social or other concept that has developed or is thought of. It does not allow any room for any

kind of compromise. It only permits affirmative steps that are constitutionally postulated. Be it clearly stated that when rights are conferred by the Constitution, it has to be understood that such rights are recognised regard being had to their naturalness and universalism. No one, let it be repeated, no one, endows any right to a female child or, for that matter, to a woman. The question of any kind of condescension or patronisation does not arise.

41. Emphasizing on the equality and dignity of women, it has been stated:-

... let it be stated with certitude and without allowing any room for any kind of equivocation or ambiguity, the perception of any individual or group or organisation or system treating a woman with inequity, indignity, inequality or any kind of discrimination is constitutionally impermissible. The historical perception has to be given a prompt burial. Female foeticide is conceived by the society that definitely includes the parents because of unethical perception of life and nonchalant attitude towards law. The society that treats man and woman with equal dignity shows the reflections of a progressive and civilised society. To think that a woman should think what a man or a society wants her to think tantamounts to slaughtering her choice, and definitely a humiliating act. When freedom of free choice is allowed within constitutional and statutory parameters, others cannot determine the norms as that would amount to acting in derogation of law.

42. In Vikas Yadav v. State of Uttar Pradesh and others, condemning honour killing, the Court after referring to Lata Singh v. State of U.P. and Maya Kaur Baldevsingh Sardar v. State of Maharashtra, has opined:-

One may feel My honour is my life but that does not mean sustaining ones honour at the cost of another.

Freedom, independence, constitutional identity, individual choice and thought of a woman, be a wife or sister or daughter or mother, cannot be allowed to be curtailed definitely not by application of physical force or threat or mental cruelty in the name of his self-assumed honour. That apart, neither the family members nor the members of the collective has any right to assault the boy chosen by the girl. Her individual choice is her self-respect and creating dent in it is destroying her honour. And to impose so-called brotherly or fatherly honour or class honour by eliminating her choice is a crime of extreme brutality, more so, when it is done under a guise. It is a vice, condemnable and deplorable perception of honour, comparable to medieval obsessive assertions.

43. The aforesaid enunciation of law makes it graphically clear that the constitutional identity, freedom of choice, dignity of a woman and affirmative rights conferred on her by the Constitution cannot be allowed to be abrogated even for a moment. In this context, we have to scan and appreciate the provision contained in Section 11 of the 1984 Act. The provision, as has been stated earlier, mandates the proceedings to be held in camera if one of the parties so desires. Equality of choice has been conferred by the statute. That apart, Section 22 of the 1955 Act lays down the proceedings to be held in camera and any matter in relation to any such proceeding may not be printed or published except a judgment of the High Court or of the Supreme Court with the previous permission of the Court.

44. We, as advised at present, constrict our analysis to the provisions of the 1984 Act. First, as we notice, the expression of desire by the wife or the husband is whittled down and smothered if

the Court directs that the proceedings shall be conducted through the use of videoconferencing. As is demonstrable from the analysis of paragraph 14 of the decision, the Court observed that wherever one or both the parties make a request for the use of videoconferencing, the proceedings may be conducted by way of videoconferencing obviating the need of the parties to appear in person. The cases where videoconferencing has been directed by this Court are distinguishable. They are either in criminal cases or where the Court found it necessary that the witness should be examined through videoconferencing. In a case where the wife does not give consent for videoconferencing, it would be contrary to Section 11 of the 1984 Act. To say that if one party makes the request, the proceedings may be conducted by videoconferencing mode or system would be contrary to the language employed under Section 11 of the 1984 Act. The said provision, as is evincible to us, is in consonance with the constitutional provision which confer affirmative rights on women that cannot be negatived by the Court. The Family Court also has the jurisdiction to direct that the proceedings shall be held in camera if it so desires and, needless to say, the desire has to be expressed keeping in view the provisions of the 1984 Act.

45. The language employed in Section 11 of the 1984 Act is absolutely clear. It provides that if one of the parties desires that the proceedings should be held in camera, the Family Court has no option but to so direct. This Court, in exercise of its jurisdiction, cannot take away such a sanctified right that law recognizes either for the wife or the husband. That apart, the Family Court has the duty to make efforts for settlement. Section 23(2) of the 1955 Act mandates for reconciliation. The language used under Section 23(2) makes it an obligatory duty on the part of the court at the first instance in every case where it is possible, to make every endeavour to bring about reconciliation between the parties where it is possible to do so consistent with the nature and circumstances of the case. There are certain exceptions as has been enumerated in the proviso which pertain to incurably of unsound mind or suffering from a virulent and incurable form of leprosy or suffering from venereal disease in a communicable form or has renounced the world by entering any religious order or has not been heard of as being alive for a period of seven years, etc. These are the exceptions carved out by the legislature. The Court has to play a diligent and effective role in this regard.

46. The reconciliation requires presence of both the parties at the same place and the same time so as to be effectively conducted. The spatial distance will distant the possibility of reconciliation because the Family Court Judge would not be in a position to interact with the parties in the manner as the law commands. By virtue of the nature of the controversy, it has its inherent sensitivity. The Judge is expected to deal with care, caution and with immense sense of worldly experience absolutely being conscious of social sensibility. Needless to emphasise, this commands a sense of trust and maintaining an atmosphere of confidence and also requirement of assurance that the confidentiality is in no way averted or done away with. There can be no denial of this fact. It is sanguinely private. Recently, in Justice K.S. Puttaswamy (Retd) v. Union of India & others, this Court, speaking through one of us (Chandrachud, J.), has ruled thus:-

The intersection between ones mental integrity and privacy entitles the individual freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity.

The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. And again:

Privacy represents the core of the human personality and recognizes the ability of each individual to make choices and to take decisions governing matters intimate and personal.

47. Frankfurter Felix in Schulte Co. v. Gangi, has stated that the policy of a statute should be drawn out of its terms as nourished by their proper environment and not like nitrogen out of the air.

Benjamin N. Cardozo, in Hopkins Savings Assn. v. Cleary, has opined that when a statute is reasonably susceptible of two interpretations, the Court has to prefer the meaning that preserves to the meaning that destroys.

48. The command under Section 11 of the 1984 Act confers a right on both the parties. It is statutory in nature. The Family Court Judge who is expected to be absolutely sensitive has to take stock of the situation and can suo motu hold the proceedings in camera. The Family Court Judge is only meant to deal with the controversies and disputes as provided under the 1984 Act. He is not to be given any other assignment by the High Court. The in camera proceedings stand in contradistinction to a proceeding which is tried in court. When a case is tried or heard in court, there is absolute transparency. Having regard to the nature of the controversy and the sensitivity of the matter, it is desirable to hear in court various types of issues that crop up in these types of litigations. The Act commands that there has to be an effort for settlement. The legislative intendment is for speedy settlement. The counsellors can be assigned the responsibility by the court to counsel the parties. That is the schematic purpose of the law. The confidentiality of the proceedings is imperative for these proceedings.

49. The procedure of videoconferencing which is to be adopted when one party gives consent is contrary to Section 11 of the 1984 Act. There is no provision that the matter can be dealt with by the Family Court Judge by taking recourse to videoconferencing. When a matter is not transferred and settlement proceedings take place which is in the nature of reconciliation, it will be well nigh impossible to bridge the gap. What one party can communicate with other, if they are left alone for sometime, is not possible in videoconferencing and if possible, it is very doubtful whether the emotional bond can be established in a virtual meeting during videoconferencing. Videoconferencing may create a dent in the process of settlement.

50. The two-Judge Bench had referred to the decisions where the affirmative rights meant for women have been highlighted in various judgments. We have adverted to some of them to show the dignity of woman and her rights and the sanctity of her choice. When most of the time, a case is filed for transfer relating to matrimonial disputes governed by the 1984 Act, the statutory right of a woman cannot be nullified by taking route to technological advancement and destroying her right under a law, more so, when it relates to family matters. In our considered opinion, dignity of women is sustained and put on a higher pedestal if her choice is respected. That will be in consonance with Article 15(3) of the Constitution.

51. In this context, we may refer to the fundamental principle of necessity of doing justice and trial in camera. The nine-Judge Bench in Naresh Shridhar Mirajkar and Ors v. State of Maharashtra and Anr.46, after enunciating the universally accepted proposition in favour of open trials, expressed:-

While emphasising the importance of public trial, we cannot overlook the fact that the primary function of the Judiciary is to do justice between the parties who bring their causes before it. If a Judge trying a cause is satisfied that the very purpose of finding truth in the case would be

retarded, or even defeated if witnesses are required to give evidence subject to public gaze, is it or is it not open to him in exercise of his inherent power to hold the trial in camera either partly or fully? If the primary function of the court is to do justice in causes brought before it, then on principle, it is difficult to accede to the proposition that there can be no exception to the rule that all causes must be tried in open court. If the principle that all trials before courts must be held in public was treated as inflexible and universal and it is held that it admits of no exceptions whatever, cases may arise where by following the principle, justice itself may be defeated. That is why we feel no hesitation in holding that the High Court has inherent jurisdiction to hold a trial in camera if the ends of justice clearly and necessarily require the adoption of such a course. It is hardly necessary to emphasise that this inherent power must be exercised with great caution and it is only if the court is satisfied beyond a doubt that the ends of justice themselves would be defeated if a case is tried in open court that it can pass an order to hold the trial in camera; but to deny the existence of such inherent power to the court would be to ignore the primary object of adjudication itself. The principle underlying the insistence on hearing causes in open court is to protect and assist fair, impartial and objective administration of justice; but if the requirement of justice itself sometimes dictates the necessity of trying the case in camera, it cannot be said that the said requirement should be sacrificed because of the principle that every trial must be held in open court.

52. The principle of exception that the larger Bench enunciated is founded on the centripodal necessity of doing justice to the cause and not to defeat it. In matrimonial disputes that are covered under Section 7 of the 1984 Act where the Family Court exercises its jurisdiction, there is a statutory protection to both the parties and conferment of power on the court with a duty to persuade the parties to reconcile. If the proceedings are directed to be conducted through videoconferencing, the command of the Section as well as the spirit of the 1984 Act will be in peril and further the cause of justice would be defeated.

53. A cogent reflection is also needed as regards the perception when both the parties concur to have the proceedings to be held through videoconferencing. In this context, the thought and the perception are to be viewed through the lens of the textual context, legislative intent and schematic canvas. The principle may had to be tested on the bedrock that courts must have progressive outlook and broader interpretation with the existing employed language in the statute so as to expand the horizon and the connotative expanse and not adopt a pedantic approach.

54. We have already discussed at length with regard to the complexity and the sensitive nature of the controversies. The statement of law made in Krishna Veni Nagam (supra) that if either of the parties gives consent, the case can be transferred, is absolutely unacceptable. However, an exception can be carved out to the same. We may repeat at the cost of repetition that though the principle does not flow from statutory silence, yet as we find from the scheme of the Act, the Family Court has been given ample power to modulate its procedure. The Evidence Act is not strictly applicable. Affidavits of formal witnesses are acceptable. It will be permissible for the other party to cross-examine the deponent. We are absolutely conscious that the enactment gives emphasis on speedy settlement. As has been held in Bhuwan Mohan Singh (supra), the concept of speedy settlement does not allow room for lingering the proceedings. A genuine endeavour has to be made by the Family Court Judge, but in the name of efforts to bring in a settlement or to arrive at a solution of the lis, the Family Court should not be chained by the tentacles by either parties. Perhaps, one of the parties may be interested in procrastinating the litigation. Therefore, we are disposed to think that once a settlement fails and if both the parties give consent that a

witness can be examined in video conferencing, that can be allowed. That apart, when they give consent that it is necessary in a specific factual matrix having regard to the convenience of the parties, the Family Court may allow the prayer for videoconferencing. That much of discretion, we are inclined to think can be conferred on the Family Court. Such a limited discretion will not run counter to the legislative intention that permeates the 1984 Act. However, we would like to add a safeguard. A joint application should be filed before the Family Court Judge, who shall take a decision. However, we make it clear that in a transfer petition, no direction can be issued for video conferencing. We reiterate that the discretion has to rest with the Family Court to be exercised after the court arrives at a definite conclusion that the settlement is not possible and both parties file a joint application or each party filing his/her consent memorandum seeking hearing by videoconferencing.

55. Be it noted, sometimes, transfer petitions are filed seeking transfer of cases instituted under the Protection of Women from Domestic Violence Act, 2005 and cases registered under the IPC. As the cases under the said Act and the IPC have not been adverted to in Krishna Veni Nagam (supra) or in the order of reference in these cases, we do intend to advert to the same.

56. In view of the aforesaid analysis, we sum up our conclusion as follows :-

(i) In view of the scheme of the 1984 Act and in particular Section 11, the hearing of matrimonial disputes may have to be conducted in camera.

(ii) After the settlement fails and when a joint application is filed or both the parties file their respective consent memorandum for hearing of the case through videoconferencing before the concerned Family Court, it may exercise the discretion to allow the said prayer.

(iii) After the settlement fails, if the Family Court feels it appropriate having regard to the facts and circumstances of the case that videoconferencing will sub-serve the cause of justice, it may so direct.

(iv) In a transfer petition, video conferencing cannot be directed.

(v) Our directions shall apply prospectively.

(vi) The decision in Krishna Veni Nagam (supra) is overruled to the aforesaid extent

57. We place on record our appreciation for the assistance rendered by Mr. Ajit Kumar Sinha, learned senior counsel.

58. The matters be placed before the appropriate Bench for consideration of the transfer petitions on their own merits.

.CJI.

(Dipak Misra) ..J.

(A.M. Khanwilkar)

New Delhi.

October 9, 2017.

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

TRANSFER PETITION (CIVIL) No. 1278 OF 2016

Bench: Hon'ble Dr. Justice D.Y. Chandrachud

Santhini ..... Petitioner
Versus
Vijaya Venketesh ..... Respondent

WITH T.P. (C) NO.422 OF 2017

JUDGMENT

Hon'ble Dr. Justice D.Y. Chandrachud :—

The judgment proposed by the learned Chief Justice has been circulated and deliberated upon. The reasons why I am unable to adopt the view propounded in the judgment of the learned Chief Justice will be delivered separately. I record below my conclusions:

1. The Family Courts Act, 1984 has been enacted at a point in time when modern technology (at least as we know it today) which enables persons separated by spatial distances to communicate with each other face to face was not the order of the day or, in any case, was not as fully developed. That is no reason for any court - especially for this court which sets precedent for the nation - to exclude the application of technology to facilitate the judicial process.

2. Appropriate deployment of technology facilitates access to justice. Litigation under the Family Courts Act 1984 is not an exception to this principle. This court must be averse to judicially laying down a restraint on such use of technology which facilitates access to justice to persons in conflict, including those involved in conflicts within the family. Modern technology is above all a facilitator, enabler and leveler.

3. Video conferencing is a technology which allows users in different locations to hold face to face meetings. Video conferencing is being used extensively the world over (India being no exception) in on line teaching, administration, meetings, negotiation, mediation and telemedicine among a myriad other uses. Video conferencing reduces cost, time, carbon footprint and the like.

4. An in-camera trial is contemplated under Section 11 in two situations: the first where the Family Court so desires; and the second if either of the parties so desires. There is a fallacy in the hypothesis that an in-camera trial is inconsistent with the usage of video conferencing techniques. A trial in-camera postulates the exclusion of the public from the courtroom and allows for restraints on public reporting. Video conferencing does not have to be recorded nor is it accessible to the press or the public. The proper adoption of video conferencing does not negate the postulates of an in-camera trial even if such a trial is required by the court or by one of the parties under Section 11.

5. The Family Courts Act 1984 envisages an active role for the Family Court to foster settlements. Under the provisions of Section 11, the Family Court has to endeavour to "assist and persuade" parties to arrive at a settlement. Section 9 clearly recognises a discretion in the Family Court to determine how to structure the process. It does so by adopting the words "where it is possible to do so consistent with the nature and circumstances of the case". Moreover, the High Courts can

frame rules under Section 9(1) and the Family Court may, subject to those rules, "follow such procedure as it deems fit". In the process of settlement, Section 10(3) enables the Family Court to lay down its own procedure. The Family Court is entitled to take the benefit of counsellors, medical experts and persons professionally engaged in promoting the welfare of the family.

6. The above provisions - far from excluding the use of video conferencing - are sufficiently enabling to allow the Family Court to utilise technological advances to facilitate the purpose of achieving justice in resolving family conflicts. There may arise a variety of situations where in today's age and time parties are unable to come face to face for counselling or can do so only at such expense, delay or hardship which will defeat justice. One or both spouses may face genuine difficulties arising from the compulsions of employment, family circumstances (including the needs of young children), disability and social or economic handicaps in accessing a court situated in a location distant from where either or both parties reside or work. It would be inappropriate to deprive the Family Court which is vested with such wide powers and procedural flexibility to adopt video conferencing as a facilitative tool, where it is convenient and readily available. Whether video conferencing should be allowed must be determined on a case to case analysis to best effectuate the concern of providing just solutions. Far from such a procedure being excluded by the law, it will sub serve the purpose of the law.

7. Conceivably there may be situations where parties (or one of the spouses) do not want to be in the same room as the other. This is especially true when there are serious allegations of marital abuse. Video conferencing allows things to be resolved from the safety of a place which is not accessible to the other spouse against whom there is a serious allegation of misbehaviour of a psychiatric nature or in a case of substance abuse.

8. Video conferencing is gender neutral. In fact it ensures that one of the spouses cannot procrastinate and delay the conclusion of the trial. Delay, it must be remembered, generally defeats the cause of a party which is not the dominant partner in a relationship. Asymmetries of power have a profound consequence in marital ties. Imposing an unwavering requirement of personal and physical presence (and exclusion of facilitative technological tools such as video conferencing) will result in a denial of justice.

9. The High Courts have allowed for video conferencing in resolving family conflicts. A body of precedent has grown around the subject in the Indian context. The judges of the High Court should have a keen sense of awareness of prevailing social reality in their states and of the federal structure. Video conferencing has been adopted internationally in resolving conflicts within the family. There is a robust body of authoritative opinion on the subject which supports video conferencing, of course with adequate safeguards. Whether video conferencing should be allowed in a particular family dispute before the Family Court, the stage at which it should be allowed and the safeguards which should be followed should best be left to the High Courts while framing rules on the subject. Subject to such rules, the use of video conferencing must be left to the careful exercise of discretion of the Family Court in each case.

10. The proposition that video conferencing can be permitted only after the conclusion of settlement proceedings (resultantly excluding it in the settlement process), and thereafter only when both parties agree to it does not accord either with the purpose or the provisions of the Family Courts Act 1984. Exclusion of video conferencing in the settlement process is not mandated either expressly or by necessary implication by the legislation. On the contrary the legislation has

enabling provisions which are sufficiently broad to allow video conferencing. Confining it to the stage after the settlement process and in a situation where both parties have agreed will seriously impede access to justice. It will render the Family Court helpless to deal with human situations which merit flexible solutions. Worse still, it will enable one spouse to cause interminable delays thereby defeating the purpose for which a specialised court has been set up.

II The reference should in my opinion be answered in the above terms.

.....J

[Dr D Y CHANDRACHUD]

New Delhi October 09, 2017

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BHUWAN MOHAN SINGH V. MEENA

Bench: Hon'ble Mr. Justice Dipak Misra & Hon'ble Mr. Justice V. Gopala Gowda

Bhuwan Mohan Singh . . Appellant;
Versus
Meena And Others . . Respondents.

Criminal Appeal No. 1331 of 2014

(2015) 6 Supreme Court Cases 353
Date of Judgment : July 15, 2014

The Family Courts have been established for adopting and facilitating the conciliation procedure and to deal with family disputes in a speedy and expeditious manner.

A three-Judge Bench in K.A. Abdul Jaleel v. T.A. Shahida, while highlighting on the purpose of bringing in the Family Courts Act by the legislature, opined thus: - "The Family Courts Act was enacted to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith."

The purpose of highlighting this aspect is that in the case at hand the proceeding before the Family Court was conducted without being alive to the objects and reasons of the Act and the spirit of the provisions under Section 125 of the Code. It is unfortunate that the case continued for nine years before the Family Court. It has come to the notice of the Court that on certain occasions the Family Courts have been granting adjournments in a routine manner as a consequence of which both the parties suffer or, on certain occasions, the wife becomes the worst victim. When such a situation occurs, the purpose of the law gets totally atrophied. The Family Judge is expected to be sensitive to the issues, for he is dealing with extremely delicate and sensitive issues pertaining to the marriage and issues ancillary thereto. When we say this, we do not mean that the Family Courts should show undue haste or impatience, but there is a distinction between impatience and to be wisely anxious and conscious about dealing with a situation.

A Family Court Judge should remember that the procrastination is the greatest assassin of the lis before it. It not only gives rise to more family problems but also gradually builds unthinkable and Everestine bitterness. It leads to the cold refrigeration of the hidden feelings, if still left. The delineation of the lis by the Family Judge must reveal the awareness and balance. Dilatory tactics by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive to the fact that the lis before him pertains to emotional fragmentation and delay can feed it to grow. We hope and trust that the Family Court Judges shall remain alert to this and decide the matters as expeditiously as possible keeping in view the objects and reasons of the Act and the scheme of various provisions pertaining to grant of maintenance, divorce, custody of child, property disputes, etc.

JUDGMENT

The Judgment of the Court was delivered by

Hon'ble Mr. Justice Dipak Misra :—

Leave granted. The two issues that pronouncedly emanate in this appeal by special leave are whether the Family Court while deciding an application under Section 7 of the Family Court Act, 1984 (for brevity, "the Act") which includes determination of grant of maintenance to the persons as entitled under that provision, should allow adjournments in an extremely liberal manner remaining oblivious of objects and reasons of the Act and also keeping the windows of wisdom closed and the sense of judicial responsiveness suspended to the manifest perceptibility of vagrancy, destitution, impecuniosity, struggle for survival and the emotional fracture, a wife likely to face under these circumstances and further exhibiting absolute insensitivity to her condition, who, after loosing support of the husband who has failed to husband the marital status denies the wife to have maintenance for almost nine years as that much time is consumed to decide the lis and, in addition, to restrict the grant of maintenance to the date of order on some kind of individual notion. Both the approaches, as we perceive, not only defeat the command of the legislature but also frustrate the hope of wife and children who are deprived of adequate livelihood and whose aspirations perish like mushroom and possibly the brief candle of sustenance joins the marathon race of extinction. This delay in adjudication by the Family Court is not only against human rights but also against the basic embodiment of dignity of an individual.

2. Be it ingeminated that Section 125 of the Code of Criminal Procedure (for short "the Code") was conceived to ameliorate the agony, anguish, financial suffering of a woman who left her matrimonial home for the reasons provided in the provision so that some suitable arrangements can be made by the Court and she can sustain herself and also her children if they are with her. The concept of sustenance does not necessarily mean to lead the life of an animal, feel like an unperson to be thrown away from grace and roam for her basic maintenance somewhere else. She is entitled in law to lead a life in the similar manner as she would have lived in the house of her husband. That is where the status and strata come into play, and that is where the obligations of the husband, in case of a wife, become a prominent one. In a proceeding of this nature, the husband cannot take subterfuges to deprive her of the benefit of living with dignity. Regard being had to the solemn pledge at the time of marriage and also in consonance with the statutory law that governs the field, it is the obligation of the husband to see that the wife does not become a destitute, a beggar. A situation is not to be maladroitly created whereunder she is compelled to resign to her fate and think of life "dust unto dust". It is totally impermissible. In fact, it is the sacrosanct duty to render the financial support even if the husband is required to earn money with physical labour, if he is able bodied. There is no escape route unless there is an order from the Court that the wife is not entitled to get maintenance from the husband on any legally permissible grounds.

3. Presently to the facts which lie in an extremely small compass. The marriage between the appellant and the husband was solemnized on 27.11.1997 as per Hindu rites and ritual, and in the wedlock a son was born on 16.12.1998. The respondent, under certain circumstances, had to leave the marital home and thereafter filed an application on 28.8.2002 under Section 125 of the Code in the Family Court, Jaipur, Rajasthan, claiming Rs.6000/- per month towards maintenance. The Family Court finally decided the matter on 24.8.2011 awarding monthly maintenance of Rs.2500/- to the respondent-wife and Rs.1500/- to the second respondentson.

Be it stated, during the continuance of the Family Court proceedings, number of adjournments were granted, some taken by the husband and some by the wife. The learned Family Judge being dissatisfied with the material brought on record came to hold that the respondent-wife was entitled to maintenance and, accordingly, fixed the quantum and directed that the maintenance to be paid from the date of the order.

4. Being dissatisfied with the aforesaid order the respondent-wife preferred S.B. Criminal Revision Petition No. 1526 of 2011 before the High Court of Judicature at Rajasthan and the learned single Judge, vide order dated 28.5.2012[1], noted the contention of the wife that the maintenance should have been granted from the date of application, and that she had received nothing during the proceedings and suffered immensely and, eventually, directed that the maintenance should be granted from the date of filing of the application.

5. Criticizing the aforesaid order, it is submitted Mr. Jay Kishor Singh learned counsel for the appellant that when number of adjournments were sought by the wife, grant of maintenance from the date of filing of the application by the High Court is absolutely illegal and unjustified. It is his submission that the wife cannot take advantage of her own wrong.

6*. Mr. Mohit Paul, learned counsel for the respondents would submit that the Family Court adjourned the matter sometimes on its own and the enormous delay took place because of non-cooperation of the husband in the proceedings and, therefore, the wife who was compelled to sustain herself and her son with immense difficulty should not be allowed to suffer. It is proponed by him that the High Court by modifying the order and directing that the maintenance should be granted from the date of filing of the application has not committed any legal infirmity and hence, the order is inexceptionable.

7. At the outset, we are obliged to reiterate the principle of law how a proceeding under Section 125 of the Code has to be dealt with by the court, and what is the duty of a Family Court after establishment of such courts by the Family Courts Act, 1984. In ***Smt. Dukhtar Jahan v. Mohammed Farooq***[2], the Court opined that: (SCC P. 361 para 16)

> *"16. ... proceedings under Section 125 of the Code, it must be remembered, are of a summary nature and are intended to enable destitute wives and children, the latter whether they are legitimate or illegitimate, to get maintenance in a speedy manner."*

8. A three-Judge Bench in ***Vimla (K.) v. Veeraswamy (K.)***[3], while discussing about the basic purpose under Section 125 of the Code, opined that Section 125 of the Code 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.

9. A two-Judge Bench in ***Kirtikant D. Vadodaria v. State of Gujarat and another***[4], while adverting to the dominant purpose behind Section 125 of the Code, ruled that: (SCC p. 489, para 15)

> *"15. ... While dealing with the ambit and scope of the provision contained in Section 125 of the Code, it has to be borne in mind that the dominant and primary object is to give social justice to the woman, child and infirm parents etc. and to prevent destitution*

1 Meena v. State of Rajasthan, Criminal Revision Petition No. 1526 of 2011, order dated 28-5-2012 (Raj)

* Ed.: Para 6 corrected vide Official Corrigendum No. F.3/Ed. B.J./46/2014 dated 28-8-2014

2 (1987) 1 SCC 624

3 (1991) 2 SCC 375

4 (1996) 4 SCC 479

and vagrancy by compelling those who can support those who are unable to support themselves but have a moral claim for support. The provisions in Section 125 provide a speedy remedy to those women, children and destitute parents who are in distress. The provisions in Section 125 are intended to achieve this special purpose. The dominant purpose behind the benevolent provisions contained in Section 125 clearly is that the wife, child and parents should not be left in a helpless state of distress, destitution and starvation."

10. In ***Chaturbhuj v. Sita Bai***[5], reiterating the legal position the Court held: (SCC p. 320, para 6)

> *"6. ... Section 125 CrPC 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. Veena Kaushal***[6] *falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India. 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***[7]*."*

11. Recently in ***Nagendrappa Natikar v. Neelamma***[8], it has been stated that it is a piece of social legislation which provides for a summary and speedy relief by way of maintenance to a wife who is unable to maintain herself and her children.

12. The Family Courts have been established for adopting and facilitating the conciliation procedure and to deal with family disputes in a speedy and expeditious manner. A three-Judge Bench in ***K.A. Abdul Jaleel v. T.A. Shahida***[9], while highlighting on the purpose of bringing in the Family Courts Act by the legislature, opined thus: (SCC p. 170, para 10)

> *"The Family Courts Act was enacted 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.*"

13. The purpose of highlighting this aspect is that in the case at hand the proceeding before the Family Court was conducted without being alive to the objects and reasons of the Act and the spirit of the provisions under Section 125 of the Code. It is unfortunate that the case continued for nine years before the Family Court. It has come to the notice of the Court that on certain occasions the Family Courts have been granting adjournments in a routine manner as a consequence of which both the parties suffer or, on certain occasions, the wife becomes the worst victim. When such a situation occurs, the purpose of the law gets totally atrophied. The Family Judge is expected to be sensitive to the issues, for he is dealing with extremely delicate and sensitive issues pertaining to the marriage and issues ancillary thereto. When we say this, we do not mean that the Family Courts should show undue haste or impatience, but there is a distinction between impatience and to be wisely anxious and conscious about dealing with a situation. A Family Court Judge should remember that the procrastination is the greatest assassin of the lis before it. It not only gives rise to more family problems but also gradually builds unthinkable and Everestine bitterness. It leads to the cold refrigeration of the hidden feelings, if still left. The

5 (2008) 2 SCC 316
6 (1978) 4 SCC 70
7 (2005) 3 SCC 636
8 2013 (3) SCALE 561
9 (2003) 4 SCC 166

delineation of the lis by the Family Judge must reveal the awareness and balance. Dilatory tactics by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive to the fact that the lis before him pertains to emotional fragmentation and delay can feed it to grow. We hope and trust that the Family Court Judges shall remain alert to this and decide the matters as expeditiously as possible keeping in view the objects and reasons of the Act and the scheme of various provisions pertaining to grant of maintenance, divorce, custody of child, property disputes, etc.

14. While dealing with the relevant date of grant of maintenance, in ***Shail Kumari Devi and another v. Krishan Bhagwal Pathak alias Kishun B. Pathak***[10], the Court referred to the Code of Criminal Procedure (Amendment) Act, 2001 (Act 50 of 2001) and came to hold that : (SCC p. 639, para 21)

> *"21. ... even after the amendment of 2001, an order for payment of maintenance can be paid by a court either from the date of order or when express order is made to pay maintenance from the date of application, then the amount of maintenance may be paid from that date, i.e., from the date of application."*

The Court referred to the decision in ***Krishna Jain v. Dharam Raj Jain***[11] wherein it has been stated that: (*Shail Kumari Devi case*[10], SCC p. 645, para 37)

> *"37. ... to hold that, normally maintenance should be made payable from the date of the order and not from the date of the application unless such order is backed by reasons would amount to inserting something more in the sub-section which the legislature never intended. The High Court had observed that it was unable to read in sub-section (2) laying down any rule to award maintenance from the date of the order or that the grant from the date of the application is an exception."*

The High Court had also opined that whether maintenance is granted from the date of the order or from the date of application, the Court is required to record reasons as required under sub-section (6) of Section 354 of the Code.

15. After referring to the decision in Krishna Jain (supra), the Court adverted to the decision of the High Court of Andhra Pradesh in ***K. Sivaram v. K. Mangalamba***[12] wherein it has been ruled that the maintenance would be awarded from the date of the order and such maintenance could be granted from the date of the application only by recording special reasons. The view of the learned single Judge of the High Court of Andhra Pradesh stating that it is a normal rule that the Magistrate should grant maintenance only from the date of the order and not from the date of the application for maintenance was not accepted by this Court. Eventually, the Court ruled thus: (*Shail Kumari Devi case*[10], SCC p. 647, para 43)

> *"43. We, therefore, hold that while deciding an application under Section 125 of the Code, a Magistrate is required to record reasons for granting or refusing to grant maintenance to wives, children or parents. Such maintenance can be awarded from the date of the order, or, if so ordered, from the date of the application for maintenance, as the case may be. For awarding maintenance from the date of the application, express order is necessary. No special reasons, however, are required to be recorded by the*

10 (2008) 9 SCC 632
11 1992 Cri LJ 1028 (MP)
12 1990 Cri LJ 1880 (AP)

court. In our judgment, no such requirement can be read in sub-section (1) of Section 125 of the Code in absence of express provision to that effect."

16. In the present case, as we find, there was enormous delay in disposal of the proceeding under Section 125 of the Code and most of the time the husband had taken adjournments and some times the court dealt with the matter showing total laxity. The wife sustained herself as far as she could in that state for a period of nine years. The circumstances, in our considered opinion, required grant of maintenance from the date of application and by so granting the High Court has not committed any legal infirmity. Hence, we concur with the order of the High Court. However, we direct, as prayed by the learned counsel for the respondent, that he may be allowed to pay the arrears along with the maintenance awarded at present in a phased manner. Learned counsel for the appellant did not object to such an arrangement being made. In view of the aforesaid, we direct that while paying the maintenance as fixed by the learned Family Court Judge per month by 5th of each succeeding month, the arrears shall be paid in a proportionate manner within a period of three years from today.

17. Consequently, the appeal, being devoid of merits, stands dismissed.

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SHAMIMA FAROOQUI V. SHAHID KHAN

Bench: Hon'ble Mr. Justice Dipak Misra & Hon'ble Mr. Justice Prafulla C. Pant

Shamima Farooqui . . Appellant;
Versus
Shahid Khan . . Respondent.

Criminal Appeals Nos. 564-65 of 2015

(2015) 5 Supreme Court Cases 705
Date of Judgment : April 6, 2015

What is disturbing is that though the application for grant of maintenance was filed in the year 1998, it was not decided till 17.2.2012. It is also shocking to note that there was no order for grant of interim maintenance. It needs no special emphasis to state that when an application for grant of maintenance is filed by the wife the delay in disposal of the application, to say the least, is an unacceptable situation. It is, in fact, a distressing phenomenon.

An application for grant of maintenance has to be disposed of at the earliest. The family courts, The purpose of highlighting this aspect is that in the case at hand the proceeding before the Family Court was conducted without being alive to the objects and reasons of the Act and the spirit of the provisions Under Section 125 of the Code. It is unfortunate that the case continued for nine years before the Family Court. It has come to the notice of the Court that on certain occasions the Family Courts have been granting adjournments in a routine manner as a consequence of which both the parties suffer or, on certain occasions, the wife becomes the worst victim. When such a situation occurs, the purpose of the law gets totally atrophied.

The Family Judge is expected to be sensitive to the issues, for he is dealing with extremely delicate and sensitive issues pertaining to the marriage and issues ancillary thereto. When we say this, we do not mean that the Family Courts should show undue haste or impatience, but there is a distinction between impatience and to be wisely anxious and conscious about dealing with a situation. A Family Court Judge should remember that the procrastination is the greatest assassin of the lis before it. It not only gives rise to more family problems but also gradually builds unthinkable and Everestine bitterness. It leads to the cold refrigeration of the hidden feelings, if still left. The delineation of the lis by the Family Judge must reveal the awareness and balance. Dilatory tactics by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive to the fact that the lis before him pertains to emotional fragmentation and delay can feed it to grow. We hope and trust that the Family Court Judges shall remain alert to this and decide the matters as expeditiously as possible keeping in view the objects and reasons of the Act and the scheme of various provisions pertaining to grant of maintenance, divorce, custody of child, property disputes, etc."

JUDGMENT

The Judgment of the Court was delivered by

Hon'ble Mr. Justice Dipak Misra :—

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

2. The facts which are requisite to be stated for adjudication of these appeals are that the appellant filed an application under Section 125 of the Code of Criminal Procedure (CrPC) contending, inter alia, that she married Shahid Khan, the respondent herein, on 26.4.1992 and during her stay at the matrimonial home she was prohibited from talking to others, and the husband not only demanded a car from the family but also started harassing her. A time came when he sent her to the parental home where she was compelled to stay for almost three months. The indifferent husband did not come to take her back to the matrimonial home, but she returned with the fond and firm hope that the bond of wedlock would be sustained and cemented with love and peace but as the misfortune would have it, the demand for the vehicle continued and the harassment was used as a weapon for fulfilment of the demand. In due course she came to learn that the husband had illicit relationship with another woman and he wanted to marry her. Usual to sense of human curiosity and wife's right when she asked him she was assaulted. The situation gradually worsened and it became unbearable for her to stay at the matrimonial home. At that juncture, she sought help of her parents who came and took her to the parental home at Lucknow where she availed treatment. Being deserted and ill-treated and, in a way, suffering from fear psychosis she took shelter in the house of her parents and when all her hopes got shattered for reunion, she filed an application for grant of maintenance at the rate of Rs.4000/- per month on the foundation that husband was working on the post of Nayak in the Army and getting a salary of Rs.10,000/- approximately apart from other perks.

3. The application for grant of maintenance was resisted with immense vigour by the husband disputing all the averments pertaining to demand of dowry and harassment and further alleging that he had already given divorce to her on 18.6.1997 and has also paid the Mehar to her.

4. A reply was filed to the same by wife asserting that she had neither the knowledge of divorce nor had she received an amount of Mehar.

5. During the proceeding before the learned Family Judge the wife-appellant examined herself and another, and the respondent-husband examined four witnesses, including himself. The learned Family Judge, Family Court, Lucknow while dealing with the application forming the subject matter Criminal Case No. 1120 of 1998 did not accept the primary objection as regards the maintainability under Section 125 CrPC as the applicant was a Muslim woman and came to hold even after the divorce the application of the wife under Section 125 CrPC was maintainable in the family court. Thereafter, the learned Family Judge appreciating the evidence brought on record came to opine that the marriage between the parties had taken place on 26.4.1992; that the husband had given divorce on 18.6.1997; that she was ill treated at her matrimonial home; and that she had come back to her parental house and staying there; that the husband had not made any provision for grant of maintenance; that the wife did not have any source of income to support her, and the plea advanced by the husband that she had means to sustain her had not been proved; that as the husband was getting at the time of disposal of the application as per the salary certificate Rs.17654/- and accordingly directed that a sum of Rs.2500/- should be paid as monthly maintenance allowance from the date of submission of application till the date of judgment and thereafter Rs.4000/- per month from the date of judgment till the date of remarriage.

6. The aforesaid order passed by the learned Family Judge came to be assailed before the High Court in Criminal Revision wherein, the High Court after adumbrating the facts referred to the decisions in ***Anita Rani v. Rakeshpal Singh***[1], ***Dharmendra Kumar Gupta v. Chander Prabha Devi***[2], R***akesh Kumar Dikshit v. Jayanti Devi***[3], ***Ashutosh Tripathi v. State of U.P.***[4], ***Paras Nath Kurmi v. The Session Judge***[5] and ***Sartaj v. State of U.P. and others***[6] and came to hold[7] that though the learned principal Judge, Family Court had not ascribed any reason for grant of maintenance from the date of application, yet when the case for maintenance was filed in the year 1998 decided on 17.2.2012 and there was no order for interim maintenance, the grant of Rs.2500/- as monthly maintenance from the date of application was neither illegal nor excessive. The High Court took note of the fact that the husband had retired on 1.4.2012 and consequently reduced the maintenance allowance to Rs.2000/-from 1.4.2012 till remarriage of the appellant herein. Being of this view the learned Single Judge modified the order passed by the Family Court. Hence, the present appeal by special leave, at the instance of the wife.

7. We have heard Dr. J.N. Dubey, learned senior counsel for the appellant. Despite service of notice, none has appeared for the respondent.

8. It is submitted by Dr. Dubey, learned senior counsel that Section 125 CrPC is applicable to the Muslim women and the Family Court has jurisdiction to decide the issue. It is urged by him that the High Court has fallen into error by opining that the grant of maintenance at the rate of Rs.4,000/- per month is excessive and hence, it should be reduced to Rs.2000/- per month from the date of retirement of the husband i.e. 1.4.2012 till her re-marriage. It is also contended that the High Court failed to appreciate the plight of the appellant and reduced the amount and hence, the impugned order is not supportable in law.

1 1991 (2) Crimes 725 (All)
2 1990 Cr.L.J. 1884
3 1999 (2) JIC, 323 (ACC)
4 1999 (2) 763, Allahabad J.I.C
5 1999 (2) JIC 522 All
6 2000 (2) JIC 967 All
7 Shahid Khan v. Shamima Farooqui, Criminal Revision No. 134 of 2012, order dated 17-9-2013 (All)

9. First of all, we intend to deal with the applicability of Section 125 CrPC to a Muslim woman who has been divorced. In ***Shamim Bano v. Asraf Khan***[8], this Court after referring to the Constitution Bench decisions in ***Danial Latifi v. Union of India***[9] and ***Khatoon Nisa v. State of U.P.***[10] had opined as follows:(Shamim Bano case[8], SCC p. 644, paras 13-14)

> *"13. The aforesaid principle clearly lays down that even after an application has been filed under the provisions of the Act, the Magistrate under the Act has the power to grant maintenance in favour of a divorced Muslim woman and the parameters and the considerations are the same as stipulated in Section 125 of the Code. We may note that while taking note of the factual score to the effect that the plea of divorce was not accepted by the Magistrate which was upheld by the High Court, the Constitution Bench opined that as the Magistrate could exercise power under Section 125 of the Code for grant of maintenance in favour of a divorced Muslim woman under the Act, the order did not warrant any interference. Thus, the emphasis was laid on the retention of the power by the Magistrate under Section 125 of the Code and the effect of ultimate consequence.*
>
> *14. Slightly recently, in* ***Shabana Bano v. Imran Khan****[11], a two-Judge Bench, placing reliance on Danial Latifi (supra), has ruled that:-*
>
> *"21. The appellant's petition under Section 125 CrPC would be maintainable before the Family Court as long as the appellant does not remarry. The amount of maintenance to be awarded under Section 125 CrPC cannot be restricted for the iddat period only."*
>
> *Though the aforesaid decision was rendered interpreting Section 7 of the Family Courts Act, 1984, yet the principle stated therein would be applicable, for the same is in consonance with the principle stated by the Constitution Bench in Khatoon Nisa (supra)."*
>
> *In view of the aforesaid dictum, there can be no shadow of doubt that Section 125 CrPC has been rightly held to be applicable by the learned Family Judge.*

10. On a perusal of the order passed by the Family Court, it is manifest that it has taken note of the fact that the salary of the husband was Rs.17,654/- in May, 2009. It had fixed Rs.2,500/- as monthly maintenance from the date of submission of application till the date of order i.e. 17.2.2012 and from the date of order, at the rate of Rs.4,000/- per month till the date of remarriage. The High Court has opined that while granting maintenance from the date of application, judicial discretion has to be appropriately exercised, for the High Court has noted that the grant of maintenance at the rate of Rs.2,500/- per month from the date of application till date of order, did not call for modification.

11. The aforesaid finding of the High Court, affirming the view of the learned Family Judge is absolutely correct. But what is disturbing is that though the application for grant of maintenance was filed in the year 1998, it was not decided till 17.2.2012. It is also shocking to note that there was no order for grant of interim maintenance. It needs no special emphasis to state that when an application for grant of maintenance is filed by the wife the delay in disposal of the application, to say the least, is an unacceptable situation. It is, in fact, a distressing phenomenon.

8 (2014) 12 SCC 636
9 (2001) 7 SCC 740
10 (2014) 12 SCC 646
11 (2010) 1 SCC 666

An application for grant of maintenance has to be disposed of at the earliest. The family courts, which have been established to deal with the matrimonial disputes, which include application under Section 125 CrPC, have become absolutely apathetic to the same.

12. The concern and anguish that was expressed by this Court in ***Bhuwan Mohan Singh v. Meena and Ors.***[12], is to the following effect:(SCC p. 170. paras 12-13)

> *"12. The Family Courts have been established for adopting and facilitating the conciliation procedure and to deal with family disputes in a speedy and expeditious manner. A three-Judge Bench in* ***K.A. Abdul Jaleel v. T.A. Shahida****[13], while highlighting on the purpose of bringing in the Family Courts Act by the legislature, opined thus: (SCC p. 170, para 10)*
>
> > *"10. The Family Courts Act was enacted 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."*
>
> *13. The purpose of highlighting this aspect is that in the case at hand the proceeding before the Family Court was conducted without being alive to the objects and reasons of the Act and the spirit of the provisions Under Section 125 of the Code. It is unfortunate that the case continued for nine years before the Family Court. It has come to the notice of the Court that on certain occasions the Family Courts have been granting adjournments in a routine manner as a consequence of which both the parties suffer or, on certain occasions, the wife becomes the worst victim. When such a situation occurs, the purpose of the law gets totally atrophied. The Family Judge is expected to be sensitive to the issues, for he is dealing with extremely delicate and sensitive issues pertaining to the marriage and issues ancillary thereto. When we say this, we do not mean that the Family Courts should show undue haste or impatience, but there is a distinction between impatience and to be wisely anxious and conscious about dealing with a situation. A Family Court Judge should remember that the procrastination is the greatest assassin of the lis before it. It not only gives rise to more family problems but also gradually builds unthinkable and Everestine bitterness. It leads to the cold refrigeration of the hidden feelings, if still left. The delineation of the lis by the Family Judge must reveal the awareness and balance. Dilatory tactics by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive to the fact that the lis before him pertains to emotional fragmentation and delay can feed it to grow. We hope and trust that the Family Court Judges shall remain alert to this and decide the matters as expeditiously as possible keeping in view the objects and reasons of the Act and the scheme of various provisions pertaining to grant of maintenance, divorce, custody of child, property disputes, etc." [emphasis supplied]*

13. When the aforesaid anguish was expressed, the predicament was not expected to be removed with any kind of magic. However, the fact remains, these litigations can really corrode the human relationship not only today but will also have the impact for years to come and has the potentiality to take a toll on the society. It occurs either due to the uncontrolled design of the parties or the lethargy and apathy shown by the Judges who man the Family Courts. As far as

12 AIR 2014 SC 2875
13 (2003) 4 SCC 166

the first aspect is concerned, it is the duty of the Courts to curtail them. There need not be hurry but procrastination should not be manifest, reflecting the attitude of the Court. As regards the second facet, it is the duty of the Court to have the complete control over the proceeding and not permit the lis to swim the unpredictable grand river of time without knowing when shall it land on the shores or take shelter in a corner tree that stands "still" on some unknown bank of the river. It cannot allow it to sing the song of the brook. "Men may come and men may go, but I go on for ever." This would be the greatest tragedy that can happen to the adjudicating system which is required to deal with most sensitive matters between the man and wife or other family members relating to matrimonial and domestic affairs. There has to be a pro-active approach in this regard and the said approach should be instilled in the Family Court Judges by the Judicial Academies functioning under the High Courts. For the present, we say no more.

14. Coming to the reduction of quantum by the High Court, it is noticed that the High Court has shown immense sympathy to the husband by reducing the amount after his retirement. It has come on record that the husband was getting a monthly salary of Rs.17,654/-. The High Court, without indicating any reason, has reduced the monthly maintenance allowance to Rs.2,000/-. In today's world, it is extremely difficult to conceive that a woman of her status would be in a position to manage within Rs.2,000/- per month. It can never be forgotten that the inherent and fundamental principle behind Section 125 CrPC is for amelioration of the financial state of affairs as well as mental agony and anguish that woman suffers when she is compelled to leave her matrimonial home. The statute commands there has to be some acceptable arrangements so that she can sustain herself. The principle of sustenance gets more heightened when the children are with her. Be it clarified that sustenance does not mean and can never allow to mean a mere survival. A woman, who is constrained to leave the marital home, should not be allowed to feel that she has fallen from grace and move hither and thither arranging for sustenance. As per law, she is entitled to lead a life in the similar manner as she would have lived in the house of her husband. And that is where the status and strata of the husband comes into play and that is where the legal obligation of the husband becomes a prominent one. As long as the wife is held entitled to grant of maintenance within the parameters of Section 125 CrPC, it has to be adequate so that she can live with dignity as she would have lived in her matrimonial home. She cannot be compelled to become a destitute or a beggar. There can be no shadow of doubt that an order under Section 125 CrPC can be passed if a person despite having sufficient means neglects or refuses to maintain the wife. Sometimes, a plea is advanced by the husband that he does not have the means to pay, for he does not have a job or his business is not doing well. These are only bald excuses and, in fact, they have no acceptability in law. If the husband is healthy, able bodied and is in a position to support himself, he is under the legal obligation to support his wife, for wife's right to receive maintenance under Section 125 CrPC, unless disqualified, is an absolute right.

15. While determining the quantum of maintenance, this Court in ***Jabsir Kaur Sehgal v. District Judge Dehradun & Ors.***[14] has held as follows:(SCC p. 12, para 8)

> *"The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and of those he is obliged under the law and statutory but involuntary payments or deductions. The amount of maintenance fixed for the wife should be such as she can*

14 (1997) 7 SCC 7

live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband and also that she does not feel handicapped in the prosecution of her case. At the same time, the amount so fixed cannot be excessive or extortionate."

16. Grant of maintenance to wife has been perceived as a measure of social justice by this Court. In ***Chaturbhuj v. Sita Bai***[15], it has been ruled that: (SCC p. 320, para 6)

> *"Section 125 CrPC 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. Veena Kaushal****16 falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India. 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****[17]."*

17. This being the position in law, it is the obligation of the husband to maintain his wife. He cannot be permitted to plead that he is unable to maintain the wife due to financial constraints as long as he is capable of earning.

18. In this context, we may profitably quote a passage from the judgment rendered by the High Court of Delhi in ***Chander Prakash Bodhraj v. Shila Rani Chander Prakash***[18] wherein it has been opined thus: (SCC Online Del para 7)

> *"7. ... An able-bodied young man has to be presumed to be capable of earning sufficient money so as to be able reasonably to maintain his wife and child and he cannot be heard to say that he is not in a position to earn enough to be able to maintain them according to the family standard. It is for such able-bodies person to show to the Court cogent grounds for holding that he is unable to reasons beyond his control, to earn enough to discharge his legal obligation of maintaining his wife and child. When the husband does not disclose to the Court the exact amount of his income, the presumption will be easily permissible against him."*

19. From the aforesaid enunciation of law it is limpid that the obligation of the husband is on a higher pedestal when the question of maintenance of wife and children arises. When the woman leaves the matrimonial home, the situation is quite different. She is deprived of many a comfort. Sometimes the faith in life reduces. Sometimes, she feels she has lost the tenderest friend. There may be a feeling that her fearless courage has brought her the misfortune. At this stage, the only comfort that the law can impose is that the husband is bound to give monetary comfort. That is the only soothing legal balm, for she cannot be allowed to resign to destiny. Therefore, the lawful imposition for grant of maintenance allowance.

20. In the instant case, as is seen, the High Court has reduced the amount of maintenance from Rs.4,000/- to Rs.2,000/-. As is manifest, the High Court has become oblivious of the fact that she has to stay on her own. Needless to say, the order of the learned Family Judge is not manifestly perverse. There is nothing perceptible which would show that order is a sanctuary of errors. In

15 (2008) 2 SCC 316
16 (1978) 4 SCC 70
17 (2005) 3 SCC 636
18 AIR 1968 Delhi 174

fact, when the order is based on proper appreciation of evidence on record, no revisional court should have interfered with the reason on the base that it would have arrived at a different or another conclusion. When substantial justice has been done, there was no reason to interfere. There may be a shelter over her head in the parental house, but other real expenses cannot be ignored. Solely because the husband had retired, there was no justification to reduce the maintenance by 50%. It is not a huge fortune that was showered on the wife that it deserved reduction. It only reflects the non-application of mind and, therefore, we are unable to sustain the said order.

21. Having stated the principle, we would have proceeded to record our consequential conclusion. But, a significant one, we cannot be oblivious of the asseverations made by the appellant. It has been asserted that the respondent had taken voluntary retirement after the judgment dated 17.2.2012 with the purpose of escaping the liability to pay the maintenance amount as directed to the petitioner; that the last drawn salary of respondent taken into account by the learned Family Judge was Rs.17,564/- as per salary slip of May, 2009 and after deduction of AFPP Fund and AGI, the salary of the respondent was Rs.12,564/- and hence, even on the basis of the last basic pay (i.e. Rs.9,830/-) of the respondent the total pension would come to Rs.14,611/- and if 40% of commutation is taken into account then the pension of the respondent amounts to Rs.11,535/-; and that the respondent, in addition to his pension, hand received encashment of commutation to the extent of 40% i.e. Rs.3,84,500/- and other retiral dues i.e. AFPP, AFGI, Gratuity and leave encashment to the tune of Rs.16,01,455/-. The aforesaid aspects have gone uncontroverted as the respondent-husband has not appeared and contested the matter. Therefore, we are disposed to accept the assertions. This exposition of facts further impels us to set aside the order of the High Court.

22. Consequently, the appeals are allowed, the orders passed by the High Court are set aside and that of the Family Court is restored. There shall be no order as to costs.

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SMRUTI PAHARIYA VERSUS SANJAY PAHARIYA

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Bench: Hon'ble Mr. Justice K.G. Balakrishnan, CJI, Hon'ble Mr. Justice P. Sathasivam & Hon'ble Mr. Justice Asok Kumar Ganguly

CIVIL APPEAL NO. 3465 OF 2009

(@ SPECIAL LEAVE PETITION (CIVIL) NO. 17402 OF 2008)

Smruti Pahariya .....Appellant(s)
- Versus -
Sanjay Pahariya ....Respondent(s)

This Court strongly disapproves the manner in which the proceeding was conducted in this case. A Court's proceeding must have a sanctity and fairness. It cannot be conducted for the convenience of one party alone. In any event, when the Court fixed the matter for 10.12.2007, it could not pre-pone the matter on an ex-parte prayer made by the appellant-wife on 5.12.2007 and grant the decree of divorce on that day itself by treating the matter on the board in the absence of the husband. This, in our opinion, is a flagrant abuse of the judicial process and on this ground alone, the decree dated 5.12.2007 has to be set aside.

On this aspect, this Court endorses the dissatisfaction expressed by the Bombay High Court in its judgment under appeal about the manner in which the date of final hearing was pre-poned and an ex-parte decree was passed.

While dealing with the second question it appears that the Family Court has not acted in a manner which is required of it having regard to the jurisdiction vested on it under the Family Courts Act.

The Family Courts Act, 1984 (hereinafter, Act 66 of 1984) was enacted for adopting a human approach to the settlement of family disputes and achieving socially desirable results. The need for such a law was felt as early as in 1974 and Chief Justice P.B. Gajendragadhkar, as the Chairman of Law Commission, in the 59th report on Hindu Marriage Act, 1955 and Special Marriage Act, 1954, opined:-

"In our Report on the Code of Civil Procedure, we have had occasion to emphasis that in dealing with disputes concerning the family, the court ought to adopt a human approach - an approach radically different from that adopted in ordinary civil proceedings, and that the court should make reasonable efforts at settlement before commencement of the trial. In our view, it is essential that such an approach should be adopted in dealing with matrimonial disputes. We would suggest that in due course, States should think of establishing family courts, with presiding officers who will be well qualified in law, no doubt, but who will be trained to deal with such dispute in a human way, and to such courts all disputes concerning the family should be referred."

Almost 10 years thereafter when the said Act 66 of 1984 was enacted, the words of the Chief Justice were virtually quoted in its statement of objects and reasons. Consistent with the said human

approach which is expected to be taken by a Family Court Judge, Section 9 of the Act casts a duty upon the Family Court Judge to assist and persuade the parties to come to a settlement.

JUDGMENT

Hon'ble Mr. Justice Ashok Kumar Ganguly :—

1. Leave granted.

2. The wife, who is the appellant before this Court, filed this appeal seeking to impugn the judgment and order dated 5.6.2008 passed by the High Court of judicature at Bombay, which in a detailed judgment, was pleased to set aside the judgment and decree dated 5.12.2007 passed by the Family Court, Mumbai, in which the Family Court, dissolved the marriage between the appellant and the respondent by a decree of divorce on mutual consent under Section 13B of the Hindu Marriage Act, 1955 (hereinafter "the said Act").

3. Admittedly, the parties are Hindu and governed by the provisions of the said Act and they were married on 5.3.1993 at Mumbai following the Hindu Vedic rites. Marriage was also registered. After marriage, the parties resided together in Flat No. 601, 2nd Floor, Dinath Court, Sir Pochkhanwala Road, Worli, Mumbai. Two sons were born to them, one on 1.2.1995 and the other one on 3.4.1997. A few years after that, serious differences and incompatibility surfaced between them and all attempts of settlement failed. The parties stopped living together from January 2005 and decided to file a petition seeking divorce by mutual consent under Section 13B of the said Act. A joint petition to that effect was filed before the Family Court at Bandra, Mumbai and the same was registered on 19.5.2007. It was averred therein that incompatibility with each other made it difficult for them to co-exist and they stopped cohabiting as husband and wife from January 2005 (para 6). In paragraph 13, it was stated that there was no collusion between the parties in filing the petition for divorce by mutual consent and in paragraph 17 it was pointed out that there is no force or coercion between the parties in filing the petition. Along with the said petition, certain consent terms were also filed but with those terms we are not concerned in this proceeding.

4. Under the provisions of Section 13B (2) of the said Act, a minimum period of six month has to elapse before such petition can be taken up for hearing. In the instant case, the said period expired on or about 19.11.2007. In between, two dates were given, namely, 14.6.2007 and 23.8.2007 when the parties were given a chance for counselling but on both the days parties were absent and no counselling took place.

5. On 19.11.2007, after the mandatory period of six months, the matter came up before the Family Court. It appears from the affidavit filed by the wife in this proceeding before the Bombay High Court that on 3.11.2007, advocate of the parties informed the husband that the matter will be listed on 19.11.2007 and a draft affidavit of deposition was sent to him through E-mail. It is not in dispute that both the parties had the same advocate. It also appears from the affidavit of the wife that on 18.11.2007 the advocate received a text SMS in his mobile from the respondent-husband that he is unable to attend the court on 19.11.2007.

   Therefore, on 19.11.2007, when the matter appeared for the first time before the Court, the husband was absent and the Family Court asked the advocate to inform the husband of the next date of hearing of the matter, which was fixed on 1.12.2007.

6. On 19.11.2007 itself, an application was made by the wife to summon the husband directing him to be present in the Family court on the next date. Accordingly, summons were sent by the Court on 23.11.2007 by courier and the courier returned with the remark "not accepting".

   In this connection, the order which was passed by the Family Court, on 1.12.2007, on perusal of the service report is of some importance. The following order was passed on the service return:

   > *"Perused the first summons and subsequent orders thereto. I have seen service affidavit also, states that servant was present. Hence I am not able to accept it as a proper one. The courier endorsement is also vague. Considering the contents in affidavit, I allow petitioner No.1 to serve the notice by pasting on the address given in cause title to petitioner No.2. EPSB allowed. It is made returnable on 4.12.2007."*

7. The petition was thus made returnable on 4.12.2007. It appears that the bailiff pasted the summons on 3.12.2007 outside the door of the husband's residence and the matter came up before the Family Court on 4.12.2007 and on that day the husband was absent. The Family Court adjourned the matter to 10.12.2007. But on 5.12.2007, the wife, filed a petition before the Family Court with a prayer that the hearing of the matter may be pre-poned and be taken up on the very same day i.e. 5.12.2007. On the aforesaid prayer of the wife, though the matter was not on the board, it was taken on the board by the Family Court on 5.12.2007 and the decree of divorce was passed ex-parte on that date itself.

8. It may be mentioned in this connection that the Family Court pre-poned the hearing on wife's application and in the absence of the husband. Admittedly, the pre-ponement was done ex-parte.

9. In the background of these facts, basically four questions fall for our consideration:

   I. Whether impugned decree of divorce passed by the Family Court on 5.12.2007 is vitiated by procedural irregularity?

   II. Whether by conducting the proceeding, in the manner it did, the Family Court acted contrary to the avowed object of the Family Courts Act, 1984?

   III. Whether from the absence of the husband before the Family Court on 19.11.2007, 1.12.2007 and 4.12.2007 it can be inferred that his consent for grant of divorce on a petition on mutual consent subsists, even though he has not withdrawn the petition for divorce on mutual consent?

   IV. Whether on a proper construction of Section 13B (2) of the said Act, which speaks of 'the motion of both the parties', this Court can hold that the Family Court can dissolve a marriage and grant a decree of divorce in the absence of one of the parties and without actually ascertaining the consent of that party who filed the petition for divorce on mutual consent jointly with the other party?

10. This fourth question assumes general importance since it turns on the interpretation of the section. Apart from that, this question is relevant here in view of various recitals in the judgment and decree of the learned Judge of the Family Court. It appears that the Family Court granted the decree of divorce by proceeding on the presumption of continuing consent of the husband.

11. While dealing with the first question about procedural irregularity in the matter, this Court finds that the Family Court did not act properly even if it is held that it was correct in presuming the continuing consent of the respondent-husband.

12. From the sequence of events, it appears that on 19.11.2007 when the matter came up before the Court, the first day after the mandatory period of six months, the husband was absent. The Court directed service of summons on the husband on the request of the wife. The service return was before the Court on 1.12.2007. Looking at the service return, the Court found that service was not a proper one and the Court was also not satisfied with the endorsement of the courier. Under such circumstances, the Court's direction on the prayer of the appellant-wife, for substituted service under Order 5 Rule 20 of the Civil Procedure Code is not a proper one. Direction for substituted service under Order 5 Rule 20 can be passed only when Court is satisfied "that there is reason to believe that the defendant is keeping out of the way for the purpose of evading service, or that for any other reason the summons cannot be served in the ordinary way".

13. In the facts of this case, the Court did not, and rather could not, have any such satisfaction as the Court found that the service was not proper. If the service is not proper, the Court should have directed another service in the normal manner and should not have accepted the plea of the appellant-wife for effecting substituted service. From wife's affidavit asking for substituted service, it is clear that the servant of the respondent-husband intimated her advocate's clerk that respondent-husband was out of Bombay and will be away for about two weeks. However, the appellant-wife asserted that the respondent-husband was in town and was evading. But the Court on seeing the service return did not come to the conclusion that the husband was evading service. Therefore, the Court cannot, in absence of its own satisfaction that the husband is evading service, direct substituted service under Order 5 Rule 20 of the Code.

14. Apart from the aforesaid irregularity, the Court, after ordering substituted service and perusing service return on 4.12.2007, fixed the matter for 10.12.2007. Then, on the application of the wife on 5.12.2007, pre-poned the proceeding to 5.12.2007 and on that very day granted the decree of divorce even though the matter was not on the list.

15. This Court strongly disapproves of the aforesaid manner in which the proceeding was conducted in this case. A Court's proceeding must have a sanctity and fairness. It cannot be conducted for the convenience of one party alone. In any event, when the Court fixed the matter for 10.12.2007, it could not pre-pone the matter on an ex-parte prayer made by the appellant-wife on 5.12.2007 and grant the decree of divorce on that day itself by treating the matter on the board in the absence of the husband. This, in our opinion, is a flagrant abuse of the judicial process and on this ground alone, the decree dated 5.12.2007 has to be set aside.

16. On this aspect, this Court endorses the dissatisfaction expressed by the Bombay High Court in paragraph 34 of its judgment under appeal about the manner in which the date of final hearing was pre-poned and an ex-parte decree was passed.

17. While dealing with the second question it appears that the Family Court has not acted in a manner which is required of it having regard to the jurisdiction vested on it under the Family Courts Act.

18. The Family Courts Act, 1984 (hereinafter, Act 66 of 1984) was enacted for adopting a human approach to the settlement of family disputes and achieving socially desirable results. The need for such a law was felt as early as in 1974 and Chief Justice P.B. Gajendragadhkar, as the Chairman of Law Commission, in the 59th report on Hindu Marriage Act, 1955 and Special Marriage Act, 1954, opined:-

> *"In our Report on the Code of Civil Procedure, we have had occasion to emphasis that in dealing with disputes concerning the family, the court ought to adopt a human approach – an approach radically different from that adopted in ordinary civil proceedings, and that the court should make reasonable efforts at settlement before commencement of the trial. In our view, it is essential that such an approach should be adopted in dealing with matrimonial disputes. We would suggest that in due course, States should think of establishing family courts, with presiding officers who will be well qualified in law, no doubt, but who will be trained to deal with such dispute in a human way, and to such courts all disputes concerning the family should be referred."*

19. Almost 10 years thereafter when the said Act 66 of 1984 was enacted, the words of the Chief Justice were virtually quoted in its statement of objects and reasons. Consistent with the said human approach which is expected to be taken by a Family Court Judge, Section 9 of the Act casts a duty upon the Family Court Judge to assist and persuade the parties to come to a settlement.

20. In the instant case by responding to the illegal and unjust demand of the wife of pre-poning the proceeding ex-parte and granting an ex-parte decree of divorce, the Family Court did not discharge its statutory obligation under Section 13B (2) of the said Act of hearing the parties. When a proceeding is pre-poned in the absence of a party and a final order is passed immediately, the statutory duty cast on the Court to hear the party, who is absent, is not discharged. Therefore, the Family Court has not at all shown a human and a radically different approach which it is expected to have while dealing with cases of divorce on mutual consent.

21. Marriage is an institution of great social relevance and with social changes, this institution has also changed correspondingly. However, the institution of marriage is subject to human frailty and error. Marriage is certainly not a mere "reciprocal possession" of the sexual organs as was philosophized by I. Kant [The Philosophy of Law page 110, W. Hastie translation 1887] nor can it be romanticized as a relationship which Tennyson fancied as "made in Heaven" [Alymer's Field, in Complete Works 191, 193 (1878)].

22. In many cases, marriages simply fail for no fault of the parties but as a result of discord and disharmony between them. In such situations, putting an end to this relationship is the only way out of this social bondage. But unfortunately, initially the marriage laws in every country were 'fault oriented'. Under such laws marriage can be dissolved only by a Court's decree within certain limited grounds which are to be proved in an adversarial proceeding. Such 'fault' oriented divorce laws have been criticized as 'obsolete, unrealistic, discriminatory and sometimes immoral' (Foster, Divorce Law Reform; the choices before State page 112).

23. As early as in 1920 possibly for the first time in New Zealand, Section 4 of the Divorce and Matrimonial Causes Amendment Act, 1920 gave the Court the discretion to grant a decree of divorce to parties when they had separated for three years under a decree of judicial separation or separation order by the Magistrate or under a deed of separation or "even by mutual consent". Till such amendment, divorce after separation by parties on "mutual consent" was unknown.

24. Considering the said amendment of 1920 and exercising the discretion the amended law conferred on the Judge, Justice Salmond in Lodder Vs. Lodder, [1921, New Zealand Law Reports, 876], came to the conclusion that it is not necessary to enquire into the merits of the disputes between the parties since the man and the wife had put an end to their relationship 13 years ago and the learned Judge found that their alienation is "permanent and irredeemable". The learned Judge also felt that in the circumstances of the case "no public or private interest is to be served by the further continuance of the marriage bond" and a decree for its dissolution was passed. (See page 881).

25. This seems to be the first decision of a Court granting divorce on a 'no-fault' basis and because of the fact that a marriage had broken down for all practical purposes as parties were staying separately for a very long time.

26. The British society was very conservative as not to accept divorce on such a ground but in 1943, Viscount Simon, Lord Chancellor, in the case of Blunt Vs. Blunt, [1943, 2 All ER 76], speaking for the House of Lords, while categorizing the heads of discretion which should weigh with the courts in granting the decree of divorce, summed up four categories but at page 78 of the Report, the Lord Chancellor added a fifth one and the views of His Lordship were expressed in such matchless words as they deserve to be extracted herein below:-

> *"To these four considerations I would add a fifth of a more general character, which must indeed be regarded as of primary importance, viz., the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down. It is noteworthy that in recent years this last consideration has operated to induce the court to exercise a favourable discretion in many instances where in an earlier time a decree would certainly have been refused".*

27. In India also, prior to the amendment in our laws by insertion of Section 13B in the said Act, the Courts felt the necessity for an amendment in the divorce law. The Full Bench of the Delhi High Court in the judgment of Ram Kali Vs. Gopal Dass – ILR (1971) 1 Delhi 6, felt the inadequacy of the existing divorce law. Chief Justice Khanna (as His Lordship then was) speaking for the Full Bench came to the following conclusion:-

> *"...It would not be a practical and realistic approach, indeed it would be unreasonable and inhuman, to compel the parties to keep up the façade of marriage even though the rift between them is complete and there are no prospects of their ever living together as husband and wife." [See page 12].*

28. In coming to the aforesaid conclusion, the learned Chief Justice relied on the observation of the Viscount Simon, Lord Chancellor, in the case of Blunt Vs. Blunt (Supra).

29. Within a year thereafter, Hon'ble Justice Krishna Iyer, in the case of Aboobacker Haji Vs. Mamu Koya - 1971 K.L.T. 663, while dealing with Mohammedan Law relating to divorce correctly traced the modern trend in legal system on the principle of breakdown of marriage in the following words:-

> *"When an intolerable situation has been reached, the partners living separate and apart for a substantial time, an inference may be drawn that the marriage has broken*

down in fact and so should be ended by law. This trend in the field of matrimonial law is manifesting itself in the Commonwealth countries these days."(See page 668)

30. In coming to the said finding the learned Judge relied on the principles laid down by Justice Salmond in Lodder Vs. Lodder (supra).

31. After the said amendment in 1976 by way of insertion of Section 13B in the said Act in the 74th Report of the Law Commission of India (April, 1978), Justice H.R. Khanna, as its Chairman, expressed the following views on the newly amended Section 13B:

"Marriage is viewed in a number of countries as a contractual relationship between freely consenting individuals. A modified version of the basis of consent is to be found in the theory of divorce by mutual consent. The basis in this case is also consent, but the revocation of the relationship itself must be consensual, as was the original formation of the relationship. The Hindu Marriage Act, as amended in 1976, recognizes this theory in section 13B."

32. On the question of how to ascertain continuing consent in a proceeding under Section 13B of the said Act, the decision in the case of Smt. Sureshta Devi Vs. Om Prakash – (1991) 2 SCC 25, gives considerable guidance.

33. In Paragraph 8 of the said judgment, this Court summed up the requirement of Section 13B (1) as follows:

"8. There are three other requirements in sub-section (1). They are:-

(i) They have been living separately for a period of one year.

(ii) They have not been able to live together, and

(iii) They have mutually agreed that marriage should be dissolved."

34. In paragraph 10, the learned Judges dealt with sub-section (2) of Section 13B. In paragraphs 11 and 12, the learned Judges recorded the divergent views of the Bombay High Court [Jayashree Ramesh Londhe v. Ramesh Bhikaji Londhe – AIR 1982 Bom 302: 86 Bom LR 184], Delhi High Court [Chander Kanta v. Hans Kumar – AIR 1989 Del 73], Madhya Pradesh High Court [Meena Dutta v. Anirudh Dutta – (1984) 2 DMC 388 (MP)], and the views of the Kerala High Court [K.I. Mohanan v. Jeejabai – AIR 1988 Ker 28: (1986) 2 HLR 467: 1986 KLT 990], Punjab and Haryana High Court [Harcharan Kaur v. Nachhattar Singh – AIR 1988 P & H 27: (1987) 2 HLR 184: (1987) 92 Punj LR 321] and Rajasthan High Court [Santosh Kumari v. Virendra Kumar – AIR 1986 Raj 128: (1986) 1 HLR 620: 1986 Raj LR 441] respectively on Section 13B.

35. In paragraphs 13 and 14 of the Sureshta Devi (supra), the learned Judges gave an interpretation to Section 13B (2) and in doing so the learned Judges made it clear that the reasons given by the High Court of Bombay and Delhi are untenable inasmuch as both the High Courts held that once the consent is given by the parties at the time of filing the petition, it is impossible for them to withdraw the same to nullify the petition.

36. We also find that the interpretation given by Delhi and Bombay High Courts is contrary to the very wording of Section 13B (2) which recognizes the possibility of withdrawing the petition filed on consent during the time when such petition has to be kept pending.

37. In paragraph 13 of Sureshta Devi (supra), the learned Judges made the position clear by holding as follows:

> *"At the time of the petition by mutual consent, the parties are not unaware that their petition does not by itself snap marital ties. They know that they have to take a further step to snap marital ties. Sub-Section (2) of Section 13-B is clear on this point. It provides that "on the motion of both the parties,…. if the petition is not withdrawn in the meantime, the court shall….pass a decree of divorce…". What is significant in this provision is that there should also be mutual consent when they move the court with a request to pass a decree of divorce. Secondly, the court shall be satisfied about the bona fides and the consent of the parties. If there is no mutual consent at the time of the enquiry, the court gets no jurisdiction to make a decree for divorce. If the view is otherwise, the court could make an enquiry and pass a divorce decree even at the instance of one of the parties and against the consent of the other. Such a decree cannot be regarded as decree by mutual consent."*

38. Therefore, it was made clear in Sureshta Devi (supra) that under Section 13B (2), the requirement is the 'motion of both the parties' and interpreting the same, the learned Judges made it clear that there should be mutual consent when they move the Court with a request to pass a decree of divorce and there should be consent also at the time when the Court is called upon to make an enquiry, if the petition is not withdrawn and then pass the final decree.

39. Interpreting the said Section, it was held in Sureshta Devi (supra) that if the petition is not withdrawn in the meantime, the Court, at the time of making the enquiry, does not have any jurisdiction to pass a decree, unless there is mutual consent.

40. Learned Judges made it further clear that if the Court makes an enquiry and passes a divorce decree even at the instance of one of the parties and against the consent of the other, such a decree cannot be regarded as a decree by mutual consent.

41. In paragraph 14 of the said judgment, learned Judges made it further clear as follows:-

> *"If the Court is held to have the power to make a decree solely based on the initial petition, it negates the whole idea of mutuality and consent for divorce. Mutual consent to the divorce is a sine qua non for passing a decree for divorce under Section 13-B. Mutual consent should continue till the divorce decree is passed. It is a positive requirement for the court to pass a decree of divorce.*
>
> *"The consent must continue to decree nisi and must be valid subsisting consent when the case is heard." {See (i) Halsbury's Laws of England, 4th edn. Vol. 13 para 645; (ii) Rayden on Divorce, 12th edn., Vol. 1, P. 291; and (iii) Beales V. Beales}."*

42. In paragraph 15 of the judgment, this Court held that the decisions of the High Courts of Bombay, Delhi and Madhya Pradesh cannot be said to have laid down the law correctly and those judgments were overruled. We also hold accordingly.

43. The decision in Sureshta Devi (supra) was rendered by a Bench of two learned Judges of this Court. In a subsequent decision of two learned Judges of this Court in the case of Ashok Hurra Vs. Rupa Bipin Zaveri – (1997) 4 SCC 226, the judgment in Sureshta Devi (supra) was doubted as according to the learned Judges some of the observations in Sureshta Devi (supra) appear to be too wide and require reconsideration in an appropriate case.

44. Learned Judges in Ashok Hurra (supra) made it clear that they were passing the order in that case on the peculiar fact situation. This Court also held that in exercise of its jurisdiction under Article 142 of the Constitution, a decree of divorce by mutual consent under Section 13B of the Act was granted between the parties. (See paragraph 16 and 22 of the report).

45. It appears that those observations were made by the learned Judges without considering the provisions of the Family Courts Act. In any event, the decision in Ashok Hurra (supra) was considered by a larger Bench of this Court in Rupa Ashok Hurra Vs. Ashok Hurra and Anr. – (2002) 4 SCC 388. No doubt was expressed by the larger Bench on the principles laid down in Sureshta Devi (supra). It appears that a petition for review was filed against the two judge decision in Ashok Hurra (supra) and the same was dismissed.

Thereafter, the question before the Constitution Bench in Rupa Ashok Hurra (supra) was as follows:-

> *"Whether the judgment of this Court dated 10.3.1997 in Civil Appeal No.1843 of 1997 [1997 (4) SCC 226] can be regarded as a nullity and whether a writ petition under Article 32 of the Constitution can be maintained to question the validity of a judgment of this Court after the petition for review of the said judgment has been dismissed are, in our opinion, questions which need to be considered by a Constitution Bench of this Court."*

46. In the Constitution Bench decision of this Court in Rupa Ashok Hurra (supra), this Court did not express any view contrary to the views of this Court in Sureshta Devi (supra).

47. We endorse the views taken by this Court in Sureshta Devi (supra) as we find that on a proper construction of the provision in Section 13B (1) and 13B (2), there is no scope of doubting the views taken in Shreshta Devi (supra). In fact the decision which was rendered by the two learned Judges of this Court in Ashok Hurra (supra) has to be treated to be one rendered in the facts of that case and it is also clear by the observations of the learned Judges in that case.

48. None of the counsel for the parties argued for reconsideration of the ratio in Sureshta Devi (supra).

49. We are of the view that it is only on the continued mutual consent of the parties that decree for divorce under Section 13B of the said Act can be passed by the Court. If petition for divorce is not formally withdrawn and is kept pending then on the date when the Court grants the decree, the Court has a statutory obligation to hear the parties to ascertain their consent. From the absence of one of the parties for two to three days, the Court cannot presume his/her consent as has been done by the learned Family Court Judge in the instant case and especially in its facts situation, discussed above.

50. In our view it is only the mutual consent of the parties which gives the Court the jurisdiction to pass a decree for divorce under Section 13B. So in cases under Section 13B, mutual consent of the parties is a jurisdictional fact. The Court while passing its decree under Section 13B would be slow and circumspect before it can infer the existence of such jurisdictional fact. The Court has to be satisfied about the existence of mutual consent between the parties on some tangible materials which demonstrably disclose such consent. In the facts of the case, the impugned decree was passed within about three weeks from the expiry of the mandatory period of six months without actually ascertaining the consent of the husband, the respondent herein.

51. It is nobody's case that a long period has elapsed between the expiry of period of six months and the date of final decree.

52. For the reasons aforesaid, we affirm the view taken by the learned Judges of the Bombay High Court in the order under appeal.

53. The appeal is disposed of as follows:-

(i) On receipt of the copy of this judgment, the Family Court is directed to issue notice to both the parties to appear in the Court on a particular day for taking further steps in the case.

(ii) On that day, the parties are at liberty to engage their own counsel and they may be personally present before the Court and inform the Court as to whether they have consent to the passing of the decree under Section 13B of the Act. If both the parties give their consent for passing of the decree under Section 13B, the Court may pass appropriate orders.

(iii) If any of the parties makes a representation that he/she does not have consent to the passing of the decree, the Court may dispose of the proceedings in the light of the observations made by us. There shall be no order as to costs.

(K.G. BALAKRISHNAN)
(P. SATHASIVAM)
(ASOK KUMAR GANGULY)

New Delhi

May 11, 2009

❑❑❑

K.A. ABDUL JALEEL VS T.A. SHAHIDA

Bench: Hon'ble The Chief Justice of India, Hon'ble Mr. Justice S.B. Sinha & Hon'ble Mr. Justice AR. Lakshmanan

K.A. Abdul Jaleel
Vs.
T.A. Shahida

Appeal (Civil) 3322 of 2003

(2003) 4 SCC 166
Date of Judgment : 10/04/2003

The Family Courts Act was enacted 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. From a perusal of the Statement of Objects and Reasons, it appears that the said Act, inter-alia, seeks to exclusively provide within the jurisdiction of the Family Courts the matters relating to the property of the spouses or either of them. Section 7 of the Act provides for the jurisdiction of the Family Court in respect of suits and proceedings as referred to in the Explanation appended thereto. Explanation (c) appended to Section 7 refers to a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them.

JUDGMENT

Hon'ble Mr. Justice S.B. Sinha :—

Leave granted.

Whether the Family Court has jurisdiction to adjudicate upon any question relating to the properties of divorced parties arises for consideration in this appeal. The said question arises out of a judgment and order dated 20.03.2001 passed by a Division Bench of the Kerala High Court dismissing an appeal from an order passed by the Family Court, Ernakulam, dated 22.07.1998 in O.P. No.343 of 1996.

The parties to this appeal were married on 03.01.1988. A female child was born out their wedlock on 11.10.1988. Allegedly, after the birth of the second child, owing to deterioration in the health of the respondent herein, the relationship of the parties became strained. The respondent contended that at the time of marriage, a large amount in cash as also gold ornaments were given. From the cash amount the appellant herein purchased a property described in Schedule 'A' of the petition on 01.02.1988. The balance amount was kept by the appellant. He allegedly further sold the gold ornaments of the respondent and out of the sale proceeds he purchased the property described in Schedule 'B' of the petition.

In respect of properties an agreement marked Exhibit A1 was executed by the parties, in terms whereof it was agreed that the properties purchased from the aforesaid amount will be transferred in the name of the respondent by the appellant. The appellant herein pronounced Talaq on 01.11.1995 after his relationship with the respondent became strained. In terms of the said agreement dated 17.09.1994, the respondent filed a suit marked O.S. No.85 of 1995 in the Family Court on 08.12.1995. The appellant in his written statement alleged that the said agreement was signed by him under threat and coercion

and further contended that several documents purported to have been executed by him in support thereof were also obtained by applying force.

Both the parties examined themselves as also proved various documents in the said suit before the Family Court.

The Family Court by a judgment and order dated 22.07.1998 decreed the suit in favour of the respondent herein upon arriving at a finding that she was the absolute owner of the Schedule 'A' property as also 23/100 shares in the Schedule 'B' property.

Aggrieved thereby and dissatisfied therewith, the appellant preferred an appeal before the High Court which was marked as MFA No.196 of 1999. By reason of the impugned judgment dated 20.03.2001, the said appeal has been dismissed.

Mr. Haris Beeran, learned counsel appearing on behalf of the appellant, would submit that having regard to the provisions contained in Section 7 of the Family Courts Act, 1984, the Family Court had no jurisdiction to decide a dispute as regards properties claimed by a divorced wife. The learned counsel would urge that the jurisdiction exercisable by any Family Court being between the parties to a marriage which would mean parties to a subsisting marriage. In support of the said contention strong reliance has been placed on a judgment of a Division Bench of the Allahabad High Court in Amjum Hasan Siddiqui vs. Smt.Salma B. [AIR 1992 (Allahabad) 322] and Ponnavolu Sasidar vs. Sub-Registrar, Hayatnagar and Others [AIR 1992 (A.P.) 198].

Mr. T.L.V. Iyer, learned Senior Counsel appearing on behalf of the respondent, on the other hand, would contend that the matter is covered by an inter-parties judgment passed by a Division Bench of the Kerala High Court which is since reported in [1997 (1) KLT 734]. As the appellant herein did not question the correctness of the said judgment, he cannot be permitted to turn round and now challenge the jurisdiction the Family Court.

The Family Courts Act was enacted 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. From a perusal of the Statement of Objects and Reasons, it appears that the said Act, inter alia, seeks to exclusively provide within the jurisdiction of the Family Courts the matters relating to the property of the spouses or either of them. Section 7 of the Act provides for the jurisdiction of the Family Court in respect of suits and proceedings as referred to in the Explanation appended thereto. Explanation (c) appended toSection 7 refers to a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them.

The fact of the matter, as noticed hereinbefore, clearly shows that the dispute between the parties to the marriage arose out of the properties claimed by one spouse against the other. The respondent herein made a categorical statement to the effect that the properties were purchased out the amount paid in cash or by way of ornaments and the source of consideration for purchasing the properties described in Schedules 'A' and 'B' of the suit having been borne out of the same, the appellant herein was merely a trustee in relation thereto and could not have claimed any independent interest thereupon. It is also apparent that whereas the agreement marked as Exhibit A1 was executed on 17.09.1994, the appellant pronounced Talaq on 01.11.1995. The wordings 'disputes relating to marriage and family affairs and for matters connected therewith' in the view of this Court must be given a broad construction. The Statement of Objects and Reasons, as referred to hereinbefore, would clearly go to show that the jurisdiction of the Family Court extends, inter alia, in relation to properties of spouses or of either of them which would clearly mean that the properties claimed by the parties thereto as a spouse of other; irrespective of the claim whether property is claimed during the subsistence of a marriage or otherwise.

The submission of the learned counsel to the effect that this Court should read the words "a suit or proceeding between the parties to a marriage" as parties to a subsisting marriage, in our considered view would lead to miscarriage of justice.

The Family Court was set up for settlement of family disputes. The reason for enactment of the said Act was to set up a court which would deal with disputes concerning the family by adopting an approach radically different from that adopted in ordinary civil proceedings. The said Act was enacted despite the fact that Order 32A of the Code of Civil Procedure was inserted by reason of the Code of Civil Procedure (Amendment) Act, 1976, which could not bring about any desired result.

It is now a well-settled principle of law that the jurisdiction of a court created specially for resolution of disputes of certain kinds should be construed liberally. The restricted meaning if ascribed to Explanation (c) appended to Section 7 of the Act, in our opinion, would frustrate the object wherefor the Family Courts were set up.

In Amjum Hasan Siddiqui's case (supra) an application was filed in terms of Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The question before the Allahabad High Court arose as to whether a Family Court could deal with such a dispute. It was held that no application could lie before the Family Court as the claim under Section 3 of the 1986 Act would neither be a suit nor a proceeding within the meaning of Section 7 of the Family Courts Act inasmuch as such an application could only be moved before the First Class Magistrate having requisite jurisdiction as provided for in the Code of Criminal Procedure. The said decision, in our opinion, cannot be said to have any application whatsoever in the instant case.

In Smt. P. Jayalakshmi and Another vs. V. Revichandran and Another [AIR 1992 AP 190], the Andhra Pradesh High Court was dealing with a case under Section 125 of the Code of Criminal Procedure. It was held that although the matrimonial proceeding was moved before the Family Court, the same could not have provided for a legal bar for the wife and the minor child for instituting a proceeding under Section 125 of the Code of Criminal Prcoedure at Tirupathi where they were residing; as both the rights are separate.

As indicated hereinbefore, Balakrishnan, J. (as His Lordship then was) speaking for a Division Bench in a matter arising out of a preliminary issue on the question of jurisdiction held that the dispute over properties between parties to a marriage cannot be confined to the parties to a subsisting marriage. We agree with the said view. The said decision being inter- parties and having attained finality would operate as res judicata.

The further contention of the learned counsel appearing on behalf of the appellant is that as the respondent had already filed an application under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986, wherein an amount of Rs.1,33,200/- was awarded in her favour, the impugned proceeding was not maintainable.

The two proceedings are absolutely separate and distinct. The impugned judgment does not show that the said question was even argued before the High Court. As indicated hereinbefore, the factual issue involved in this appeal revolved round as to whether Exhibit A1 was obtained by applying force or undue influence upon the appellant. The said contention has been negatived by both the Family Court as also the High Court.

We, therefore, find no merit in this appeal which is dismissed with costs. Counsel's fee assessed at Rs.5,000/- (Rupees Five thousand only).

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LANDMARK JUDGMENTS ON

DIVORCE

TATINENI MAYURI VERSUS EDARA BALDEV

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

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

Tatineni Mayuri Appellant
Versus
Edara Baldev Respondent

CIVIL APPEAL NOS.2471-2473 OF 2016

(Arising out of SLP (c) Nos. 28565-28567 of 2014)

JUDGMENT

Hon'ble Mr. Justice Kurian Joseph :—

1. Leave granted.

2. The marriage between the appellant and respondent took place on 2.9.1999. A female child was born to them on 15.06.2006 and she has been named Jasmitha. In the year 2011, the appellant filed a petition before the Family Court for divorce. The Family Court allowed the petition and granted decree of divorce. Permanent custody of the child was given to the appellant-wife and the respondent-husband was given visitation rights during weekend.

3. Aggrieved, the respondent-husband approached the High Court. By impugned judgment dated 25.07.2014, the High Court allowed the appeals and remanded the matters to the Family Court with a direction that the arrangement as to the custody of the child would be continued purely as an interim measure, during the pendency of the matters before the Family Court.

4. Aggrieved, the wife has come up before this Court in appeals. It appears that this Court tried several rounds by all possible methods to purchase peace between the parties. Respondent-husband was hopeful of reunion. It seems that his hope is fading away and now he has submitted that in case the appellant so insists, he is prepared for divorce on mutual consent on appropriate terms on all aspects including custody of the child.

5. Having heard the learned counsel appearing on both sides, we are of the view that in the interest of all the parties, the further steps should be taken before the Family Court, Hyderabad. We only want to remind both, the father and the mother, that they may fight endlessly but the one person who is sandwiched, disturbed, pained, shocked and if not spoiled is their daughter. If the future of the daughter is kept in mind by both the father and the mother, they will think of disassociating themselves from all other differences between them. We are sure the parties would be in a position to reach a workable solution with regard to custody. After all the child needs both father and mother.

6. With the above observations, we dispose of the appeals directing the Family Court to take things forward and settle all the related aspects including custody of the child, bearing in mind the observation made by us hereinabove.

7. The High Court in the impugned judgment has directed that the arrangement made by the Family Court will continue as an interim measure. We are informed that the said arrangement has been subsequently varied by order dated 29.4.2015 after interacting with the child and thereafter the arrangement is that the child would be given in custody of father once in a fortnight from 10.00 a.m. to 5.00 p.m.

8. The custody as above, will be available with the father on first three saturdays of the month between 10.00 a.m. to 8.00 p.m. that is to say, from the 1st week of April, 2016 onwards. As far as the other times like vacations are concerned, it will be open to the parties to file application before the Family Court. We also make it clear that this is purely a temporary arrangement and it is for the Family Court to pass appropriate orders as the situation warrants. Parties will appear before the Family Court on 25.04.2016.

9. In view of the apprehension expressed by the learned counsel appearing for the appellant, we make it clear that the impugned judgment will stand substituted by our order with the modification with regard to the further process on divorce.

   The Family Court will make an endeavour to dispose of the matter expeditiously and preferably within six months from the date of first appearance as above.

10. The offer made by the respondent for deposit of Rs.50,000/- per month, in addition to the deposit of Rs.5,00,000/- will continue. In case, it is found difficult to work out the order as above, we grant liberty to the parties concerned to approach this Court.

.....J.
[KURIAN JOSEPH]

.....J.
[ROHINTON FALI NARIMAN]

NEW DELHI;

MARCH 03,2016

❑❑❑

HARJINDER SINGH VERSUS RAJPAL

SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

Bench: Hon'ble Mr. Justice Kurian Joseph and Hon'ble Mr. Justice Deepak Gupta

Harjinder Singh Petitioner(S)
Versus
Rajpal Respondent(S)

Petition(s) for Special Leave to Appeal (C) No(s). 18046/2013

(Arising out of impugned final judgment and order dated 21-12-2012 in FAO No. 16/2009 passed by the High Court of Punjab & Haryana at Chandigarh)

Date : 01-12-2017 This petition was called on for hearing today.

Dr. (Ms.) Vipin Gupta,Adv. For Petitioner(s) Ms. Kawaljeet Singh Bhatia, Adv. , Mr. Subhro Sanyal, AOR, Mr. Kumar Rajiv, Adv.
For Respondent(s) Mr. Anilendra Pandey,Adv., Mr. Chandan Kumar Mandal,Adv., Mr. Nitin Kumar Thakur, AOR
UPON hearing the counsel the Court made the following

ORDER

The petitioner/Harjinder Singh and the respondent/Rajpal, who are husband and wife, are present before this Court today. We have interacted with the parties. We find that everything is still not lost.

The petitioner/Harjinder Singh has been very gracious and fair in his submissions. The respondent wife has not instituted any case except one case for maintenance. We find that the parties should be given a chance to live together for a few weeks, keeping the case pending before us.

Accordingly, respondent/Rajpal is directed to go with the petitioner/Harjinder Singh today from the Court. The respondent is directed to behave herself properly and look after the petitioner and his aged mother. Nobody from the family of the respondent shall interfere with their peaceful living. Without permission from the Court respondent/Rajpal shall not leave the company of the petitioner/Harjinder Singh.

Post on 17.01.2018 for further orders.

(NARENDRA PRASAD)
COURT MASTER

(RENU DIWAN)
ASST. REGISTRAR

SHAYARA BANO VERSUS UNION OF INDIA AND OTHERS

IN THE SUPREME COURT OF INDIA
Original Civil Jurisdiction

Bench: Hon'ble Mr. Justice Jagdish Singh Khehar, CJI. Hon'ble Mr. Justice Kurian Joseph, Hon'ble Mr. Justice R.F. Nariman, Hon'ble Mr. Justice Uday Umesh Lalit & Hon'ble Mr. Justice S.Abdul Nazeer

Writ Petition (C) No. 118 of 2016

Shayara Bano … Petitioner
versus
Union of India and others … Respondents

with
Suo Motu Writ (C) No. 2 of 2015

In Re: Muslim Women's Quest For Equality
versus
Jamiat Ulma-I-Hind

Writ Petition(C) No. 288 of 2016

Aafreen Rehman … Petitioner
versus
Union of India and others … Respondents

Writ Petition(C) No. 327 of 2016

Gulshan Parveen … Petitioner
versus
Union of India and others … Respondents

Writ Petition(C) No. 665 of 2016

Ishrat Jahan … Petitioner
versus
Union of India and others … Respondents

Writ Petition(C) No. 43 of 2017

Atiya Sabri … Petitioner
versus
Union of India and others … Respondents

JUDGMENT

Hon'ble Mr. Justice Jagdish Singh Khehar, CJI.

Only important paragraphs of the judgments :

11. Since the issue under consideration is the dissolution of marriage by 'talaq', under the Islamic law of divorce, it is imperative, to understand the concept of 'talaq'. In this behalf, it is relevant to mention, that under the Islamic law, divorce is classified into three categories. Talaq understood simply, is a means of divorce, at the instance of the husband. 'Khula', is another mode of divorce, this divorce is at the instance of the wife. The third category of divorce is 'mubaraat' – divorce by mutual consent.

12. 'Talaq', namely, divorce at the instance of the husband, is also of three kinds – 'talaq-e-ahsan', 'talaq-e-hasan' and 'talaq-e-biddat'. The petitioner's contention before this Court is, that 'talaq-e-ahsan', and 'talaqe-hasan' are both approved by the 'Quran' and 'hadith'. 'Talaq-e-ahsan', is considered as the 'most reasonable' form of divorce, whereas, 'talaq-ehasan' is also considered as 'reasonable'. It was submitted, that 'talaq-ebiddat' is neither recognized by the 'Quran' nor by 'hadith', and as such, is to be considered as sacrosanctal to Muslim religion. The controversy which has arisen for consideration before this Court, is with referenc to 'talaq-ebiddat'.

13. It is necessary for the determination of the present controversy, to understand the parameters, and the nature of the different kinds of 'talaq'. 'Talaq-e-ahsan' is a single pronouncement of 'talaq' by the husband, followed by a period of abstinence. The period of abstinence is described as 'iddat'. The duration of the 'iddat' is ninety days or three menstrual cycles (in case, where the wife is menstruating). Alternatively, the period of 'iddat' is of three lunar months (in case, the wife is not menstruating). If the couple resumes cohabitation or intimacy, within the period of 'iddat', the pronouncement of divorce is treated as having been revoked. Therefore, 'talaq-e-ahsan' is revocable. Conversely, if there is no resumption of cohabitation or intimacy, during the period of 'iddat', then the divorce becomes final and irrevocable, after the expiry of the 'iddat' period. It is considered irrevocable because, the couple is forbidden to resume marital relationship thereafter, unless they contract a fresh 'nikah' (-marriage), with a fresh 'mahr'. 'Mahr' is a mandatory payment, in the form of money or possessions, paid or promised to be paid, by the groom or by the groom's father, to the bride, at the time of marriage, which legally becomes her property. However, on the third pronouncement of such a 'talaq', the couple cannot remarry, unless the wife first marries someone else, and only after her marriage with other person has been dissolved (either through 'talaq' - divorce, or death), can the couple remarry. Amongst Muslims, 'talaq-e-ahsan' is regarded as – 'the most proper' form of divorce.

14. 'Talaq-e-hasan' is pronounced in the same manner, as 'talaq-eahsan'. Herein, in place of a single pronouncement, there are three successive pronouncements. After the first pronouncement of divorce, if there is resumption of cohabitation within a period of one month, the pronouncement of divorce is treated as having been revoked. The same procedure is mandated to be followed, after the expiry of the first month (during which marital ties have not been resumed). 'Talaq' is pronounced again. After the second pronouncement of 'talaq', if there is resumption of cohabitation within a period of one month, the pronouncement of divorce is treated as having been revoked. It is significant to note, that the first and the second pronouncements may be revoked by the husband. If he does so, either expressly or by resuming conjugal relations, 'talaq'

pronounced by the husband becomes ineffective, as if no 'talaq' had ever been expressed. If the third 'talaq' is pronounced, it becomes irrevocable. Therefore, if no revocation is made after the first and the second declaration, and the husband makes the third pronouncement, in the third 'tuhr' (period of purity), as soon as the third declaration is made, the 'talaq' becomes irrevocable, and the marriage stands dissolved, whereafter, the wife has to observe the required 'iddat' (the period after divorce, during which a woman cannot remarry. Its purpose is to ensure, that the male parent of any offspring is clearly identified). And after the third 'iddat', the husband and wife cannot remarry, unless the wife first marries someone else, and only after her marriage with another person has been dissolved (either through divorce or death), can the couple remarry. The distinction between 'talaq-eashan' and 'talaq-e-hasan' is, that in the former there is a single pronouncement of 'talaq' followed by abstinence during the period of 'iddat', whereas, in the latter there are three pronouncements of 'talaq', interspersed with abstinence. As against 'talaq-e-ahsan', which is regarded as 'the most proper' form of divorce, Muslims regard 'talaq-e-hasan' only as 'the proper form of divorce'.

15. The third kind of 'talaq' is – 'talaq-e-biddat'. This is effected by one definitive pronouncement of 'talaq' such as, "I talaq you irrevocably" or three simultaneous pronouncements, like "talaq, talaq, talaq", uttered at the same time, simultaneously. In 'talaq-e-biddat', divorce is effective forthwith. The instant talaq, unlike the other two categories of 'talaq' is irrevocable at the very moment it is pronounced. Even amongst Muslims 'talaq-e-biddat', is considered irregular.

16. According to the petitioner, there is no mention of 'talaq-e-biddat' in the Quran. It was however acknowledged, that the practice of 'talaq-ebiddat' can be traced to the second century, after the advent of Islam. It was submitted, that 'talaq-e-biddat' is recognized only by a few Sunni schools. Most prominently, by the Hanafi sect of Sunni Muslims. It was however emphasized, that even those schools that recognized 'talaq-ebiddat' described it, "as a sinful form of divorce". It is acknowledged, that this form of divorce, has been described as "bad in theology, but good in law". We have recorded the instant position at this juncture, because learned counsel for the rival parties, uniformly acknowledge the same.

(17-27) "..."

Part-5.

Abrogation of the practice of 'talaq-e-biddat' by legislation, the world over, in Islamic, as well as, non-Islamic States:

28. 'Muslim Law in India and Abroad', by Tahir Mahmood and Saif Mahmood (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2012 edition), records the following position about the abrogation of the practice of 'talaqe-biddat' as a means of divorce, through statutory enactments, the world over. The countries which have abolished 'talaq-e-biddat' have been divided into Arab States, Southeast Asian States, and Subcontinental States. We have maintained the above classifications, in order to establish their factual positions. Firstly, to demonstrate that the practice was prevalent across the globe in States having sizeable Muslim populations. And secondly, that the practice has been done away with, by way of legislation, in the countries referred to below.

A. Laws of Arab States

(i) Algeria: Is a theocratic State, which declares Islam to be its official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the following legislation:

Code of Family Law 1984

Law No.84-11 of 1984 as amended in 2005

"Article 49. Divorce cannot be established except by a judgment of the court, preceded by an attempt at reconciliation for a period not exceeding three months."

(ii) Egypt: Is a secular State. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the following legislation:

Law of Personal Status 1929

Law 25 of 1929 as amended by Law 100 of 1985

"Article 1. A Talaq pronounced under the effect of intoxication or compulsion shall not be effective.

Article 2. A conditional Talaq which is not meant to take effect immediately shall have no effect if it is used as an inducement to do some act or to abstain from it.

Article 3. A Talaq accompanied by a number, expressly or impliedly, shall not be effective except as a single revocable divorce.

Article 4. Symbolic expressions of talaq, i.e., words which may or may not bear the implication of a divorce, shall not effect a divorce unless the husband actually intended it."

(iii) Iraq: Is a theocratic State, which declares Islam to be its official religion.

The majority of Iraq's Muslims is Shias. On the issue in hand, it has enacted the following legislation:

Code of Personal Status 1959

Law 188 of 1959 as amended by Law 90 of 1987

"Article 35. No divorce shall be effective when pronounced by the persons mentioned below:

(a) one who is intoxicated, insane or imbecile, under duress, or not in his senses due to anger, sudden calamity, old age or sickness;

(b) a person in death-sickness or in a condition which in all probabilities is fatal and of which he actually dies, survived by his wife."

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Article 37. (1) Where a Talaq is coupled with a number, express or implied, not more than one divorce shall take place.

(2) If a woman is divorced thrice on three separate occasions by her husband, no revocation or remarriage would be permissible after that.

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Article 39. (1) When a person intends to divorce his wife, he shall institute a suit in the Court of Personal Status requesting that it be effected and that an order be issued therefor. If a person cannot so approach the court, registration of the divorce in the court during the period of Iddat shall be binding on him.

(2) The certificate of marriage shall remain valid till it is cancelled by the court."

(iv) Jordan: Is a secular State. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the following legislation:

Code of Personal Status 1976

Law 61 of 1976

"Article 88. (1) Talaq shall not be effective if pronounced under intoxication, bewilderment, compulsion, mental disorder, depression or effect of sleep.

(2) 'Bewildered' is one who has lost senses due to anger or provocation, etc., and cannot understand what he is saying.

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Article 90. A divorce coupled with a number, expressly or impliedly, as also a divorce repeated in the same sitting, will not take effect except as a single divorce.

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Article 94. Every divorce shall be revocable except the final third, one before consummation and one with consideration.

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Article 98. Where an irrevocable Talaq was pronounced once or twice, renewal of marriage with the consent of parties is not prohibited."

(v) Kuwait: Is a theocratic State, which declares Islam to be the official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has the following legislation in place:

Code of Personal Status 1984

Law 51 of 1984

"Article 102. Talaq may be effected by major and sane men acting by their free will and understanding the implications of their action. Therefore Talaq shall not take effect if the husband is mentally handicapped, imbecile, under coercion, mistake, intoxication, fear or high anger affecting his speech and action.

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Article 109. If a Talaq is pronounced with a number (two, three) by words, signs or writing, only one Talaq shall take effect."

(vi) Lebanon: Is a secular State. Muslims constitute its majority, which is estimated to be 54% (27% Shia, and 27% Sunni). On the issue in hand, it has enacted the following legislation:

Family Rights Law 1962

Law of 16 July 1962

"Article 104. A divorce by a drunk person shall have no effect.

Article 105. A divorce pronounced under coercion shall have no effect."

(vii) Libya: Is a theocratic State, which declares Islam to be its official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the following legislation:

Family Law 1984

Law 10 of 1984 as amended by Law 15 of 1984

"Article 28. Divorce is termination of the marriage bond. No divorce will become effective in any case except by a decree of a competent court and subject to the provision of Article 30.

Article 29. Divorce is of two kinds – revocable and irrevocable. Revocable divorce does not terminate the marriage till the expiry of Iddat.

Irrevocable divorce terminates the marriage forthwith.

Article 30. All divorces shall be revocable except a third-time divorce, one before consummation of marriage, one for a consideration, and those specified in this law to be irrevocable.

Article 31. A divorce shall be effective only if pronounced in clear words showing intention to dissolve the marriage. Symbolic or metaphorical expression will not dissolve the marriage.

Article 32. A divorce pronounced by a minor or insane person, or if pronounced under coercion, or with no clear intention to dissolve the marriage, shall have no legal effect.

Article 33. (1) A divorce meant to be effect on some action or omission of the wife shall have no legal effect.

(2) A divorce given with a view to binding the wife to an oath or restrain her from doing something shall have no legal effect.

(3) A divorce to which a number is attached, by express words or a gesture, shall effect only a single revocable divorce, except when it is pronounced for the third time.

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Article 35. The marriage may be dissolved by mutual consent of the parties. Such a divorce must be registered with the court. If the parties cannot agree on the terms of such a divorce, they shall approach the court and it will appoint arbitrators to settle the matter or reconcile them.

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Article 47. A divorce must be pronounced in a court and in the presence of the other party or his or her representative. The court shall before giving effect to a divorce exhaust all possibilities of reconciliation."

(viii) Morocco: Is a theocratic State, which declares Islam to be its official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the following legislation:

Code of Personal Status 2004

Law 70.03 of 2004

"Article 79. Whoever divorces his wife by Talaq must petition the court for permission to register it with the Public Notaries of the area where the matrimonial home is situate, or where the wife resides, or where the marriage took place.

Article 80. The petition will mention the identity of spouses, their professions, addresses, number of children, if any, with their age, health condition and educational status. It must be supported by a copy of the marriage agreement and a document stating the husband's social status and financial obligations.

Article 81. The court shall summon the spouses and attempt reconciliation. If the husband deliberately abstains, this will be deemed to be withdrawal of the petition. If the wife abstains, the court will notify her that if she does not present herself the petition may be decided in her absence. If the husband has fraudulently given a wrong address for the wife, he may be prosecuted at her instance.

Article 82. The court will hear the parties and their witnesses in camera and take all possible steps to reconcile them, including appointment of arbitrators or a family reconciliation council, and if there are children such efforts shall be exhausted within thirty days. If reconciliation takes place, a report will be filed with the court.

Article 83. If reconciliation attempts fail, the court shall fix an amount to be deposited by the husband in the court within thirty days towards payment of the wife's post-divorce dues and maintenance of children.

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Article 90. No divorce is permissible for a person who is not in his senses or is under coercion or provocation.

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Article 92. Multiple expressions of divorce, oral or written, shall have the effect of a single divorce only.

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Article 123. Every divorce pronounced by the husband shall be revocable, except a third-time divorce, divorce before consummation of marriage, divorce by mutual consent, and divorce by Khula or Talaq-e-Tafweez.

(ix) Sudan: Is a theocratic State, which declares Islam to be its official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has the following legislation in place:

Law on Talaq 1935

Judicial Proclamation No.4 of 1935

"Article 1. A divorce uttered in a state of intoxication or under duress shall be invalid and ineffective.

Article 2. A contingent divorce which is not meant to be effective immediately and is used as an inducement or threat shall have not effect.

Article 3. A formula of divorce coupled with a number, expressly or impliedly, shall effect only one divorce.

Article 4. Metaphorical expressions used for a divorce shall have the effect of dissolving the marriage only if the husband actually meant a divorce."

(x) Syria: Is a secular State. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the following legislation:

Code of Personal Status 1953

Law 59 of 1953 as amended by Law 34 of 1975

"Article 89. No divorce shall take place when the man is drunk, out of his senses, or under duress. A person is out of his senses when due to anger, etc. he does not appreciate what he says.

Article 90. A conditional divorce shall have no effect if not actually intended and used only as an inducement to do or abstain from doing something or as an oath or persuasion.

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Article 92. If a divorce is coupled with a number, expressly or impliedly, not more than one divorce shall take place.

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Article 94. Every divorce shall be revocable except a third-time divorce, one before consummation, a divorce with a consideration, and a divorce stated in this Code to be irrevocable.

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Article 117. Where a person divorces his wife the court may, if satisfied that he has arbitrarily done so without any reasonable cause and that as a result of the divorce the wife shall suffer damage and become destitute, give a decision, with due regard to the husband's financial condition and the amount of wife's suffering, that he should pay her compensation not exceeding three years' maintenance, in addition to maintenance payable during the period of Iddat. It may be directed to be paid either in a lump sum or in instalments as the circumstances of a case may require.

(xi) Tunisia: Is a theocratic State, which declares Islam to be its official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has enacted the following legislation:

Code of Personal Status 1956

Law 13-8 of 1956 as amended by Law 7 of 1981

"Article 31.(1) A decree of divorce shall be given: (i) with the mutual consent of the parties; or (ii) at the instance of either party on the ground of injury; or (iii) if the husband insists on divorce or the wife demands it. The party causing material or mental injury by the fact of divorce under clauses (ii) and (iii) shall be directed to indemnify the aggrieved spouse.

(2) As regards the woman to be indemnified for material injury in terms of money, the same shall be paid to her after the expiry of Iddat and may be in the form of retention of the matrimonial home. This indemnity will be subject to revision, increase or decrease in accordance with the changes in the circumstances of the divorced wife until she is alive or until she changes her marital status by marrying again. If the former husband dies, this indemnity will be a charge on his estate and will have to be met by his heirs if they consent to it and will be decided by the court if they disagree. They may pay her in a lump sum within one year from the former husband's death the indemnity claimable by her.

Article 32 (1) No divorce shall be decreed except after the court has made an overall inquiry into the causes of rift and failed to effect reconciliation.

(2) Where no reconciliation is possible the court shall provide, even if not asked to, for all important matters relating to the residence of the spouses, maintenance and custody of children and meeting the children, except when the parties specifically agree to forgo all or any of these rights. The court shall fix the maintenance on the basis of all those facts which it comes to know while attempting reconciliation. All important matters shall be provided for in the decree, which shall be nonappealable but can be reviewed for making additional provisions.

(3) The court of first instance shall pass orders in the matters of divorce and all concerning matters including the compensation money to which the divorced wife may be entitled after the expiry of Iddat. The portions of the decree relating to custody, maintenance, compensation, residence and right to visit children shall be executed immediately."

(xii) United Arab Emirates: Is a theocratic State, as the Federal Constitution declares Islam to be the official religion. The Constitution also provides for freedom of religion, in accordance with established customs. Muslims of the Shia sect constitute its majority. On the issue in hand, it has the following legislation in place:

Law of Personal Status 2005

Federal Law No.28 of 2005

"Article 140(1). If a husband divorces his wife after consummation of a valid marriage by his unilateral action and without any move for divorce from her side, she will be entitled to compensation besides maintenance for Iddat. The amount of compensation will be decided with due regard to the means of the husband and the hardship suffered by the wife, but it shall not exceed the amount of one year's maintenance payable in law to a woman of her status.

(2) The Kazi may decree the compensation, to be paid as a lump sum or in instalments, according to the husband's ability to pay."

(xiii) Yemen: Is a theocratic State, which declares Islam to be the official religion. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has the following legislation in place:

Decree on Personal Status 1992

Decree 20 of 1992

"Article 61. A divorce shall not be effective if pronounced by a man who is drunk, or has lost his senses, or has no power of discernment, if this is shown by his condition and action.

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Article 64. A divorce to which a number is attached, whatever be the number, will effect only a single revocable divorce.

Article 65. The words saying that if the wife did or failed to do something she will stand divorced will not effect a divorce.

Article 66. The words that if an oath or vow is broken it will effect a divorce will not dissolve the marriage even if the said oath or vow is broken.

Article 67. A divorce can be revoked by the husband during the Iddat period. After the expiry of Iddat, a direct remarriage between them will be lawful.

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Article 71. If a man arbitrarily divorces his wife without any reasonable ground and it causes hardship to her, the court may grant her compensation payable by the husband not exceeding maintenance for one year in accordance with her status. The court may decide if the compensation will be paid as a lump sum or in instalments."

B. Laws of Southeast Asian States

(i) Indonesia: The Constitution of Indonesia guarantees freedom of religion among Indonesians. However, the Government recognizes only six official religions – Islam, Protestantism, Catholicism, Hinduism, Buddhism, and Confucianism. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has the following legislation in place:

(a) Law of Marriage 1974

Law 1 of 1974

"Article 38. A divorce shall be effected only in the court and the court shall not permit a divorce before attempting reconciliation between the parties. Divorce shall be permissible only for sufficient reasons indicating breakdown of marriage.

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Article 41. In the event of a divorce both the parents shall continue to be responsible for the maintenance of their children. As regards custody of children, in case of a dispute between them the court shall take a decision. Expenses of maintenance and education shall be primarily the father's liability, but if he is unable to discharge this liability the court may transfer it to the mother. The court may also direct the former husband to pay alimony to the divorced wife."

(b) Marriage Regulations 1975

Regulation 9 of 1975

"Article 14. A man married under Islamic law wanting to divorce his wife shall by a letter notify his intention to the District Court seeking proceedings for that purpose.

Article 15. On receiving a letter the court shall, within thirty days, summon the parties and gather from them all relevant facts.

Article 16. If the court is satisfied of the existence of any of the grounds mentioned in Article 19 below and is convinced that no reconciliation between the parties is possible it will allow a divorce.

Article 17. Immediately after allowing a divorce as laid down in Article 16 above the court shall issue a certificate of divorce and send it to the Registrar for registration of the divorce.

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Article 19. A divorce may be allowed on the petition of either party if the other party:

(a) has committed adultery or become addict to alcohol, drugs, gambling or another serious vice;

(b) has deserted the aggrieved party for two years or more without any legal ground and against the said party's will;

(c) has been imprisoned for at least five years;

(d) has treated the aggrieved party with cruelty of an injurious nature;

(e) has been suffering from a physical deformity affecting conjugal duties, or where relations between the spouses have become too much strained making reconciliation impossible."

(ii) Malaysia: Under the Constitution of Malaysia, Islam is the official religion of the country, but other religions are permitted to be practiced in peace and harmony. Muslims of the Sunni sect constitute its majority. On the issue in hand, it has the following legislation in place:

Islamic Family Law Act 1984

Act 304 of 1984

"Article 47. (1) A husband or a wife who desires a divorce shall present an application for divorce to the court in the prescribed form accompanied by a statutory declaration containing (a) particulars of the marriage and the name, ages and sex of the children, if any, of the marriage; (b) particulars of the facts giving the court jurisdiction under Section 45; (c) particulars of any previous matrimonial proceedings between the parties, including the place of the proceedings; (d) a statement as to the reasons for desiring divorce; (e) a statement as to whether any, and if so, what steps have been taken to effect reconciliation; (f) the terms of any agreement regarding maintenance and habitation of the wife and the children of the marriage, if any, and the division of any assets acquired through the joint effort of the parties, if any, or where no such agreement has been reached, the applicant's proposals regarding those matters; and (g) particulars of the order sought.

(2) Upon receiving an application for divorce, the court shall cause summons to be served on the other party together with a copy of the application and the statutory declaration made by the applicant, and the summons shall direct the other party to appear before the court so as to enable it to inquire whether or not the other party consents to the divorce.

(3) If the other party consents to the divorce and the court is satisfied after due inquiry and investigation that the marriage has irretrievably broken down, the court shall advise the husband to pronounce one Talaq before the court.

(4) The court shall record the fact of the pronouncement of one Talaq and shall send a certified copy of the record to the appropriate Registrar and to the Chief Registrar for registration.

(5) Where the other party does not consent to the divorce or it appears to the court that there is reasonable possibility of a reconciliation between the parties, the court shall as soon as possible appoint a Conciliatory Committee consisting of a religious officer as Chairman and two other persons, one to act for the husband and the other for the wife, and refer the case to the Committee.

(6) In appointing the two persons under sub-section (5) the court shall, where possible, give preference to close relatives of the parties having knowledge of the circumstances of the case.

(7) The court may give directions to the Conciliatory Committee as to the conduct of the conciliation and it shall conduct it in accordance with such directions.

(8) If the Committee is unable to agree or if the court is not satisfied with its conduct of the conciliation, the court may remove the Committee and appoint another Committee in its place.

(9) The Committee shall endeavour to effect reconciliation within a period of six months from the date of its being constituted or such further period as may be allowed by the court.

(10) The Committee shall require the attendance of the parties and shall give each of them an opportunity of being heard and may hear such other persons and make such inquiries as it thinks fit and may, if it considers it necessary, adjourn its proceedings from time to time.

(11) If the Conciliatory Committee is unable to effect reconciliation and is unable to persuade the parties to resume their conjugal relationship, it shall issue a certificate to that effect and may append to the certificate such recommendations as it thinks fit regarding maintenance and custody of the minor children of the marriage, if any, regarding division of property and other matters related to the marriage.

(12) No advocate and solicitor shall appear or act for any party in any proceeding before a Conciliatory Committee and no party shall be represented by any person other than a member of his or her family without the leave of the Conciliatory Committee.

(13) Where the Committee reports to the court that reconciliation has been effected and the parties have resumed their conjugal relationship, the court shall dismiss the application for divorce.

(14) Where the Committee submits to the court a certificate that it is unable to effect reconciliation and to persuade the parties to resume the conjugal relationship, the court shall advise the husband to pronounce one Talaq before the court, and where the court is unable to procure the presence of the husband before the court to pronounce one Talaq, or where the husband refuses to pronounce one Talaq, the court shall refer the case to the Hakams [arbitrators] for action according to section 48.

(15) The requirement of sub-section (5) as to reference to a Conciliatory Committee shall not apply in any case (a) where the applicant alleges that he or she has been deserted by an does not know the whereabouts of the other party; (b) where the other party is residing outside West Malaysia and it is unlikely that he or she will be within the jurisdiction of the court within six months after the date of the application; (c) where the other party is imprisoned for a term of three years or more; (d) where the applicant alleges that the other party is suffering from incurable mental illness; or (e) where the court is satisfied that there are exceptional circumstances which make reference to a Conciliatory Committee impracticable.

(16) Save as provided in sub-section (17), a Talaq pronounced by the husband or an order made by the court shall not be effective until the expiry of the Iddat.

(17) If the wife is pregnant at the time the Talaq is pronounced or the order is made, the Talaq or the order shall not be effective until the pregnancy ends."

(iii) Philippines: Is a secular State. Christians constitute its majority. On the issue in hand, it has the following legislation in place:

Code of Muslim Personal Law 1977

Decree No.1083 of 1977

"Article 46. (1) A divorce by Talaq may be effected by the husband in a single repudiation of his wife during her Tuhr [non-menstrual period] within which he has totally abstained from carnal relations with her.

(2) Any number of repudiations made during one Tuhr [non-menstrual period] shall constitute only one repudiation and shall become irrevocable after the expiration of the prescribed Iddat.

(3) A husband who repudiates his wife, either for the first or second time, shall have the right to take her back within the Iddat period by resumption of cohabitation without need of a new contract of marriage. Should he fail to do so, the repudiation shall become irrevocable.

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Article 85. Within seven days after the revocation of a divorce the husband shall, with the wife's consent, send a statement thereof to the Circuit Registrar in whose records the divorce was previously entered.

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Article 161. (1) A Muslim male who has pronounced a Talaq shall, without delay, file with the Clerk of the Sharia Circuit Court of the place where his family resides a written notice of such fact and the circumstances attending thereto, after having served a copy to the wife concerned. The Talaq pronounced shall not become irrevocable until after the expiration of the prescribed Iddat.

(2) Within seven days from receipt of notice the Clerk of the Court shall require each of the parties to nominate a representative. The representatives shall be appointed by the court to constitute, with the Clerk of the Court as Chairman, an Agama [religious scholars] Arbitration Council which shall try and submit to the court a report on the result of arbitration on the basis of which, and such other evidence as may be allowed, the court will pass an order.

(3) The provisions of this Article will be observed if the wife exercises right to Talaq-e-Tafweez.

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Article 183. A person who fails to comply with the requirements of Article 85, 161 and 162 of this Code shall be penalized by imprisonment or a fine of two hundred to two thousand Pesos, or both."

C. Laws of Sub-continental States

(i) Pakistan & Bangladesh: Are both theocratic States, wherein Islam is the official religion. In both countries Muslims of the Sunni sect constitute the majority. On the issue in hand, it has the following legislation in place:

Muslim Family Laws Ordinance 1961
Ordinance VIII of 1961 amended in Bangladesh by Ordinance 114 of 1985
(Bangladesh changes noted below relevant provisions)

"Section 7. (1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of Talaq in any form whatsoever, give the Chairman a notice in writing of his having done so, and shall supply a copy thereof to the wife.

(2) Whoever contravenes the provision of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both. [Bangladesh: ten thousand taka]

(3) Save as provided in sub-section (5), a Talaq unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under subsection (1) is delivered to the Chairman.

(4) Within thirty days of the receipt of notice under sub-section (1) the Chairman shall constitute an Arbitration Council for the purpose of bringing about reconciliation between the parties, and the Arbitration council shall take all steps necessary to bring about such reconciliation.

(5) If the wife be pregnant at the time Talaq is pronounced, Talaq shall not be effective until the period mentioned in sub-section (3) or of pregnancy, whichever is later, ends.

(6) Nothing shall debar a wife whose marriage has been terminated by Talaq effective under this section from re-marrying the same husband without any intervening marriage with a third person, unless such termination is for the third time so effective."

(ii) Sri Lanka: Is a secular State. Buddhists constitute its majority. On the issue in hand, it has the following legislation in place:

Muslim Marriage and Divorce Act 1951

Act 6 of 1951 as amended by Act 40 of 2006

"Section 17 (4) Save as otherwise hereinafter expressly provided, every marriage contracted between Muslims after the commencement of this Act shall be registered, as hereinafter provided, immediately upon the conclusion of the Nikah ceremony connected therewith.

(5) In the case of each such marriage, the duty of causing it to be registered is hereby imposed upon the following persons concerned in the marriage; (a) the bridegroom, (b) the guardian of the bride, and (c) the person who conducted the Nikah ceremony connected with the marriage.

Section 27. Where a husband desires to divorce his wife the procedure laid down in Schedule II shall be followed."

(2) Where a wife desires to effect a divorce from her husband on any ground not referred to in sub-section (1), being a divorce of any description permitted to a wife by the Muslim law governing the sect to which the parties belong, the procedure laid down in the Schedule III shall be followed so far as the nature of the divorce claimed in each case renders it possible or necessary to follow that procedure.

29. 'Talaq-e-biddat' is effective, the very moment it is pronounced. It is irrevocable when it is pronounced.

X. Conclusions emerging out of the above consideration:

190. The following conclusions emerge from the considerations recorded at I to IX above:

(1) Despite the decision of the Rashid Ahmad case1 on the subject of 'talaq-e-biddat', by the Privy Council, the issue needs a fresh examination, in view of the subsequent developments in the matter.

(2) All the parties were unanimous, that despite the practice of 'talaq-ebiddat' being considered sinful, it was accepted amongst Sunni Muslims belonging to the Hanafi school, as valid in law, and has been in practice amongst them.

(3) It would not be appropriate for this Court, to record a finding, whether the practice of 'talaq-e-biddat' is, or is not, affirmed by 'hadiths', in view of the enormous contradictions in the 'hadiths', relied upon by the rival parties.

(4) 'Talaq-e-biddat' is integral to the religious denomination of Sunnis belonging to the Hanafi school. The same is a part of their faith, having been followed for more than 1400 years, and as such, has to be accepted as being constituent of their 'personal law'.

(5) The contention of the petitioners, that the questions/subjects covered by the Muslim Personal Law (Shariat) Application Act, 1937, ceased to be 'personal law', and got transformed into 'statutory law', cannot be accepted, and is accordingly rejected.

(6) 'Talaq-e-biddat', does not violate the parameters expressed in Article 25 of the Constitution. The practice is not contrary to public order, morality and health. The practice also does not violate Articles 14, 15 and 21 of the Constitution, which are limited to State actions alone.

(7) The practice of 'talaq-e-biddat' being a constituent of 'personal law' has a stature equal to other fundamental rights, conferred in Part III of the Constitution. The practice cannot therefore be set aside, on the ground of being violative of the concept of the constitutional morality, through judicial intervention.

(8) Reforms to 'personal law' in India, with reference to socially unacceptable practices in different religions, have come about only by way of legislative intervention. Such legislative intervention is permissible under Articles 25(2) and 44, read with entry 5 of the Concurrent List, contained in the Seventh Schedule of the Constitution. The said procedure alone need to be followed with reference to the practice of 'talaq-e-biddat', if the same is to be set aside.

(9) International conventions and declarations are of no avail in the present controversy, because the practice of 'talaq-e-biddat', is a component of 'personal law', and has the protection of Article 25 of the Constitution.

Part-10.

The declaration:

191. The whole nation seems to be up in arms. There is seemingly an overwhelming majority of Muslim-women, demanding that the practice of 'talaq-e-biddat' which is sinful in theology, be declared as impermissible in law. The Union of India, has also participated in the debate. It has adopted an aggressive posture, seeking the invalidation of the practice by canvassing, that it violates the fundamental rights enshrined in Part III of the Constitution, and by further asserting, that it even violates constitutional morality. During the course of hearing, the issue was hotly canvassed in the media. Most of the views expressed in erudite articles on the subject, hugely affirmed that the practice was demeaning. Interestingly even during the course of hearing, learned counsel appearing for the rival parties, were in agreement, and described the practice of 'talaq-e-biddat' differently as, unpleasant, distasteful and unsavory. The position adopted by others was harsher, they considered it as disgusting, loathsome and obnoxious. Some even described it as being debased, abhorrent and wretched.

192. We have arrived at the conclusion, that 'talaq-e-biddat', is a matter of 'personal law' of Sunni Muslims, belonging to the Hanafi school. It constitutes a matter of their faith. It has been practiced by them, for at least 1400 years. We have examined whether the practice satisfies the constraints provided for under Article 25 of the Constitution, and have arrived at the conclusion, that it does not breach any of them. We have also come to the conclusion, that the practice being a component of 'personal law', has the protection of Article 25 of the Constitution.

193. Religion is a matter of faith, and not of logic. It is not open to a court to accept an egalitarian approach, over a practice which constitutes an integral part of religion. The Constitution allows

the followers of every religion, to follow their beliefs and religious traditions. The Constitution assures believers of all faiths, that their way of life, is guaranteed, and would not be subjected to any challenge, even though they may seem to others (-and even rationalists, practicing the same faith) unacceptable, in today's world and age. The Constitution extends this guarantee, because faith constitutes the religious consciousness, of the followers. It is this religious consciousness, which binds believers into separate entities. The Constitution endevours to protect and preserve, the beliefs of each of the separate entities, under Article 25.

194. Despite the views expressed by those who challenged the practice of 'talaq-e-biddat', being able to demonstrate that the practice transcends the barriers of constitutional morality (emerging from different provisions of the Constitution), we have found ourselves unable to persuade ourselves, from reaching out in support of the petitioners concerns. We cannot accept the petitioners' claim, because the challenge raised is in respect of an issue of 'personal law' which has constitutional protection.

195. In continuation of the position expressed above, we may acknowledge, that most of the prayers made to the Court (-at least on first blush) were persuasive enough, to solicit acceptance. Keeping in mind, that this opportunity had presented itself, so to say, to assuage the cause of Muslim women, it was felt, that the opportunity should not be lost. We are however satisfied that, that would not be the rightful course to tread. We were obliged to keep reminding ourselves, of the wisdoms of the framers of the Constitution, who placed matters of faith in Part III of the Constitution.

Therefore, any endeavour to proceed on issues canvassed before us would, tantamount to overlooking the clear letter of law. We cannot nullify and declare as unacceptable in law, what the Constitution decrees us, not only to protect, but also to enforce. The authority to safeguard and compel compliance, is vested under a special jurisdiction in constitutional Courts (-under Article 32, with the Supreme Court; and under Article 226, with the High Courts). Accepting the petitioners prayers, would be in clear transgression of the constitutional mandate contained in Article 25.

196. Such a call of conscience, as the petitioners desire us to accept, may well have a cascading effect. We say so, because the contention of the learned Attorney General was, that 'talaq-e-ahsan' and 'talaq-e-hasan' were also liable to be declared unconstitutional, for the same reasons as have been expressed with reference to 'talaq-e-biddat' (-for details, refer to paragraph 77 above). According to the learned Attorney General, the said forms of talaq also suffered from the same infirmities as 'talaq-e-biddat'. The practices of 'polygamy' and 'halala' amongst Muslims are already under challenge before us. It is not difficult to comprehend, what kind of challenges would be raised by rationalists, assailing practices of different faiths on diverse grounds, based on all kinds of enlightened sensibilities. We have to be guarded, lest we find our conscience traversing into every nook and corner of religious practices, and 'personal law'. Can a court, based on a righteous endeavour, declare that a matter of faith, be replaced – or be completely done away with. In the instant case, both prayers have been made. Replacement has been sought by reading the three pronouncements in 'talaq-e-biddat', as one. Alternatively, replacement has been sought by reading into 'talaq-e-biddat', measures of arbitration and conciliation, described in the Quran and the 'hadiths'. The prayer is also for setting aside the practice, by holding it to be unconstitutional. The wisdom emerging from judgments rendered by this Court is unambiguous, namely, that while examining issues falling in the realm of religious practices or 'personal law',

it is not for a court to make a choice of something which it considers as forward looking or non-fundamentalist. It is not for a court to determine whether religious practices were prudent or progressive or regressive. Religion and 'personal law', must be perceived, as it is accepted, by the followers of the faith. And not, how another would like it to be (-including self-proclaimed rationalists, of the same faith). Article 25 obliges all Constitutional Courts to protect 'personal laws' and not to find fault therewith. Interference in matters of 'personal law' is clearly beyond judicial examination. The judiciary must therefore, always exercise absolute restraint, no matter how compelling and attractive the opportunity to do societal good may seem. It is therefore, that this Court had the occasion to observe, "….. However laudible, desirable and attractive the result may seem … an activist Court is not fully equipped to cope with the intricacies of the legislative subject and can at best advise and focus attention on the State polity on the problem and shake it from its slumber, goading it to awaken, march and reach the goal. For, in whatever measure be the concern of this Court, it compulsively needs to apply, motion, described in judicial parlance as self-restraint ….."[30]

197. We have arrived at the conclusion, that the legal challenge raised at the behest of the petitioners must fail, on the judicial front. Be that as it may, the question still remains, whether this is a fit case for us to exercise our jurisdiction under Article 142, "…for doing complete justice …", in the matter. The reason for us to probe the possibility of exercising our jurisdiction under Article 142, arises only for one simple reason, that all concerned are unequivocal, that besides being arbitrary the practice of 'talaq-e-biddat' is gender discriminatory.

198. A perusal of the consideration recorded by us reveals, that the practice of 'talaq-e-biddat' has been done away with, by way of legislation in a large number of egalitarian States, with sizeable Muslim population and even by theocratic Islamic States. Even the AIMPLB, the main contestant of the petitioners' prayers, whilst accepting the position canvassed on behalf of the petitioners, assumed the position, that it was not within the realm of judicial discretion, to set aside a matter of faith and religion. We have accepted the position assumed by the AIMPLB. It was however acknowledged even by the AIMPLB, that legislative will, could salvage the situation. This assertion was based on a conjoint reading of Articles 25(2) and Article 44 of the Constitution, read with entry 5 of the Concurrent List contained in the Seventh Schedule of the Constitution. There can be no doubt, and it is our definitive conclusion, that the position can only be salvaged by way of legislation. We understand, that it is not appropriate to tender advice to the legislature, to enact law on an issue. However, the position as it presents in the present case, seems to be a little different. Herein, the views expressed by the rival parties are not in contradiction. The Union of India has appeared before us in support of the cause of the petitioners. The stance adopted by the Union of India is sufficient for us to assume, that the Union of India supports the petitioners' cause.

Unfortunately, the Union seeks at our hands, what truly falls in its own. The main party that opposed the petitoners' challenge, namely, the AIMPLB filed an affidavit before this Court affirming the following position:

"1. I am the Secretary of All India Muslim Personal Board will issue an advisory through its Website, Publications and Social Media Platforms and thereby advise the persons who perform 'Nikah' (marriage) and request them to do the following:-

(a) At the time of performing 'Nikah' (marriage), the person performing the 'Nikah' will advise the Bridegroom/Man that in case of differences leading to Talaq the Bridegroom/Man shall not pronounce three divorces in one sitting since it is an undesirable practice in Shariat;

(b) That at the time of performing 'Nikah' (Marriage), the person performing the 'Nikah' will advise both the Bridegroom/Man and the Bride/Woman to incorporate a condition in the 'Nikahnama' to exclude resorting to pronouncement of three divorces by her husband in one sitting.

3. I say and submit that, in addition, the Board is placing on record, that the Working Committee of the Board had earlier already passed certain resolutions in the meeting held on 15th & 16th April, 2017 in relation to Divorce (Talaq) in the Muslim community. Thereby it was resolved to convey a code of conduct/guidelines to be followed in the matters of divorce particularly emphasizing to avoid pronouncement of three divorces in one sitting. A copy of the resolution dated April 16, 2017 along with the relevant Translation of Resolution Nos. 2, 3, 4 & 5 relating to Talaq (Divorce) is enclosed herewith for the perusal of this Hon'ble Court and marked as Annexure A-1 (Colly) [Page Nos. 4 to 12] to the present Affidavit."

A perusal of the above affidavit reveals, that the AIMPLB has undertaken to issue an advisory through its website, to advise those who enter into a matrimonial alliance, to agree in the 'nikah-nama', that their marriage would not be dissolvable by 'talaq-e-biddat'. The AIMPLB has sworn an affidavit to prescribe guidelines, to be followed in matters of divorce, emphasizing that 'talaq-e-biddat' be avoided. It would not be incorrect to assume, that even the AIMPLB is on board, to assuage the petitioner's cause.

199. In view of the position expressed above, we are satisfied, that this is a case which presents a situation where this Court should exercise its discretion to issue appropriate directions under Article 142 of the Constitution. We therefore hereby direct, the Union of India to consider appropriate legislation, particularly with reference to 'talaq-e-biddat'. We hope and expect, that the contemplated legislation will also take into consideration advances in Muslim 'personal law' – 'Shariat', as have been corrected by legislation the world over, even by theocratic Islamic States. When the British rulers in India provided succor to Muslims by legislation, and when remedial measures have been adopted by the Muslim world, we find no reason, for an independent India, to lag behind. Measures have been adopted for other religious denominations (see at IX – Reforms to 'personal law' in India), even in India, but not for the Muslims. We would therefore implore the legislature, to bestow its thoughtful consideration, to this issue of paramount importance. We would also beseech different political parties to keep their individual political gains apart, while considering the necessary measures requiring legislation.

200. Till such time as legislation in the matter is considered, we are satisfied in injuncting Muslim husbands, from pronouncing 'talaq-e-biddat' as a means for severing their matrimonial relationship. The instant injunction, shall in the first instance, be operative for a period of six months. If the legislative process commences before the expiry of the period of six months, and a positive decision emerges towards redefining 'talaq-ebiddat' (three pronouncements of 'talaq', at one and the same time) – as one, or alternatively, if it is decided that the practice of 'talaq-

e-biddat' be done away with altogether, the injunction would continue, till legislation is finally enacted. Failing which, the injunction shall cease to operate.

201. Disposed of in the above terms.

..……..…..……CJI.

(Jagdish Singh Khehar)

..……..…..…….……J.

(S. Abdul Nazeer)

New Delhi; August 22, 2017.

Note: The emphases supplied in all the quotations in the instant judgment, are ours.

Per Hon'ble Mr. Justice Kurian Joseph :—

1. What is bad in theology was once good in law but after Shariat has been declared as the personal law, whether what is Quranically wrong can be legally right is the issue to be considered in this case. Therefore, the simple question that needs to be answered in this case is only whether triple talaq has any legal sanctity. That is no more res integra. This Court in Shamim Ara v. State of UP and Another[45] has held, though not in so many words, that triple talaq lacks legal sanctity. Therefore, in terms of Article 141[46], Shamim Ara is the law that is applicable in India.

2. Having said that, I shall also make an independent endeavor to explain the legal position in Shamim Ara and lay down the law explicitly.

3. The Muslim Personal Law (Shariat) Application Act, 1937 (hereinafter referred to as "the 1937 Act") was enacted to put an end to the unholy, oppressive and discriminatory customs and usages in the Muslim community.[47] Section 2 is most relevant in the face of the present controversy.

> 2. Application of Personal law to Muslims. –
>
> Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and

45 (2002) 7 SCC 518

46 141. Law declared by Supreme Court to be binding on all courts.-The law declared by the Supreme Court shall be binding on all courts within the territory of India.

47 STATEMENT OF OBJECTS AND REASONS
For several years past it has been the cherished desire of the Muslims of British India that Customary Law should in no case take the place of Muslim Personal Law. The matter has been repeatedly agitated in the press as well as on the platform. The Jamiat-ul-Ulema-i-Hind, the greatest Moslem religious body has supported the demand and invited the attention of all concerned to the urgent necessity of introducing a measure to this effect. Customary Law is a misnomer in as much as it has not any sound basis to stand upon and is very much liable to frequent changes and cannot be expected to attain at any time in the future that certainty and definiteness which must be the characteristic of all laws. The status of Muslim women under the so-called Customary Law is simply disgraceful. All the Muslim Women Organisations have therefore condemned the Customary Law as it adversely affects their rights. They demand that the Muslim Personal Law (Shariat) should be made applicable to them. The introduction of Muslim Personal Law will automatically raise them to the position to which they are naturally entitled. In addition to this present measure, if enacted, would have very salutary effect on society because it would ensure certainty and definiteness in the mutual rights and obligations of the public. Muslim Personal Law (Shariat) exists in the form of a veritable code and is too well known to admit of any doubt or to entail any great labour in the shape of research, which is the chief feature of Customary Law. (Emphasis supplied)

religious endowments) the rule of decision in cases where the parties are Muslims shall be Muslim Personal Law (Shariat). (Emphasis supplied)

4. After the 1937 Act, in respect of the enumerated subjects under Section 2 regarding "marriage, dissolution of marriage, including talaq", the law that is applicable to Muslims shall be only their personal law namely Shariat. Nothing more, nothing less. It is not a legislation regulating talaq. In contradistinction, The Dissolution of Muslim Marriages Act, 1939 provides for the grounds for dissolution of marriage. So is the case with the Hindu Marriage Act, 1955. The 1937 Act simply makes Shariat applicable as the rule of decision in the matters enumerated in section 2.

   Therefore, while talaq is governed by Shariat, the specific grounds and procedure for talaq have not been codified in the 1937 Act.

5. In that view of the matter, I wholly agree with the learned Chief Justice that the 1937 Act is not a legislation regulating talaq. Consequently, I respectfully disagree with the stand taken by Nariman, J. that the 1937 Act is a legislation regulating triple talaq and hence, the same can be tested on the anvil of Article 14. However, on the pure question of law that a legislation, be it plenary or subordinate, can be challenged on the ground of arbitrariness, I agree with the illuminating exposition of law by Nariman, J. I am also of the strong view that the Constitutional democracy of India cannot conceive of a legislation which is arbitrary.

6. Shariat, having been declared to be Muslim Personal Law by the 1937 Act, we have to necessarily see what Shariat is. This has been beautifully explained by the renowned author, Asaf A.A. Fyzee in his book Outlines of Muhammadan Law, 5th Edition, 2008 at page 10.[48]

   "…What is morally beautiful that must be done; and what is morally ugly must not be done. That is law or Shariat and nothing else can be law. But what is absolutely and indubitably beautiful, and what is absolutely and indubitably ugly? These are the important legal questions; and who can answer them? Certainly not man, say the Muslim legists. We have the Qur'an which is the very word of God. Supplementary to it we have Hadith which are the Traditions of the Prophet- the records of his actions and his sayings- from which we must derive help and inspiration in arriving at legal decisions. If there is nothing either in the Qur'an or in the Hadith to answer the particular question which is before us, we have to follow the dictates of secular reason in accordance with certain definite principles. These principles constitute the basis of sacred law or Shariat as the Muslim doctors understand it. And it is these fundamental juristic notions which we must try to study and analyse before we approach the study of the Islamic civil law as a whole, or even that small part of it which in India is known as Muslim law."

7. There are four sources for Islamic law- (i) Quran (ii) Hadith (iii) Ijma (iv) Qiyas. The learned author has rightly said that the Holy Quran is the "first source of law". According to the learned author, pre-eminence is to be given to the Quran. That means, sources other than the Holy Quran are only to supplement what is given in it and to supply what is not provided for. In other words, there cannot be any Hadith, Ijma or Qiyas against what is expressly stated in the Quran. Islam cannot be anti-Quran.

   According to Justice Bader Durrez Ahmad in Masroor Ahmed v. State (NCT of Delhi) & Another[49]:

48 Tahir Mahmood (ed.), Asaf A.A. Fyzee Outlines of Muhammadan Law, 5th edition 2008.

49 ILR (2007) II Delhi 1329

"14. In essence, the Shariat is a compendium of rules guiding the life of a Muslim from birth to death in all aspects of law, ethics and etiquette. These rules have been crystallized through the process of ijtihad employing the sophisticated jurisprudential techniques. The primary source is the Quran. Yet, in matters not directly covered by the divine book, rules were developed looking to the hadis and upon driving a consensus. The differences arose between the schools because of reliance on different hadis, differences in consensus and differences on qiyas and aql as the case may be." (Emphasis supplied)

8. It is in that background that I make an attempt to see what the Quran states on talaq. There is reference to talaq in three Surasin Sura II while dealing with social life of the community, in Sura IV while dealing with decencies of family life and in Sura LXV while dealing explicitly with talaq.

9. Sura LXV of the Quran deals with talaq. It reads as follows:

"Talaq, or Divorce.

In the name of God, Most Gracious,

Most Merciful.

1. O Prophet! When ye
Do divorce women,
Divorce them at their
Prescribed periods,
And count (accurately)
Their prescribed periods:
And fear God your Lord:
And turn them not out
Of their houses, nor shall
They (themselves) leave,
Except in case they are
Guilty of some open lewdness,
Those are limits
Set by God: and any
Who transgresses the limits
Of God, does verily
Wrong his (own) soul:
Thou knowest not if
Perchance God will
Bring about thereafter

Some new situation.

2. Thus when they fulfill
Their term appointed,
Either take them back
On equitable terms
Or part with them
On equitable terms;
And take for witness
Two persons from among you,
Endued with justice,
And establish the evidence
(As) before God. Such
Is the admonition given
To him who believes
In God and the Last Day.
And for those who fear
God, He (ever) prepares
A way out,

3. And He provides for him
From (sources) he never
Could imagine. And if
Any one puts his trust
In God, sufficient is (God)
For him. For God will
Surely accomplish His purpose :
Verily, for all things
Has God appointed
A due proportion.

4. Such of your women
As have passed the age
Of monthly courses, for them
The prescribed period, if ye
Have any doubts, is

Three months, and for those
Who have no courses
(It is the same):
For those who carry
(Life within their wombs),
Their period is until
They deliver their burdens :
And for those who
Fear God, He will
Make their path easy.

5. That is the Command
Of God, which He
Has sent down to you :
And if any one fears God,
He will remove his ills
From him, and will enlarge
His reward.

6. Let the women live
(In 'iddat) in the same
Style as ye live,
According to your means :
Annoy them not, so as
To restrict them.
And if they carry (life
In their wombs), then
Spend (your substance) on them
Until they deliver
Their burden : and if
They suckle your (offspring),
Give them their recompense :
And take mutual counsel
Together, according to
What is just and reasonable.

And if ye find yourselves
In difficulties, let another
Woman suckle (the child)
On the (father's) behalf.

7. Let the man of means
Spend according to
His means : and the man
Whose resources are restricted,
Let him spend according
To what God has given him.
God puts no burden
On any person beyond
What He has given him.
After a difficulty, God
Will soon grant relief."

Verse 35 in Sura IV of the Quran speaks on arbitration for reconciliation-

"35. If ye fear a breach
Between them twain,
Appoint (two) arbiters,
One from his family,
And the other from hers;
If they wish for peace,
God will cause
Their reconciliation:
For God hath full knowledge,
And is acquainted
With all things."

Sura II contains the following verses pertaining to divorce:

"226.For those who take
An oath for abstention
From their wives,
A waiting for four months
Is ordained;

If then they return,
God is Oft–forgiving,
Most Merciful.
227.But if their intention
Is firm for divorce,
God heareth
And knoweth all things.
228. Divorced women
Shall wait concerning themselves
For three monthly periods.
Nor is it lawful for them
To hide what God
Hath created in their wombs,
If they have faith
In God and the Last Day.
And their husbands
Have the better right
To take them back
In that period, if
They wish for reconciliation.
And women shall have rights
Similar to the rights
Against them, according
To what is equitable;
But men have a degree
(of advantage) over them.
And God is Exalted in Power, Wise."
"229. A divorce is only
Permissible twice: after that,
The parties should either hold
Together on equitable terms,
Or separate with kindness.
It is not lawful for you,

(Men), to take back
Any of your gifts (from your wives),
Except when both parties
Fear that they would be
Unable to keep the limits
Ordained by God.
If ye (judges) do indeed
Fear that they would be
Unable to keep the limits
Ordained by God,
There is no blame on either
Of them if she give
Something for her freedom.
These are the limits
Ordained by God;
So do not transgress them
If any do transgress
The limits ordained by God,
Such persons wrong
(Themselves as well as others).
230. So if a husband
Divorces his wife (irrevocably),
He cannot, after that,
Re-marry her until
After she has married
Another husband and
He has divorced her.
In that case there is
No blame on either of them
If they re-unite, provided
They feel that they
Can keep the limits
Ordained by God.

Such other limits
Ordained by God,
Which He makes plain
To those who understand.
231. When ye divorce
Women, and they fulfill
The term of their ('Iddat),
Either take them back
On equitable terms
Or set them free
On equitable terms;
But do not take them back
To injure them, (or) to take
Undue advantage;
If anyone does that,
He wrongs his own soul.
Do not treat God's Signs
As a jest,
But solemnly rehearse
God's favours on you,
And the fact that He
Sent down to you
The Book
And Wisdom,
For your instruction.
And fear God,
And know that God
Is well acquainted
With all things."[50]

10. These instructive verses do not require any interpretative exercise. They are clear and unambiguous as far as talaq is concerned. The Holy Quran has attributed sanctity and permanence to matrimony. However, in extremely unavoidable situations, talaq is permissible. But an attempt

50 Verses from the Holy Quran as extracted above are taken from "The Holy Quran" translated by Abdullah Yusuf Ali which was agreed to be a fair translation by all parties.

for reconciliation and if it succeeds, then revocation are the Quranic essential steps before talaq attains finality.[51] In triple talaq, this door is closed, hence, triple talaq is against the basic tenets of the Holy Quran and consequently, it violates Shariat.

11. The above view has been endorsed by various High Courts, finally culminating in Shamim Ara by this Court which has since been taken as the law for banning triple talaq. Interestingly, prior to Shamim Ara, Krishna Iyer, J. in Fuzlunbi v. K Khader Vali and Another[52], while in a three judge bench in this Court, made a very poignant observation on the erroneous approach of Batchelor, J. in Sarabai v. Rabiabai[53] on the famous comment "good in law, though bad in theology". To quote:

"20. Before we bid farewell to Fuzlunbi it is necessary to mention that Chief Justice Baharul Islam, in an elaborate judgment replete with quotes from the Holy Quoran, has exposed the error of early English authors and judges who dealt with talaq in Muslim Law as good even if pronounced at whim or in tantrum, and argued against the diehard view of Batchelor, J. that this view "is good in law, though bad in theology". Maybe, when the point directly arises, the question will have to be considered by this Court but enough unto the day the evil thereof and we do not express our opinion on this question as it does not call for a decision in the present case."

12. More than two decades later, Shamim Ara has referred to, as already noted above, the legal perspective across the country on the issue of triple talaq starting with the decision of the Calcutta High Court in Furzund Hossein v. Janu Bibee[54] in 1878 and finally, after discussing two decisions of the Gauhati High Court namely Jiauddin Ahmed v. Anwara Begum[55] and Rukia Khatun v. Abdul Khalique Laskar[56], this Court held as follows-

"13. There is yet another illuminating and weighty judicial opinion available in two decisions of the Gauhati High Court recorded by Baharul Islam, J. (later a Judge of the Supreme Court of India) sitting singly in Jiauddin Ahmed v. Anwara Begum (1981) 1 Gau LR 358 and later speaking for the Division Bench in Rukia Khatun v.Abdul Khalique Laskar (1981) 1 Gau LR 375. In Jiauddin Ahmed case a plea of previous divorce i.e. the husband having divorced the wife on some day much previous to the date of filing of the written statement in the Court was taken and upheld. The question posed before the High Court was whether there has been valid talaq of the wife by the husband under the Muslim law. The learned Judge observed that though marriage under the Muslim law is only a civil contract yet the rights and responsibilities consequent upon it are of such importance to the welfare of humanity, that a high degree of sanctity is attached to it. But inspite of the sacredness of the character of the marriage tie, Islam recognizes the necessity, in exceptional circumstances, of keeping the way open for its dissolution (para 6). Quoting in the judgment several Holy Quranic verses and from commentaries thereon by well-

51 Similar observations were made by the High Court of Gauhati through Baharul Islam, J. in Jiauddin Ahmed v. Anwara Begum(1981) 1 Gau LR 358 wherein he noted that "though marriage under Muslim Law is only a civil contract yet the rights and responsibilities consequent upon it are of such importance to the welfare of humanity, that a high degree of sanctity is attached to it. But in spite of the sacredness of the character of the marriagetie , Islam recognizes the necessity, in exceptional circumstances, of keeping the way open for its dissolution". This view has been noted and approved of in Shamim Ara at paragraph 13.(Emphasis supplied)

52 (1980) 4 SCC 125

53 ILR 30 Bom 537

54 ILR (1878) 4 Cal 588

55 (1981) 1 Gau LR 358

56 (1981) 1 Gau LR 375

recognized scholars of great eminence, the learned Judge expressed disapproval of the statement that "the whimsical and capricious divorce by the husband is good in law, though bad in theology" and observed that such a statement is based on the concept that women were chattel belonging to men, which the Holy Quran does not brook. The correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters - one from the wife's family and the other from the husband's; if the attempts fail, 'talaq' may be effected. (para 13). In Rukia Khatun case, the Division Bench stated that the correct law of talaq as ordained by the Holy Quran, is: (i) that 'talaq' must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, 'talaq' may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay views which, in their opinion, did not lay down the correct law.

14. We are in respectful agreement with the above said observations made by the learned Judges of High Courts…." (Emphasis supplied)

13. There is also a fruitful reference to two judgments of the Kerala High Court - one of Justice Krishna Iyer in A. Yousuf Rawther v. Sowramma[57] and the other of Justice V. Khalid in Mohd. Haneefa v. Pathummal Beevi[58]. No doubt, Sowaramma was not a case on triple talaq, however, the issue has been discussed in the judgment in paragraph 7 which has also been quoted in Shamim Ara.

"..The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions. …It is a popular fallacy that a Muslim male enjoys, under the Quoranic law, unbridled authority to liquidate the marriage. 'The whole Quoran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him, "if they (namely, women) obey you, then do not seek a way against them"'. (Quoran IV:34). The Islamic law gives to the man primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no man can justify a divorce, either in the eye of religion or the 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." ….Commentators on the Quoran have rightly observed - and this tallies with the law now administered in some Muslim countries like Iraq - that the husband must satisfy the court about the reasons for divorce. However, Muslim law, as applied in India, has taken a course contrary to the spirit of what the Prophet or the Holy Quoran laid down and the same misconception vitiates the law dealing with the wife's right to divorce…"

14. Khalid, J. has been more vocal in Mohd. Haneefa:

"5..Should Muslim wives suffer this tyranny for all times? Should their personal law remain so cruel towards these unfortunate wives? Can it not be amended suitably to alleviate their sufferings? My judicial conscience is disturbed at this monstrosity. The question is whether the conscience of the leaders of public opinion of the community will also be disturbed."

57 AIR 1971 Ker 261

58 1972 KLT 512

15. After a detailed discussion on the aforementioned cases, it has been specifically held by this Court in Shamim Ara, at paragraph 15 that "…there are no reasons substantiated in justification of talaq and no plea or proof that any effort at reconciliation preceded the talaq." It has to be particularly noted that this conclusion by the Bench in Shamim Ara is made after "respectful agreement" with Jiauddin Ahmed that "talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters — one from the wife's family and the other from the husband's; if the attempts fail, 'talaq' may be effected." In the light of such specific findings as to how triple talaq is bad in law on account of not following the Quranic principles, it cannot be said that there is no ratio decidendi on triple talaq in Shamim Ara.

16. Shamim Ara has since been understood by various High Courts across the country as the law deprecating triple talaq as it is opposed to the tenets of the Holy Quran. Consequently, triple talaq lacks the approval of Shariat.

17. The High Court of Andhra Pradesh, in Zamrud Begum v. K. Md. Haneef and another[59], is one of the first High Courts to affirm the view adopted in Shamim Ara. The High Court, after referring to Shamim Ara and all the other decisions mentioned therein, held in paragraphs 13 and 17 as follows:

> "13. It is observed by the Supreme Court in the above said decision that talaq may be oral or in writing and it must be for a reasonable cause. It must be preceded by an attempt of reconciliation of husband and wife by two arbitrators one chosen from the family of the wife and other by husband. If their attempts fail then talaq may be effected by pronouncement. The said procedure has not been followed. The Supreme Court has culled out the same from Mulla and the principles of Mahammedan Law.
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> XXXX
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> 17. I am of the considered view that the alleged talaq is not a valid talaq as it is not in accordance with the principles laid down by the Supreme Court. If there is no valid talaq the relationship of the wife with her husband still continues and she cannot be treated as a divorced wife…." (Emphasis supplied)

18. In A. S. Parveen Akthar v. The Union of India[60], the High Court of Madras was posed with the question on the validity and constitutionality of Section 2 of the 1937 Act in so far as it recognises triple talaq as a valid form of divorce. The Court referred to the provisions of the Quran, opinions of various eminent scholars of Islamic Law and previous judicial pronouncements including Shamim Ara and came to the following conclusion:

> "45. Thus, the law with regard to talaq, as declared by the apex Court, is that talaq must be for a reasonable cause and must be preceded by attempt at reconciliation between the husband and the wife by two arbiters one chosen by wife's family and the other from husband's family and it is only if their attempts fail, talaq may be effected.
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> XXXX
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> 48. Having regard to the law now declared by the apex Court in the case of Shamim Ara, 2002 AIR SCW 4162, talaq, in whatever form, must be for a reasonable cause, and must

59 (2003) 3 ALD 220

60 2003-1-L.W. 370

be preceded by attempts for reconciliation by arbiters chosen from the families of each of the spouses, the petitioner's apprehension that notwithstanding absence of cause and no efforts having been made to reconcile the spouses, this form of talaq is valid, is based on a misunderstanding of the law." (Emphasis supplied)

As far as the constitutionality of Section 2 is concerned, the Court refrained from going into the question in view of the decisions of this Court in Shri Krishna Singh v. Mathura Ahir and Others [61] and Ahmedabad Women Action Group (AWAG) and Ors. v. Union of India[62].

19. The High Court of Jammu and Kashmir, in Manzoor Ahmad Khan v.Saja & Ors.[63], has also placed reliance on Shamim Ara. The Court, at paragraph 11, noted that in Shamim Ara, the Apex Court relied upon the passages from judgments of various High Courts "which are eye openers for those who think that a Muslim man can divorce his wife merely at whim or on caprice." The Court finally held that the marriage between the parties did not stand dissolved.

20. In Ummer Farooque v. Naseema[64], Justices R Bhaskaran and K.P. Balachandran of the High Court of Kerala, after due consideration of the prior decisions of the various Courts, in paragraphs 5 and 6 held that:

"5…The general impression as reflected in the decision of a Division Bench of this Court in Pathayi v. Moideen (1968 KLT 763) was that the only condition necessary for a valid exercise of the right of divorce by a husband is that he must be a major and of sound mind at the that time and he can effect divorce whenever he desires and no witnesses are necessary for dissolution of the marriage and the moment when talaq is pronounced, dissolution of marriage is effected; it can be conveyed by the husband to the wife and it need not be even addressed to her and it takes effect the moment it comes to her knowledge etc. But this can no longer be accepted in view of the authoritative pronouncement of the Supreme Court in Shamim Ara v. State of U.P. [2002 (3) KLT 537 (SC)].

6. The only thing to be further considered in this case is whether the divorce alleged to have been effected by the husband by pronouncement of talaq on 23-7-1999 is proved or not. The mere pronouncement of talaq three times even in the presence of the wife is not sufficient to effect a divorce under Mohammadan Law. As held by the Supreme Court in Shamim Ara's case [2002 (3) KLT 537 (SC)], there should be an attempt of mediation by two mediators; one on the side of the husband and the other on the side of the wife and only in case it was a failure that the husband is entitled to pronounce talaq to divorce the wife…" (Emphasis supplied)

21. In Masroor Ahmed, Justice Badar Durrez Ahmed, held as follows:

"32. In these circumstances (the circumstances being – (1) no evidence of pronouncement of talaq; (2) no reasons and justification of talaq; amd (3) no plea or proof that talaq was preceded by efforts towards reconciliation), the Supreme Court held that the marriage was not dissolved and that the liability of the husband to pay maintenance continued. Thus, after Shamim Ara (supra), the position of the law relating to talaq, where it is contested by either spouse, is that, if

61 (1981) 3 SCC 689

62 (1997) 3 SCC 573

63 2010 (4) JKJ 380

64 2005 (4) KLT 565

it has to take effect, first of all the pronouncement of talaq must be proved (it is not sufficient to merely state in court in a written statement or in some other pleading that talaq was given at some earlier point of time), then reasonable cause must be shown as also the attempt at reconciliation must be demonstrated to have taken place…." (Emphasis supplied)

22. As recently as in 2016, Mustaque, J. of the High Court of Kerala in Nazeer @ Oyoor Nazeer v. Shemeema[65], has inter alia referred to Shamim Ara and has disapproved triple talaq.

23. Therefore, I find it extremely difficult to agree with the learned Chief Justice that the practice of triple talaq has to be considered integral to the religious denomination in question and that the same is part of their personal law.

24. To freely profess, practice and propagate religion of one's choice is a Fundamental Right guaranteed under the Indian Constitution. That is subject only to the following- (1) public order, (2) health, (3) morality and (4) other provisions of Part III dealing with Fundamental Rights. Under Article 25 (2) of the Constitution of India, the State is also granted power to make law in two contingencies notwithstanding the freedom granted under Article 25(1). Article 25 (2) states that "nothing in this Article shall affect the operation of any existing law or prevent the State from making any law- (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus." Except to the above extent, the freedom of religion under the Constitution of India is absolute and on this point, I am in full agreement with the learned Chief Justice. However, on the statement that triple talaq is an integral part of the religious practice, I respectfully disagree.

    Merely because a practice has continued for long, that by itself cannot make it valid if it has been expressly declared to be impermissible. The whole purpose of the 1937 Act was to declare Shariat as the rule of decision and to discontinue anti-Shariat practices with respect to subjects enumerated in Section 2 which include talaq. Therefore, in any case, after the introduction of the 1937 Act, no practice against the tenets of Quran is permissible. Hence, there cannot be any Constitutional protection to such a practice and thus, my disagreement with the learned Chief Justice for the constitutional protection given to triple talaq. I also have serious doubts as to whether, even under Article 142, the exercise of a Fundamental Right can be injuncted.

25. When issues of such nature come to the forefront, the discourse often takes the form of pitting religion against other constitutional rights. I believe that a reconciliation between the same is possible, but the process of harmonizing different interests is within the powers of the legislature. Of course, this power has to be exercised within the constitutional parameters without curbing the religious freedom guaranteed under the Constitution of India. However, it is not for the Courts to direct for any legislation.

26. Fortunately, this Court has done its part in Shamim Ara. I expressly endorse and re-iterate the law declared in Shamim Ara. What is held to be bad in the Holy Quran cannot be good in Shariat and, in that sense, what is bad in theology is bad in law as well.

.....J.

(KURIAN JOSEPH)

New Delhi; August 22, 2017.

65 2017 (1) KLT 300

Hon'ble Mr. Justice R.F. Nariman for himself & Hon'ble Mr. Justice U.U. Lalit

Having perused a copy of the learned Chief Justice's judgment, I am in respectful disagreement with the same.

1. This matter has found its way to a Constitution Bench of this Court because of certain newspaper articles which a Division Bench of this Court in Prakash v. Phulavati, (2016) 2 SCC 36, adverted to, and then stated:

> "28. An important issue of gender discrimination which though not directly involved in this appeal, has been raised by some of the learned counsel for the parties which concerns rights of Muslim women. Discussions on gender discrimination led to this issue also. It was pointed out that in spite of guarantee of the Constitution, Muslim women are subjected to discrimination. There is no safeguard against arbitrary divorce and second marriage by her husband during currency of the first marriage, resulting in denial of dignity and security to her. Although the issue was raised before this Court in Ahmedabad Women Action Group (AWAG) v. Union of India [Ahmedabad Women Action Group (AWAG) v. Union of India, (1997) 3 SCC 573], this Court did not go into the merits of the discrimination with the observation that the issue involved State policy to be dealt with by the legislature. [This Court referred to the observations of Sahai, J. in Sarla Mudgal v. Union of India, (1995) 3 SCC 635 : 1995 SCC (Cri) 569 that a climate was required to be built for a uniform civil code. Reference was also made to observations in Madhu Kishwar v. State of Bihar, (1996) 5 SCC 125 to the effect that the Court could at best advise and focus attention to the problem instead of playing an activist role.] It was observed that challenge to the Muslim Women (Protection of Rights on Divorce) Act, 1986 was pending before the Constitution Bench and there was no reason to multiply proceedings on such an issue.
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> 31. It was, thus, submitted that this aspect of the matter may be gone into by separately registering the matter as public interest litigation (PIL). We are of the view that the suggestion needs consideration in view of the earlier decisions of this Court. The issue has also been highlighted in recent articles appearing in the press on this subject. [The Tribune dated 24-9-2015 "Muslim Women's Quest for Equality" by Vandana Shukla and Sunday Express Magazine dated 4-10-2015 "In Her Court" by Dipti Nagpaul D'Souza.]
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> 32. For this purpose, a PIL be separately registered and put up before the appropriate Bench as per orders of Hon'ble the Chief Justice of India." (at pages 53 and 55)

Several writ petitions have thereafter been filed and are before us seeking in different forms the same relief – namely, that a Triple Talaq at one go by a Muslim husband which severs the marital bond is bad in constitutional law.

2. Wide ranging arguments have been made by various counsel appearing for the parties. These have been referred to in great detail in the judgment of the learned Chief Justice. In essence, the petitioners, supported by the Union of India, state that Triple Talaq is an anachronism in today's day and age and, constitutionally speaking, is anathema. Gender discrimination is put at the forefront of the argument, and it is stated that even though Triple Talaq may be sanctioned by the Shariat law as applicable to Sunni Muslims in India, it is violative of Muslim women's fundamental rights to be found, more particularly, in Articles 14, 15(1) and 21 of the Constitution of India.

Opposing this, counsel for the Muslim Personal Board and others who supported them, then relied heavily upon a Bombay High Court judgment, being State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84, for the proposition that personal laws are beyond the pale of the fundamental rights Chapter of the Constitution and hence cannot be struck down by this Court. According to them, in this view of the matter, this Court should fold its hands and send Muslim women and other women's organisations back to the legislature, as according to them, if Triple Talaq is to be removed as a measure of social welfare and reform under Article 25(2), the legislature alone should do so. To this, the counter argument of the other side is that Muslim personal laws are not being attacked as such. What is the subject matter of attack in these matters is a statute, namely, the Muslim Personal Law (Shariat) Application Act, 1937 (hereinafter referred to as the "1937 Act"). According to them, Triple Talaq is specifically sanctioned by statutory law vide Section 2 of the 1937 Act and what is sought for is a declaration that Section 2 of the 1937 Act is constitutionally invalid to the aforesaid extent. To this, the Muslim Personal Board states that Section 2 is not in order to apply the Muslim law of Triple Talaq, but is primarily intended to do away with custom or usage to the contrary, as the non-obstante clause in Section 2 indicates. Therefore, according to them, the Muslim personal law of Triple Talaq operates of its own force and cannot be included in Article 13(1) as "laws in force" as has been held in Narasu Appa (supra).

3. The question, therefore, posed before this Court is finally in a very narrow compass. Triple Talaq alone is the subject matter of challenge – other forms of Talaq are not. The neat question that arises before this Court is, therefore, whether the 1937 Act can be said to recognize and enforce Triple Talaq as a rule of law to be followed by the Courts in India and if not whether Narasu Appa (supra) which states that personal laws are outside Article 13(1) of the Constitution is correct in law.

4. Inasmuch as the Muslims in India are divided into two main sects, namely Sunnis and Shias, and this case pertains only to Sunnis as Shias do not recognize Triple Talaq, it is important to begin at the very beginning.

5. In a most illuminating introduction to Mulla's Principles of Mahomedan Law (16th Ed.) (1968), Justice Hidayatullah, after speaking about Prophet Mahomed, has this to say:

"The Prophet had established himself as the supreme overlord and the supreme preceptor. Arabia was steeped in ignorance and barbarism, superstition and vice. Female infanticide, drinking, lechery and other vices were rampant.

However, the Prophet did not nominate a successor. His death was announced by Abu Bakr and immediate action was taken to hold an election. As it happened, the Chiefs of the tribe of Banu Khazraj were holding a meeting to elect a Chief and the Companions went to the place. This meeting elected Abu Bakr as the successor. The next day Abu Bakr ascended the pulpit and everyone took an oath of allegiance (Bai'at).

This election led to the great schism between the Sunnis and Shias. The Koreish tribe was divided into Ommayads and Hashimites. The Hashimites were named after Hashim the great grand-father of the Prophet. There was bitter enmity between the Ommayads and the Hashimites. The Hashimites favoured the succession of Ali and claimed that he ought to have been chosen because of appointment by the Prophet and propinquity to him. The election in fact took place when the household of the Prophet (including Ali) was engaged in the obsequies. This offended

the Hashimites. It may, however, be said that Ali, regardless of his own claims, immediately swore allegiance to Abu Bakr. Ali was not set up when the second and third elections of Omar and Osman took place, but he never went against these decisions and accepted the new Caliph each time and gave him unstinted support.

Abu Bakr was sixty years old and was Caliph only for two years (d. 634 A.D.). Even when he was Caliph, the power behind him was Omar Ibnul Khattab. It is said that Abu Bakr named Omar as his successor. Even if this be not true, it is obvious that the election was a mere formality. Omar was assassinated after ten years as Caliph (644 A.D.). Osman was elected as the third Caliph. Tradition is that Omar had formed an inner panel of electors (six in number), but this is discountenanced by some leading historians. Later this tradition was used by the Abbasids to form an inner conclave for their elections. This special election used to be accepted by the people at a general, but somewhat formal, election. Osman was Caliph for 12 years and was assassinated (656 A.D.). Ali was at last elected as the fourth Caliph. The election of the first four Caliphs, who are known as Khulfai-i-Rashidin (rightly-guided Caliphs) was real, although it may be said that each time the choice was such as to leave no room for opposition. Ali was Caliph for five years. He was killed in battle in 661 A.D. Ali's son Hasan resigned in favour of Muavia the founder of the Ommayad dynasty. Hasan was, however, murdered. The partisans of Ali persuaded Hussain, the second son of Ali, to revolt against Mauvia's son Yezid, but at Kerbala, Husain died fighting after suffering great privations. The rift between the Sunnis and the Shias (Shiat-i-Ali party of Ali) became very great thereafter."

6. It is in this historical setting that it is necessary to advert to the various sub-sects of the Sunnis. Four major sub-sects are broadly recognized schools of Sunni law. They are the Hanafi school, Maliki school, Shafi'i school and Hanbali school. The overwhelming majority of Sunnis in India follow the Hanafi school of law. Mulla in Principles of Mahomedan Law (20th Ed.), pg. xix to xxi, has this to say about the Hanafi school:

"This is the most famous of the four schools of Hanafi law. This school was founded by Abu Hanifa (699-767 A.D.). The school is also known as "Kufa School". Although taught by the great Imam Jafar-as-Sadik, the founder of the Shia School, Abu Hanifa was, also a pupil of Abu Abdullah ibn-ul- Mubarak and Hamid bin-Sulaiman and this may account for his founding a separate school. This school was favoured by the Abbasid Caliphs and its doctrines spread far and wide. Abu Hanifa earned the appellation "The Great Imam". The school was fortunate in possessing, besides Abu Hanifa, his two more celebrated pupils, Abu Yusuf (who became the Chief Kazi at Baghdad) and Imam Muhammad Ash- Shaybani, a prolific writer, who has left behind a number of books on jurisprudence. The founder of the school himself left very little written work. The home of this school was Iraq but it shares this territory with other schools although there is a fair representation. The Ottoman Turks and the Seljuk Turks were Hanafis. The doctrines of this school spread to Syria, Afghanistan, Turkish Central Asia and India. Other names connected with the Kufa School are Ibn Abi Layla and Safyan Thawri. Books on the doctrines are al- Hidaay of Marghinani (translated by Hamilton), Radd-al-Mukhtar and Durr-ul-Mukhtar of Ibn Abidin and al-Mukhtasar of Kuduri. The Fatawa-i-Alamgiri collected in Aurangzeb's time contain the doctrines of this school with other material."

7. Needless to add, the Hanafi school has supported the practice of Triple Talaq amongst the Sunni Muslims in India for many centuries.

8. Marriage in Islam is a contract, and like other contracts, may under certain circumstances, be terminated. There is something astonishingly modern about this – no public declaration is a condition precedent to the validity of a Muslim marriage nor is any religious ceremony deemed absolutely essential, though they are usually carried out. Apparently, before the time of Prophet Mahomed, the pagan Arab was absolutely free to repudiate his wife on a mere whim, but after the advent of Islam, divorce was permitted to a man if his wife by her indocility or bad character renders marital life impossible. In the absence of good reason, no man can justify a divorce for he then draws upon himself the curse of God. Indeed, Prophet Mahomed had declared divorce to be the most disliked of lawful things in the sight of God. The reason for this is not far to seek. Divorce breaks the marital tie which is fundamental to family life in Islam. Not only does it disrupt the marital tie between man and woman, but it has severe psychological and other repercussions on the children from such marriage.

9. This then leads us to the forms of divorce recognized in Islamic Law. Mulla (supra), at pages 393-395, puts it thus:

"S.311. Different modes of talak. – A talak may be effected in any of the following ways:-

(1) Talak ahsan. – This consists of a single pronouncement of divorce made during a tuhr (period between menstruations) followed by abstinence from sexual intercourse for the period of iddat.

When the marriage has not been consummated, a talak in the ahsan form may be pronounced even if the wife is in her menstruation.

Where the wife has passed the age of periods of menstruation the requirement of a declaration during a tuhr is inapplicable; furthermore, this requirement only applies to a oral divorce and not a divorce in writing.

Talak Ahsan is based on the following verses of Holy Quran: "and the divorced woman should keep themselves in waiting for three courses." (II:228).

"And those of your woman who despair of menstruation, if you have a doubt, their prescribed time is three months, and of those too, who have not had their courses." (LXV: 4).

(2) Talak hasan- This consists of three pronouncements made during successive tuhrs, no intercourse taking place during any of the three tuhrs.

The first pronouncement should be made during a tuhr, the second during the next tuhr, and the third during the succeeding tuhr.

Talak Hasan is based on the following Quranic injunctions:

"Divorce may be pronounced twice, then keep them in good fellowship or let (them) go kindness." (II: 229).

"So if he (the husband) divorces her (third time) she shall not be lawful to him afterward until she marries another person." (II: 230).

(3) Talak-ul-bidaat or talak-i-badai.- This consists of –

(i) Three pronouncements made during a single tuhr either in one sentence, e.g., "I divorce thee thrice," - or in separate sentences e.g., "I divorce thee, I divorce thee, I divorce thee", or

(ii) a single pronouncement made during a tuhr clearly indicating an intention irrevocably to dissolve the marriage, e.g., "I divorce thee irrevocably."

Talak-us-sunnat and talak-ul-biddat

The Hanafis recognized two kinds of talak, namely, (1) talak-us-sunnat, that is, talak according to the rules laid down in the sunnat (traditions) of the Prophet; and (2) talak-ul-biddat, that is, new or irregular talak. Talak-ul-biddat was introduced by the Omeyyade monarchs in the second century of the Mahomedan era. Talak-ulsunnat is of two kinds, namely, (1) ahsan, that is, most proper, and (2) hasan, that is, proper. The talak-ul-biddat or heretical divorce is good in law, though bad in theology and it is the most common and prevalent mode of divorce in this country, including Oudh. In the case of talak ahsan and talak hasan, the husband has an opportunity of reconsidering his decision, for the talak in both these cases does not become absolute until a certain period has elapsed (S.312), and the husband has the option to revoke it before then. But the talak-ul-biddat becomes irrevocable immediately it is pronounced (S.312). The essential feature of a talak-ul-biddat is its irrevocability. One of tests of irrevocability is the repetition three times of the formula of divorce within one tuhr. But the triple repetition is not a necessary condition of talak-ul-biddat, and the intention to render a talak irrevocable may be expressed even by a single declaration. Thus if a man says "I have divorced you by a talak-ul-bain (irrevocable divorce)", the talak is talak-ulbiddat or talak-i-badai and it will take effect immediately it is pronounced, though it may be pronounced but once. Here the use of the expression "bain" (irrevocable) manifests of itself the intention to effect an irrevocable divorce."

[Emphasis Supplied]

10. "..."

11. It is at this stage that the 1937 Act needs consideration. The Statement of Objects and Reasons of this Act are as follows:

"For several years past it has been the cherished desire of the Muslims of British India that Customary Law should in no case take the place of Muslim Personal Law. The matter has been repeatedly agitated in the press as well as on the platform. The Jamiat-ul-Ulema-i-Hind, the greatest Moslem religious body has supported the demand and invited the attention of all concerned to the urgent necessity of introducing a measure to this effect. Customary Law is a misnomer in as much as it has not any sound basis to stand upon and is very much liable to frequent changes and cannot be expected to attain at any time in the future that certainty and definiteness which must be the characteristic of all laws. The status of Muslim women under the so-called Customary Law is simply disgraceful. All the Muslim Women Organisations have therefore condemned the Customary Law as it adversely affects their rights. They demand that the Muslim Personal Law (Shariat) should be made applicable to them. The introduction of Muslim Personal Law will automatically raise them to the position to which they are naurally entitled.

In addition to this present measure, if enacted, would have very salutary effect on society because it would ensure certainty and definiteness in the mutual rights and obligations of the public. Muslim Personal Law (Shariat) exists in the form of a veritable code and is too well known to admit of any doubt or to entail any great labour in the shape of research, which is the chief feature of Customary Law." [Emphasis Supplied]

12. It is a short Act consisting of 6 Sections. We are directly concerned in these cases with Section 2. Section 2 of the 1937 Act states:

"2. Application of Personal law to Muslims. - Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal properly inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

13. A word as to the meaning of the expression "Shariat". A.A.A. Fyzee (supra), at pages 9-11, describes "Shariat" as follows:

"Coming to law proper, it is necessary to remember that there are two different conceptions of law. Law may be considered to be of divine origin, as is the case with the Hindu law and the Islamic law, or it may be conceived as man-made. The latter conception is the guiding principle of all modern legislation; it is, as Ostrorog has pointed out, the Greek, Roman, Celtic or Germanic notion of law. We may be compelled to act in accordance with certain principles because God desires us to do so, or in the alternative because the King or the Assembly of wise men or the leader of the community or social custom demand it of us, for the good of the people in general. In the case of Hindu law, it is based first on the Vedas or Sruti (that which is heard); secondly on the Smriti (that which is remembered by the sages or rishis).

Although the effect of custom is undoubtedly great yet dharma, as defined by Hindu lawyers, implies a course of conduct which is approved by God.

Now, what is the Islamic notion of law? In the words of Justice Mahmood, 'It is to be remembered that Hindu and Muhammadan law are so intimately connected with religion that they cannot readily be dissevered from it'. There is in Islam a doctrine of 'certitude' (ilm al-yaqin) in the matter of Good and Evil. We in our weakness cannot understand what Good and Evil are unless we are guided in the matter by an inspired Prophet. Good and Evil – husn (beauty) and qubh (ugliness) – are to be taken in the ethical acceptation of the terms. What is morally beautiful that must be done; and what is morally ugly must not be done. That is law or Shariat and nothing else can be law. But what is absolutely and indubitably beautiful, and what is absolutely and indubitably ugly? These are the important legal questions; and who can answer them? Certainly not man, say the Muslim legists. We have the Qur'an which is the very word of God. Supplementary to it we have Hadith which are Traditions of the Prophet – the records of his actions and his sayings – from which we must derive help and inspiration in arriving at legal decisions. If there is nothing either in the Qur'an or in the Hadith to answer the particular question which is before us, we

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have to follow the dictates of secular reason in accordance with certain definite principles. These principles constitute the basis of sacred law or Shariat as the Muslim doctors understand it. And it is these fundamental juristic notions which we must try to study and analyse before we approach the study of the Islamic civil law as a whole, or even that small part of it which in India is known as Muslim law. Modern jurists emphasize the importance of law for understanding the character and ethos of a people. Law, says a modern jurist, 'streams from the soul of a people like national poetry, it is as holy as the national religion, it grows and spreads like language; religious, ethical, and poetical elements all contribute to its vital force'; it is 'the distilled essence of the civilization of a people'; it reflects the people's soul more clearly than any other organism. This is true of Islam more than of any other faith.

The Shari'at is the central core of Islam; no understanding of its civilization, its social history or its political system, is possible without a knowledge and appreciation of its legal system.

Shariat (lit., the road to the watering place, the path to be followed) as a technical term means the Canon law of Islam, the totality of Allah's commandments. Each one of such commandments is called hukm (pl. ahkam). The law of Allah and its inner meaning is not easy to grasp; and Shariat embraces all human actions. For this reason it is not 'law' in the modern sense; it contains an infallible guide to ethics. It is fundamentally a Doctrine of Duties, a code of obligations. Legal considerations and individual rights have a secondary place in it; above all the tendency towards a religious evaluation of all the affairs of life is supreme.

According to the Shariat religious injunctions are of five kinds, al-ahkam alkhamsah. Those strictly enjoined are farz, and those strictly forbidden are haram. Between them we have two middle categories, namely, things which you are advised to do (mandub), and things which you are advised to refrain from (makruh) and finally there are things about which religion is indifferent (ja'iz). The daily prayers, five in number, are farz; wine is haram; the addition prayers like those on the Eid are mandub; certain kinds of fish are makruh; and there are thousands of ja'iz things such as travelling by air. Thus the Shariat is totalitarian; all human activity is embraced in its sovereign domain. This fivefold division must be carefully noted; for unless this is done it is impossible to understand the distinction between that which is only morally enjoined and that which is legally enforced. Obviously, moral obligation is quite a different thing from legal necessity and if in law these distinctions are not kept in mind error and confusion are the inevitable result."

14. It can be seen that the 1937 Act is a preconstitutional legislative measure which would fall directly within Article 13(1) of the Constitution of India, which reads as under:

"Article 13 - Laws inconsistent with or in derogation of the fundamental rights -

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this part, shall, to the extent of such inconsistency, be void.

(2) xxx xxx xxx

(3) In this article, unless the context otherwise requires,-

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas."

15. However, learned counsel for the Muslim Personal Board as well as other counsel supporting their stand have argued that, read in light of the Objects and Reasons, the 1937 Act was not meant to enforce Muslim personal law, which was enforceable by itself through the Courts in India. The 1937 Act was only meant, as the non-obstante clause in Section 2 indicates, to do away with custom or usage which is contrary to Muslim personal law.

16. We are afraid that such a constricted reading of the statute would be impermissible in law. True, the Objects and Reasons of a statute throw light on the background in which the statute was enacted, but it is difficult to read the non-obstante clause of Section 2 as governing the enacting part of the Section, or otherwise it will become a case of the tail wagging the dog. A similar attempt was made many years ago and rejected in Aswini Kumar Ghosh v. Arabinda Bose, 1953 SCR 1. This Court was concerned with Section 2 of the Supreme Court Advocates (Practice in High Courts) Act, 1951. Section 2 of the said Act read as follows:

"Notwithstanding anything contained in the Indian Bar Councils Act, 1926, or in any other law regulating the conditions subject to which a person not entered in the roll of Advocates of a High Court may, be permitted to practice in that High Court every Advocate of the Supreme Court shall be entitled as of right to practice in any High Court whether or not he is an Advocate of that High Court:

Provided that nothing in this section shall be deemed to entitle any person, merely by reason of his being an Advocate of the Supreme Court, to practice in any High Court of which he was at any time a judge, if he had given an undertaking not to practice therein after ceasing to hold office as such judge."

17. "..."

18. It is, therefore, clear that all forms of Talaq recognized and enforced by Muslim personal law are recognized and enforced by the 1937 Act. This would necessarily include Triple Talaq when it comes to the Muslim personal law applicable to Sunnis in India. Therefore, it is very difficult to accept the argument on behalf of the Muslim Personal Board that Section 2 does not recognize or enforce Triple Talaq. It clearly and obviously does both, because the Section makes Triple Talaq "the rule of decision in cases where the parties are Muslims".

19. As we have concluded that the 1937 Act is a law made by the legislature before the Constitution came into force, it would fall squarely within the expression "laws in force" in Article 13(3)(b) and would be hit by Article 13(1) if found to be inconsistent with the provisions of Part III of the Constitution, to the extent of such inconsistency.

20-23. "..."

24. "Religion" has been given the widest possible meaning by this Court in Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, 1954 SCR 1005 at 1023-1024. In this country, therefore, atheism would also form part of "religion". But one important caveat has been entered by this Court, namely, that only what is an essential religious practice is protected under Article 25. A few decisions have laid down what constitutes

an essential religious practice. Thus, in Javed v. State of Haryana, 2003 (8) SCC 369, this Court stated as under:

"60. Looked at from any angle, the challenge to the constitutional validity of Section 175(1)(q) and Section 177(1) must fail. The right to contest an election for any office in Panchayat is neither fundamental nor a common law right. It is the creature of a statute and is obviously subject to qualifications and disqualifications enacted by legislation. It may be permissible for Muslims to enter into four marriages with four women and for anyone whether a Muslim or belonging to any other community or religion to procreate as many children as he likes but no religion in India dictates or mandates as an obligation to enter into bigamy or polygamy or to have children more than one. What is permitted or not prohibited by a religion does not become a religious practice or a positive tenet of a religion. A practice does not acquire the sanction of religion simply because it is permitted. Assuming the practice of having more wives than one or procreating more children than one is a practice followed by any community or group of people, the same can be regulated or prohibited by legislation in the interest of public order, morality and health or by any law providing for social welfare and reform which the impugned legislation clearly does." (at page 394)

And in Commissioner of Police v. Acharya Jagdishwarananda Avadhuta, 2004 (12) SCC 770, it was stated as under:

"9. The protection guaranteed under Articles 25 and 26 of the Constitution is not confined to matters of doctrine or belief but extends to acts done in pursuance of religion and, therefore, contains a guarantee for rituals, observances, ceremonies and modes of worship which are essential or integral part of religion.

What constitutes an integral or essential part of religion has to be determined with reference to its doctrines, practices, tenets, historical background, etc. of the given religion. (See generally the Constitution Bench decisions in Commr., H.R.E. v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt [AIR 1954 SC 282 : 1954 SCR 1005], Sardar Syedna Taher Saifuddin Saheb v. State of Bombay [AIR 1962 SC 853 : 1962 Supp (2) SCR 496] and Seshammal v. State of T.N. [(1972) 2 SCC 11 : AIR 1972 SC 1586] regarding those aspects that are to be looked into so as to determine whether a part or practice is essential or not.) What is meant by "an essential part or practices of a religion" is now the matter for elucidation. Essential part of a religion means the core beliefs upon which a religion is founded. Essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices that the superstructure of a religion is built, without which a religion will be no religion. Test to determine whether a part or practice is essential to a religion is to find out whether the nature of the religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part. There cannot be additions or subtractions to such part because it is the very essence of that religion and alterations will change its fundamental character. It is such permanent essential parts which are protected by the Constitution. Nobody can say that an essential part or practice of one's religion has changed from a particular date or by an event. Such alterable parts or practices are definitely not the "core" of religion whereupon the belief is based and religion is founded upon. They could only be treated as mere embellishments to the non-essential (sic essential) part or practices." (at pages 782-783)

25. Applying the aforesaid tests, it is clear that Triple Talaq is only a form of Talaq which is permissible in law, but at the same time, stated to be sinful by the very Hanafi school which tolerates it.

According to Javed (supra), therefore, this would not form part of any essential religious practice. Applying the test stated in Acharya Jagdishwarananda (supra), it is equally clear that the fundamental nature of the Islamic religion, as seen through an Indian Sunni Muslim's eyes, will not change without this practice.

Indeed, Islam divides all human action into five kinds, as has been stated by Hidayatullah, J. in his introduction to Mulla (supra). There it is stated:

"E. Degrees of obedience: Islam divides all actions into five kinds which figure differently in the sight of God and in respect of which His Commands are different. This plays an important part in the lives of Muslims.

(i) First degree: Fard. Whatever is commanded in the Koran, Hadis or ijmaa must be obeyed. Wajib. Perhaps a little less compulsory than Fard but only slightly less so.

(ii) Second degree: Masnun, Mandub and Mustahab: These are recommended actions.

(iii) Third degree: Jaiz or Mubah: These are permissible actions as to which religion is indifferent.

(iv) Fourth degree: Makruh: That which is reprobated as unworthy.

(v) Fifth degree: Haram: That which is forbidden."

Obviously, Triple Talaq does not fall within the first degree, since even assuming that it forms part of the Koran, Hadis or Ijmaa, it is not something "commanded". Equally Talaq itself is not a recommended action and, therefore, Triple Talaq will not fall within the second degree. Triple Talaq at best falls within the third degree, but probably falls more squarely within the fourth degree. It will be remembered that under the third degree, Triple Talaq is a permissible action as to which religion is indifferent. Within the fourth degree, it is reprobated as unworthy. We have already seen that though permissible in Hanafi jurisprudence, yet, that very jurisprudence castigates Triple Talaq as being sinful. It is clear, therefore, that Triple Talaq forms no part of Article 25(1). This being the case, the submission on behalf of the Muslim Personal Board that the ball must be bounced back to the legislature does not at all arise in that Article 25(2)(b) would only apply if a particular religious practice is first covered under Article 25(1) of the Constitution.

26. And this brings us to the question as to when petitions have been filed under Article 32 of the Constitution of India, is it permissible for us to state that we will not decide an alleged breach of a fundamental right, but will send the matter back to the legislature to remedy such a wrong.

27-40. "..."

41. That the arbitrariness doctrine contained in Article 14 would apply to negate legislation, subordinate legislation and executive action is clear from a celebrated passage in the case of Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722 (at pages 740-741):

"16... The true scope and ambit of Article 14 has been the subject-matter of numerous decisions and it is not necessary to make any detailed reference to them. It is sufficient to state that the content and reach of Article 14 must not be confused with the doctrine of classification.

Unfortunately, in the early stages of the evolution of our constitutional law, Article 14 came to be identified with the doctrine of classification because the view taken was that that article forbids discrimination and there would be no discrimination where the classification making the differentia fulfils two conditions, namely, (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that that differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action. It was for the first time in E.P. Royappa v. State of Tamil Nadu [(1974) 4 SCC 3, 38: 1974 SCC (L&S) 165, 200: (1974) 2 SCR 348] that this Court laid bare a new dimension of Article 14 and pointed out that that article has highly activist magnitude and it embodies a guarantee against arbitrariness. This Court speaking through one of us (Bhagwati, J.) said: [SCC p. 38: SCC (L&S) p. 200, para 85] "The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose, J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its allembracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment."

This vital and dynamic aspect which was till then lying latent and submerged in the few simple but pregnant words of Article 14 was explored and brought to light in Royappa case [(1975) 1 SCC 485: 1975 SCC (L&S) 99: (1975) 3 SCR 616] and it was reaffirmed and elaborated by this Court in Maneka Gandhi v. Union of India [(1978) 1 SCC 248] where this Court again speaking through one of us (Bhagwati, J.) observed: (SCC pp. 283-84, para 7) "Now the question immediately arises as to what is the requirement of Article 14: What is the content and reach of the great equalising principle enunciated in this Article?

There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits.... Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence."

This was again reiterated by this Court in International Airport Authority case [(1979) 3 SCC 489] at p. 1042 (SCC p. 511) of the Report. It must therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the courts is

not paraphrase of Article 14 nor is it the objective and end of that article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an 'authority' under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution." [Emphasis Supplied]

42. In this view of the law, a three Judge Bench of this Court in K.R. Lakshmanan (Dr.) v. State of T.N., (1996) 2 SCC 226, struck down a 1986 Tamil Nadu Act on the ground that it was arbitrary and, therefore, violative of Article 14. Two separate arguments were addressed under Article 14. One was that the Act in question was discriminatory and, therefore, violative of Article 14. The other was that in any case the Act was arbitrary and for that reason would also violate a separate facet of Article 14. This is clear from paragraph 45 of the said judgment. The judgment went on to accept both these arguments. In so far as the discrimination aspect is concerned, this Court struck down the 1986 Act on the ground that it was discriminatory in paragraphs 46 and 47.

Paragraphs 48 to 50 are important, in that this Court struck down the 1986 Act for being arbitrary, separately, as follows (at pages 256-257):

"48. We see considerable force in the contention of Mr. Parasaran that the acquisition and transfer of the undertaking of the Club is arbitrary. The two Acts were amended by the 1949 Act and the definition of 'gaming' was amended. The object of the amendment was to include horse-racing in the definition of 'gaming'. The provisions of the 1949 Act were, however, not enforced till the 1974 Act was enacted and enforced with effect from 31-3-1975. The 1974 Act was enacted with a view to provide for the abolition of wagering or betting on horseraces in the State of Tamil Nadu. It is thus obvious that the consistent policy of the State Government, as projected through various legislations from 1949 onwards, has been to declare horse-racing as gambling and as such prohibited under the two Acts. The operation of the 1974 Act was stayed by this Court and as a consequence the horse-races are continuing under the orders of this Court. The policy of the State Government as projected in all the enactments on the subject prior to 1986 shows that the State Government considered horse-racing as gambling and as such prohibited under the law. The 1986 Act on the other hand declares horse-racing as a public purpose and in the interest of the general public. There is apparent contradiction in the two stands. We do not agree with the contention of Mr. Parasaran that the 1986 Act is a colourable piece of legislation, but at the same time we are of the view that no public purpose is being served by acquisition and transfer of the undertaking of the Club by the Government. We fail to understand how the State Government can acquire and take over the functioning of the race-club when it has already enacted the 1974 Act with the avowed object of declaring horse-racing as gambling?

Having enacted a law to abolish betting on horse-racing and stoutly defending the same before this Court in the name of public good and public morality, it is not open to the State Government to acquire the undertaking of horse-racing again in the name of public good and public purpose. It is ex facie irrational to invoke "public good and public purpose" for declaring horseracing as gambling and as such prohibited under law, and at the same time speak of "public purpose and

public good" for acquiring the race-club and conducting the horse-racing by the Government itself. Arbitrariness is writ large on the face of the provisions of the 1986 Act.

49. We, therefore, hold that the provisions of 1986 Act are discriminatory and arbitrary and as such violate and infract the right to equality enshrined under Article 14 of the Constitution.

50. Since we have struck down the 1986 Act on the ground that it violates Article 14 of the Constitution, it is not necessary for us to go into the question of its validity on the ground of Article 19 of the Constitution." [Emphasis Supplied]

43. Close upon the heels of this judgment, a discordant note was struck in State of A.P. v. McDowell & Co., (1996) 3 SCC 709. Another three Judge Bench, in repelling an argument based on the arbitrariness facet of Article 14, held:

"43. Shri Rohinton Nariman submitted that inasmuch as a large number of persons falling within the exempted categories are allowed to consume intoxicating liquors in the State of Andhra Pradesh, the total prohibition of manufacture and production of these liquors is 'arbitrary' and the amending Act is liable to be struck down on this ground alone. Support for this proposition is sought from a judgment of this Court in State of T.N. v. Ananthi Ammal [(1995) 1 SCC 519]. Before, however, we refer to the holding in the said decision, it would be appropriate to remind ourselves of certain basic propositions in this behalf. In the United Kingdom, Parliament is supreme. There are no limitations upon the power of Parliament. No court in the United Kingdom can strike down an Act made by Parliament on any ground. As against this, the United States of America has a Federal Constitution where the power of the Congress and the State Legislatures to make laws is limited in two ways, viz., the division of legislative powers between the States and the Federal Government and the fundamental rights (Bill of Rights) incorporated in the Constitution. In India, the position is similar to the United States of America. The power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground. We do not wish to enter into a discussion of the concepts of procedural unreasonableness and substantive unreasonableness — concepts inspired by the decisions of United States Supreme Court. Even in U.S.A., these concepts and in particular the concept of substantive due process have proved to be of unending controversy, the latest thinking tending towards a severe curtailment of this ground (substantive due process). The main criticism against the ground of substantive due process being that it seeks to set up the courts as arbiters of the wisdom of the legislature in enacting the particular piece of legislation. It is enough for us to say that by whatever name it is characterised, the ground of invalidation must fall within the four corners of the two grounds mentioned above. In other words, say, if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the clauses (2) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to

know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom. In this connection, it should be remembered that even in the case of administrative action, the scope of judicial review is limited to three grounds, viz., (i) unreasonableness, which can more appropriately be called irrationality, (ii) illegality and (iii) procedural impropriety (see Council of Civil Service Unions v. Minister for Civil Service [1985 AC 374: (1984) 3 All ER 935: (1984) 3 WLR 1174] which decision has been accepted by this Court as well). The applicability of doctrine of proportionality even in administrative law sphere is yet a debatable issue. (See the opinions of Lords Lowry and Ackner in R. v. Secy. of State for Home Deptt., ex p Brind [1991 AC 696: (1991) 1 All ER 720] AC at 766-67 and 762.) It would be rather odd if an enactment were to be struck down by applying the said principle when its applicability even in administrative law sphere is not fully and finally settled. It is one thing to say that a restriction imposed upon a fundamental right can be struck down if it is disproportionate, excessive or unreasonable and quite another thing to say that the court can strike down enactment if it thinks it unreasonable, unnecessary or unwarranted."

(at pages 737-739)

44. This judgment failed to notice at least two binding precedents, first, the judgment of a Constitution Bench in Ajay Hasia (supra) and second, the judgment of a coordinate three judge bench in Lakshmanan (supra). Apart from this, the reasoning contained as to why arbitrariness cannot be used to strike down legislation as opposed to both executive action and subordinate legislation was as follows:

(1) According to the Bench in McDowell (supra), substantive due process is not something accepted by either the American courts or our courts and, therefore, this being a reiteration of substantive due process being read into Article 14 cannot be applied. A Constitution Bench in Mohd. Arif v. Supreme Court of India, (2014) 9 SCC 737, has held, following the celebrated Maneka Gandhi (supra), as follows:

"27. The stage was now set for the judgment in Maneka Gandhi [Maneka Gandhi v. Union of India, (1978) 2 SCR 621: (1978) 1 SCC 248]. Several judgments were delivered, and the upshot of all of them was that Article 21 was to be read along with other fundamental rights, and so read not only has the procedure established by law to be just, fair and reasonable, but also the law itself has to be reasonable as Articles 14 and 19 have now to be read into Article 21. [See at SCR pp. 646-48: SCC pp. 393-95, paras 198-204 per Beg, C.J., at SCR pp. 669, 671-74 & 687: SCC pp. 279-84 & 296-97, paras 5-7 & 18 per Bhagwati, J. and at SCR pp. 720-23 : SCC pp. 335-39, paras 74-85 per Krishna Iyer, J.]. Krishna Iyer, J. set out the new doctrine with remarkable clarity thus: (SCR p. 723: SCC pp. 338-39, para 85)

"85. To sum up, 'procedure' in Article 21 means fair, not formal procedure. 'Law' is reasonable law, not any enacted piece. As Article 22 specifically spells out the procedural safeguards for preventive and punitive detention, a law providing for such detentions should conform to Article 22. It has been rightly pointed out that for other rights forming part of personal liberty, the procedural safeguards enshrined in Article 21 are available. Otherwise, as the procedural safeguards contained in Article 22 will be available only in cases of preventive and punitive detention, the right to life, more fundamental than any other forming part of personal liberty and paramount to the happiness, dignity and

worth of the individual, will not be entitled to any procedural safeguard save such as a legislature's mood chooses."

28. Close on the heels of Maneka Gandhi case [Maneka Gandhi v. Union of India, (1978) 2 SCR 621: (1978) 1 SCC 248] came Mithu v. State of Punjab [(1983) 2 SCC 277: 1983 SCC (Cri) 405], in which case the Court noted as follows: (SCC pp. 283-84, para 6)

"6. … In Sunil Batra v. Delhi Admn. [(1978) 4 SCC 494: 1979 SCC (Cri) 155], while dealing with the question as to whether a person awaiting death sentence can be kept in solitary confinement, Krishna Iyer J. said that though our Constitution did not have a "due process" clause as in the American Constitution; the same consequence ensued after the decisions in Bank Nationalisation case [Rustom Cavasjee Cooper (Banks Nationalisation) v. Union of India, (1970) 1 SCC 248] and Maneka Gandhi case [Maneka Gandhi v. Union of India, (1978) 2 SCR 621: (1978) 1 SCC 248] ….

In Bachan Singh [Bachan Singh v. State of Punjab, (1980) 2 SCC 684: 1980 SCC (Cri) 580] which upheld the constitutional validity of the death penalty, Sarkaria J., speaking for the majority, said that if Article 21 is understood in accordance with the interpretation put upon it in Maneka Gandhi [Maneka Gandhi v. Union of India, (1978) 2 SCR 621 : (1978) 1 SCC 248], it will read to say that : (SCC p. 730, para 136)

'136. "No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law."

The wheel has turned full circle. Substantive due process is now to be applied to the fundamental right to life and liberty." (at pages 755-756)

Clearly, therefore, the three Judge Bench has not noticed Maneka Gandhi (supra) cited in Mohd. Arif (supra) to show that the wheel has turned full circle and substantive due process is part of Article 21 as it is to be read with Articles 14 and 19.

Mathew, J., while delivering the first Tej Bahadur Sapru Memorial Lecture entitled "Democracy and Judicial Review", has pointed out:

"Still another point and I am done. The constitutional makers have formally refused to incorporate the "due process clause" in our Constitution on the basis, it seems, of the advice tendered by Justice Frankfurter to Shri B.N. Rau thinking that it will make the Court a third Chamber and widen the area of Judicial review. But unwittingly, I should think, they have imported the most vital and active element of the concept by their theory of review of 'reasonable restrictions' which might be imposed by law on many of the fundamental rights. Taken in its modern expanded sense, the American "due process clause" stands as a high level guarantee of 'reasonableness' in relation between man and state, an injunction against arbitrariness or oppressiveness. I have had occasion to consider this question in Kesavananda Bharati's case. I said:

"When a court adjudges that a legislation is bad on the ground that it is an unreasonable restriction, it is drawing the elusive ingredients for its conclusion from several sources…If you examine the cases relating to the imposition of reasonable restrictions by a law, it will be found that all of them adopt a standard which the American Supreme Court has adopted in adjudging reasonableness of a legislation under the due process clause."

In fact, Mithu v. State of Punjab, (1983) 2 SCC 277, followed a Constitution Bench judgment in Sunil Batra v. Delhi Administration & Ors., (1978) 4 SCC 494. In that case, Section 30(2) of the Prisons Act was challenged as being unconstitutional, because every prisoner under sentence of death shall be confined in a cell apart from all other prisoners, that is to say he will be placed under solitary confinement. The Constitution Bench read down Section 30(2) to refer only to a person who is sentenced to death finally, which would include petitions for mercy to the Governor and/or to the President which have not yet been disposed of. In so holding, Desai, J. speaking for four learned Judges, held (at pages 574-575):

"228. The challenge under Article 21 must fail on our interpretation of sub-section (2) of Section 30. Personal liberty of the person who is incarcerated is to a great extent curtailed by punitive detention. It is even curtailed in preventive detention. The liberty to move, mix, mingle, talk, share company with co-prisoners, if substantially curtailed, would be violative of Article 21 unless the curtailment has the backing of law. Sub-section (2) of Section 30 establishes the procedure by which it can be curtailed but it must be read subject to our interpretation. The word "law" in the expression "procedure established by law" in Article 21 has been interpreted to mean in Maneka Gandhi's case (supra) that the law must be right, just and fair, and not arbitrary, fanciful or oppressive. Otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied. If it is arbitrary it would be violative of Article 14. Once Section 30(2) is read down in the manner in which we have done, its obnoxious element is erased and it cannot be said that it is arbitrary or that there is deprivation of personal liberty without the authority of law." [Emphasis Supplied]

In a long and illuminating concurring judgment, Krishna Iyer, J., added (at page 518):

"52. True, our Constitution has no 'due process' clause or the VIII Amendment; but, in this branch of law, after R.C. Cooper v. Union of India, (1970) 1 SCC 248 and Maneka Gandhi v. Union of India, (1978) 1 SCC 248, the consequence is the same. For what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counter-productive, is unarguably unreasonable and arbitrary and is shot down by Articles 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21." [Emphasis Supplied]

Coming to Mithu (supra), a Constitution Bench of this Court struck down Section 303 of the Indian Penal Code, by which a mandatory sentence of death was imposed on life convicts who commit murder in jail.

The argument made by the learned counsel on behalf of the petitioner was set out thus:

"5. But before we proceed to point out the infirmities from which Section 303 suffers, we must indicate the nature of the argument which has been advanced on behalf of the petitioners in order to assail the validity of that section. The sum and substance of the argument is that the provision contained in Section 303 is wholly unreasonable and arbitrary and thereby, it violates Article 21 of the Constitution which affords the guarantee that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law. Since the procedure by which Section 303 authorises the deprivation of life is unfair and unjust, the Section is unconstitutional. Having examined this argument with care and concern, we are of the opinion that it must be accepted and Section 303 of the Penal Code struck down."

(at page 283)

After quoting from Sunil Batra (supra), the question before the Court was set out thus:

"6……The question which then arises before us is whether the sentence of death, prescribed by Section 303 of the Penal Code for the offence of murder committed by a person who is under a sentence of life imprisonment, is arbitrary and oppressive so as to be violative of the fundamental right conferred by Article 21." (at page 285)

After setting out the question thus, the Court further stated:

"9…...Is a law which provides for the sentence of death for the offence of murder, without affording to the accused an opportunity to show cause why that sentence should not be imposed, just and fair? Secondly, is such a law just and fair if, in the very nature of things, it does not require the court to state the reasons why the supreme penalty of law is called for? Is it not arbitrary to provide that whatever may be the circumstances in which the offence of murder was committed, the sentence of death shall be imposed upon the accused?" (at page 287)

The question was then answered in the following manner:

"18. It is because the death sentence has been made mandatory by Section 303 in regard to a particular class of persons that, as a necessary consequence, they are deprived of the opportunity under Section 235(2) of the Criminal Procedure Code to show cause why they should not be sentenced to death and the court is relieved from its obligation under Section 354(3) of that Code to state the special reasons for imposing the sentence of death. The deprivation of these rights and safeguards which is bound to result in injustice is harsh, arbitrary and unjust."

19… To prescribe a mandatory sentence of death for the second of such offences for the reason that the offender was under the sentence of life imprisonment for the first of such offences is arbitrary beyond the bounds of all reason. Assuming that Section 235(2) of the Criminal Procedure Code were applicable to the case and the court was under an obligation to hear the accused on the question of sentence, it would have to put some such question to the accused:

"You were sentenced to life imprisonment for the offence of forgery. You have committed a murder while you were under that sentence of life imprisonment. Why should you not be sentenced to death?"

The question carries its own refutation. It highlights how arbitrary and irrational it is to provide for a mandatory sentence of death in such circumstances.

23. On a consideration of the various circumstances which we have mentioned in this judgment, we are of the opinion that Section 303 of the Penal Code violates the guarantee of equality contained in Article 14 as also the right conferred by Article 21 of the Constitution that no person shall be deprived of his life or personal liberty except according to procedure established by law." (at pages 293, 294 and 296)

In a concurring judgment, Chinnappa Reddy, J., struck down the Section in the following terms:

"25. Judged in the light shed by Maneka Gandhi [(1978) 1 SCC 248] and Bachan Singh [(1980) 2 SCC 684], it is impossible to uphold Section 303 as valid. Section 303 excludes judicial discretion. The scales of justice are removed from the hands of the Judge so soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so irrestitutable is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive.

Section 303 is such a law and it must go the way of all bad laws. I agree with my Lord Chief Justice that Section 303, Indian Penal Code, must be struck down as unconstitutional."

(at page 298)

It is, therefore, clear from a reading of even the aforesaid two Constitution Bench judgments that Article 14 has been referred to in the context of the constitutional invalidity of statutory law to show that such statutory law will be struck down if it is found to be "arbitrary".

However, the three Judge Bench in Mcdowell (supra) dealt with the binding Constitution Bench decision in Mithu (supra) as follows (at page 739):

"45. Reference was then made by Shri G. Ramaswamy to the decision in Mithu v. State of Punjab [(1983) 2 SCC 277: 1983 SCC (Cri) 405] wherein Section 303 of the Indian Penal Code was struck down. But that decision turned mainly on Article 21 though Article 14 is also referred to along with Article 21. Not only did the offending provision exclude any scope for application of judicial discretion, it also deprived the accused of the procedural safeguards contained in Sections 235(2) and 354(3) of the Criminal Procedure Code. The ratio of the said decision is thus of no assistance to the petitioners herein."

A binding judgment of five learned Judges of this Court cannot be said to be of "no assistance" by stating that the decision turned mainly on Article 21, though Article 14 was also referred to. It is clear that the ratio of the said Constitution Bench was based both on Article 14 and Article 21 as is clear from the judgment of the four learned Judges in paragraphs 19 and 23 set out supra.[66] A three Judge Bench in the teeth of this ratio cannot, therefore, be said to be good law. Also, the binding Constitution Bench decision in Sunil Batra (supra), which held arbitrariness as a ground for striking down a legislative provision, is not at all referred to in the three Judge Bench decision in Mcdowell (supra).

66 It is clear that one judgment can have more than one ratio decidendi. This was recognized early on by the Privy Council in an appeal from the Supreme Court of New South Wales, in Commissioners of Taxation for the State of New South Wales v. Palmer & Others, 1907 Appeal Cases 179 at 184. Lord Macnaghten put it thus:
"… But it is impossible to treat a proposition which the court declares to be a distinct and sufficient ground for its decision as a mere dictum, simply because there is also another ground stated upon which, standing alone, the case might have been determined."
In Jacobs v. London County Council, [1950] 1 All E.R. 737 at 741, the House of Lords, after referring to some earlier decisions held, as follows: "..However, this may be, there is, in my opinion, no justification for regarding as obiter dictum a reason given by a judge for his decision, because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be obiter, then a case which ex facie decided two things would decide nothing. A good illustration will be found in London Jewellers, Ltd., v. Attenborough ([1934] 2 K.B. 206). In that case the determination of one of the issues depended on how far the Court of Appeal was bound by its previous decision in Folkes v. King ([1923] 1 K.B. 282), in which the court had given two grounds for its decision, the second of which [as stated by Greer, L.J. ([1934] 2 K.B. 222), in Attenborough's case ([1934] 2 K.B. 206)] was that:
"….where a man obtains possession with authority to sell, or to become the owner himself, and then sells, he cannot be treated as having obtained the goods by larceny by a trick."
In Attenborough's case ([1934] 2 K.B. 206) it was contended that, since there was another reason given for the decision in Folkes' case ([1923] 1 K.B. 282), the second reason was obiter, but Greer, L.J., said ([1934] 2 K.B. 222) in reference to the argument of counsel:
"I cannot help feeling that if we were unhampered by authority there is much to be said for this proposition which commended itself to Swift, J., and which commended itself to me in Folkes v. King ([1923] 1 K.B. 282), but that view is not open to us in view of the decision of the Court of Appeal in Folkes v. King ([1923] 1 K.B. 282). In that case two reasons were given by all the members of the Court of Appeal for their decision and we are not entitled to pick out the first reason as the ratio decidendi and neglect the second, or to pick out the second reason as the ratio decidendi and neglect the first; we must take both as forming the ground of the judgment."
So, also, in Cheater v. Cater ([1918] 1 K.B. 247) Pickford, L.J., after citing a passage from the judgment of Mellish, L.J., in Erskine v. Adeane ((1873), 8 Ch. App. 756), said ([1918] 1 K.B. 252):
"That is a distinct statement of the law and not a dictum. It is the second ground given by the lord justice for his judgment. If a judge states two grounds for his judgment and bases his decision upon both, neither of those grounds is a dictum."

(2) The second reason given is that a challenge under Article 14 has to be viewed separately from a challenge under Article 19, which is a reiteration of the point of view of A.K. Gopalan v. State of Madras, 1950 SCR 88, that fundamental rights must be seen in watertight compartments. We have seen how this view was upset by an eleven Judge Bench of this Court in Rustom Cavasjee Cooper v. Union of India, (1970) 1 SCC 248, and followed in Maneka Gandhi (supra). Arbitrariness in legislation is very much a facet of unreasonableness in Article 19(2) to (6), as has been laid down in several Judgments of this Court, some of which are referred to in Om Kumar (infra) and, therefore, there is no reason why arbitrariness cannot be used in the aforesaid sense to strike down legislation under Article 14 as well.

(3) The third reason given is that the Courts cannot sit in Judgment over Parliamentary wisdom. Our law reports are replete with instance after instance where Parliamentary wisdom has been successfully set at naught by this Court because such laws did not pass muster on account of their being "unreasonable", which is referred to in Om Kumar (infra).

We must never forget the admonition given by Khanna, J. in State of Punjab v. Khan Chand, (1974) 1 SCC 549. He said:

"12. It would be wrong to assume that there is an element of judicial arrogance in the act of the Courts in striking down an enactment.

The Constitution has assigned to the Courts the function of determining as to whether the laws made by the Legislature are in conformity with the provisions of the Constitution. In adjudicating the constitutional validity of statutes, the Courts discharge an obligation which has been imposed upon them by the Constitution. The Courts would be shirking their responsibility if they hesitate to declare the provisions of a statute to be unconstitutional, even though those provisions are found to be violative of the Articles of the Constitution. Articles 32 and 226 are an integral part of the Constitution and provide remedies for enforcement of fundamental rights and other rights conferred by the Constitution.

Hesitation or refusal on the part of the Courts to declare the provisions of an enactment to be unconstitutional, even though they are found to infringe the Constitution because of any notion of judicial humility would in a large number of cases have the effect of taking away or in any case eroding the remedy provided to the aggrieved parties by the Constitution. Abnegation in matters affecting one's own interest may sometimes be commendable but abnegation in a matter where power is conferred to protect the interest of others against measures which are violative of the Constitution is fraught with serious consequences. It is as much the duty of the courts to declare a provision of an enactment to be unconstitutional if it contravenes any article of the Constitution as it is theirs to uphold its validity in case it is found' to suffer from no such infirmity."

This again cannot detain us.

(4) One more reason given is that the proportionality doctrine, doubtful of application even in administrative law, should not, therefore, apply to this facet of Article 14 in constitutional law. Proportionality as a constitutional doctrine has been highlighted in Om Kumar v. Union of India, (2001) 2 SCC 386 at 400- 401 as follows:

"30. On account of a Chapter on Fundamental Rights in Part III of our Constitution right from 1950, Indian Courts did not suffer from the disability similar to the one experienced by

English Courts for declaring as unconstitutional legislation on the principle of proportionality or reading them in a manner consistent with the charter of rights. Ever since 1950, the principle of "proportionality" has indeed been applied vigorously to legislative (and administrative) action in India. While dealing with the validity of legislation infringing fundamental freedoms enumerated in Article 19(1) of the Constitution of India — such as freedom of speech and expression, freedom to assemble peaceably, freedom to form associations and unions, freedom to move freely throughout the territory of India, freedom to reside and settle in any part of India — this Court has occasion to consider whether the restrictions imposed by legislation were disproportionate to the situation and were not the least restrictive of the choices. The burden of proof to show that the restriction was reasonable lay on the State. "Reasonable restrictions" under Articles 19(2) to (6) could be imposed on these freedoms only by legislation and courts had occasion throughout to consider the proportionality of the restrictions. In numerous judgments of this Court, the extent to which "reasonable restrictions" could be imposed was considered.

In Chintamanrao v. State of M.P. [AIR 1951 SC 118: 1950 SCR 759] Mahajan, J. (as he then was) observed that "reasonable restrictions" which the State could impose on the fundamental rights "should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public". "Reasonable" implied intelligent care and deliberation, that is, the choice of a course which reason dictated. Legislation which arbitrarily or excessively invaded the right could not be said to contain the quality of reasonableness unless it struck a proper balance between the rights guaranteed and the control permissible under Articles 19(2) to (6). Otherwise, it must be held to be wanting in that quality. Patanjali Sastri, C.J. in State of Madras v. V.G. Row [AIR 1952 SC 196: 1952 SCR 597: 1952 Cri LJ 966], observed that the Court must keep in mind the "nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time". This principle of proportionality vis-à-vis legislation was referred to by Jeevan Reddy, J. in State of A.P. v. McDowell & Co. [(1996) 3 SCC 709] recently. This level of scrutiny has been a common feature in the High Court and the Supreme Court in the last fifty years. Decided cases run into thousands.

31. Article 21 guarantees liberty and has also been subjected to principles of "proportionality". Provisions of the Criminal Procedure Code, 1974 and the Indian Penal Code came up for consideration in Bachan Singh v. State of Punjab [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] the majority upholding the legislation. The dissenting judgment of Bhagwati, J. (see Bachan Singh v. State of Punjab [(1982) 3 SCC 24 : 1982 SCC (Cri) 535]) dealt elaborately with "proportionality" and held that the punishment provided by the statute was disproportionate.

32. So far as Article 14 is concerned, the courts in India examined whether the classification was based on intelligible differentia and whether the differentia had a reasonable nexus with the object of the legislation. Obviously, when the courts considered the question whether the classification was based on intelligible differentia, the courts were examining the validity of the differences and the adequacy of the differences. This is again nothing but the principle of proportionality. There are also cases where legislation or rules have been struck down as being arbitrary in the sense of being unreasonable [see Air India v. Nergesh Meerza [(1981) 4 SCC 335: 1981 SCC (L&S) 599] (SCC at pp. 372-373)]. But this latter aspect of striking down legislation only on the basis of "arbitrariness" has been doubted in State of A.P. v. McDowell and Co. [(1996) 3 SCC 709] ."

45. The thread of reasonableness runs through the entire fundamental rights Chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14. Further, there is an apparent contradiction in the three Judges' Bench decision in McDowell (supra) when it is said that a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive or unreasonable", yet such challenge would fail on the very ground of the law being "unreasonable, unnecessary or unwarranted". The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution.

46. We only need to point out that even after McDowell (supra), this Court has in fact negated statutory law on the ground of it being arbitrary and therefore violative of Article 14 of the Constitution of India. In Malpe Vishwanath Acharya v. State of Maharashtra, (1998) 2 SCC 1, this Court held that after passage of time, a law can become arbitrary, and, therefore, the freezing of rents at a 1940 market value under the Bombay Rent Act would be arbitrary and violative of Article 14 of the Constitution of India (see paragraphs 8 to 15 and 31).

47. Similarly in Mardia Chemicals Ltd. & Ors. v. Union of India & Ors. etc. etc., (2004) 4 SCC 311 at 354, this Court struck down Section 17(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, as follows:

"64. The condition of pre-deposit in the present case is bad rendering the remedy illusory on the grounds that: (i) it is imposed while approaching the adjudicating authority of the first instance, not in appeal, (ii) there is no determination of the amount due as yet, (iii) the secured assets or their management with transferable interest is already taken over and under control of the secured creditor, (iv) no special reason for double security in respect of an amount yet to be determined and settled, (v) 75% of the amount claimed by no means would be a meagre amount, and (vi) it will leave the borrower in a position where it would not be possible for him to raise any funds to make deposit of 75% of the undetermined demand. Such conditions are not only onerous and oppressive but also unreasonable and arbitrary. Therefore, in our view, subsection (2) of Section 17 of the Act is unreasonable, arbitrary and violative of Article 14 of the Constitution."

48. In two other fairly recent judgments namely State of Tamil Nadu v. K. Shyam Sunder, (2011) 8 SCC 737 at paragraphs 50 to 53, and A.P. Dairy Development Corpn. Federation v. B. Narasimha Reddy, (2011) 9 SCC 286 at paragraph 29, this Court reiterated the position of law that a legislation can be struck down on the ground that it is arbitrary and therefore violative of Article 14 of the Constitution.

49. In a Constitution Bench decision in Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1 at 524, an extravagant argument that the impugned legislation was intended to please a section of the community as part of the vote catching mechanism was held to not be a legally acceptable plea and rejected by holding that:

"219. A legislation passed by Parliament can be challenged only on constitutionally recognised grounds. Ordinarily, grounds of attack of a legislation is whether the legislature has legislative competence or whether the legislation is ultra vires the provisions of the Constitution. If any

of the provisions of the legislation violates fundamental rights or any other provisions of the Constitution, it could certainly be a valid ground to set aside the legislation by invoking the power of judicial review. A legislation could also be challenged as unreasonable if it violates the principles of equality adumbrated in our Constitution or it unreasonably restricts the fundamental rights under Article 19 of the Constitution. A legislation cannot be challenged simply on the ground of unreasonableness because that by itself does not constitute a ground. The validity of a constitutional amendment and the validity of plenary legislation have to be decided purely as questions of constitutional law. This Court in State of Rajasthan v. Union of India [(1977) 3 SCC 592] said: (SCC p. 660, para 149)

"149. … if a question brought before the court is purely a political question not involving determination of any legal or constitutional right or obligation, the court would not entertain it, since the court is concerned only with adjudication of legal rights and liabilities."

50. A subsequent Constitution Bench in K.T. Plantation (P) Ltd. v. State of Karnataka, (2011) 9 SCC 1, dealt with the constitutional validity of the Roerich and Devikarani Roerich Estate (Acquisition and Transfer) Act, 1996, the legal validity of Section 110 of the Karnataka Land Reforms Act, 1961, Notification No. RD 217 LRA 93 dated 8-3-1994 issued by the State Government thereunder and the scope and content of Article 300-A of the Constitution. While examining the validity of a legislation which deprives a person of property under Article 300-A, this Court when faced with Mcdowell (supra) pointed out that (at page 58):

"203. Even in McDowell case [(1996) 3 SCC 709], it was pointed out that some or other constitutional infirmity may be sufficient to invalidate the statute. A three- Judge Bench of this Court in McDowell & Co. case [(1996) 3 SCC 709] held as follows: (SCC pp. 737-38, para 43)

"43. … The power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone viz. (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground.… No enactment can be struck down by just saying that it is arbitrary or unreasonable.

Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom."

204. A two-Judge Bench of this Court in Union of India v. G. Ganayutham [(1997) 7 SCC 463: 1997 SCC (L&S) 1806], after referring to McDowell case [(1996) 3 SCC 709] stated as under: (G. Ganayutham case [(1997) 7 SCC 463: 1997 SCC (L&S) 1806] , SCC p. 476, para 22)

"22. … That a statute can be struck down if the restrictions imposed by it are disproportionate or excessive having regard to the purpose of the statute and that the court can go into the question whether there is a proper balancing of the fundamental right and the restriction imposed, is well settled."

205. Plea of unreasonableness, arbitrariness, proportionality, etc. always raises an element of subjectivity on which a court cannot strike down a statute or a statutory provision, especially

when the right to property is no more a fundamental right. Otherwise the court will be substituting its wisdom to that of the legislature, which is impermissible in our constitutional democracy." [Emphasis Supplied]

51. In a recent Constitution Bench decision in Natural Resources Allocation, In re, Special Reference No.1 of 2012, (2012) 10 SCC 1, this Court went into the arbitrariness doctrine in some detail. It referred to Royappa (supra), Maneka Gandhi (supra) and Ajay Hasia (supra) (and quoted from paragraph 16 which says that "… the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached…"). It then went on to state that "arbitrariness" and "unreasonableness" have been used interchangeably as follows:

"103. As is evident from the above, the expressions "arbitrariness" and "unreasonableness" have been used interchangeably and in fact, one has been defined in terms of the other. More recently, in Sharma Transport v. Govt. of A.P. [(2002) 2 SCC 188], this Court has observed thus: (SCC pp. 203-04, para 25)

"25. … In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression 'arbitrarily' means:

in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone." (at page 81)

After stating all this, it then went on to comment, referring to McDowell (supra) that no arbitrary use should be made of the arbitrariness doctrine. It then concluded (at page 83):

"107. From a scrutiny of the trend of decisions it is clearly perceivable that the action of the State, whether it relates to distribution of largesse, grant of contracts or allotment of land, is to be tested on the touchstone of Article 14 of the Constitution. A law may not be struck down for being arbitrary without the pointing out of a constitutional infirmity as McDowell case [(1996) 3 SCC 709] has said.

Therefore, a State action has to be tested for constitutional infirmities qua Article 14 of the Constitution. The action has to be fair, reasonable, non-discriminatory, transparent, noncapricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. It should conform to the norms which are rational, informed with reasons and guided by public interest, etc. All these principles are inherent in the fundamental conception of Article 14. This is the mandate of Article 14 of the Constitution of India." [Emphasis Supplied]

On a reading of this judgment, it is clear that this Court did not read McDowell (supra) as being an authority for the proposition that legislation can never be struck down as being arbitrary. Indeed the Court, after referring to all the earlier judgments, and Ajay Hasia (supra) in particular, which stated that legislation can be struck down on the ground that it is "arbitrary" under Article 14, went on to conclude that "arbitrariness" when applied to legislation cannot be used loosely. Instead, it broad based the test, stating that if a constitutional infirmity is found, Article 14 will interdict such infirmity. And a constitutional infirmity is found in Article 14 itself whenever legislation is "manifestly arbitrary"; i.e. when it is not fair, not reasonable, discriminatory, not transparent, capricious, biased, with favoritism or nepotism and not in pursuit of promotion of healthy competition and equitable treatment.

Positively speaking, it should conform to norms which are rational, informed with reason and guided by public interest, etc.

52. Another Constitution Bench decision reported as Dr. Subramanian Swamy v. Director, Central Bureau of Investigation, (2014) 8 SCC 682, dealt with a challenge to Section 6-A of the Delhi Special Police Establishment Act, 1946. This Section was ultimately struck down as being discriminatory and hence violative of Article 14. A specific reference had been made to the Constitution Bench by the reference order in Dr. Subramanian Swamy v. Director, Central Bureau of Investigation, (2005) 2 SCC 317, and after referring to several judgments including Ajay Hasia (supra), Mardia Chemicals (supra), Malpe Vishwanath Acharya (supra) and McDowell (supra), the reference inter alia was as to whether arbitrariness and unreasonableness, being facets of Article 14, are or are not available as grounds to invalidate a legislation.

After referring to the submissions of counsel, and several judgments on the discrimination aspect of Article 14, this Court held:

"48. In E.P. Royappa [E.P. Royappa v. State of T.N., (1974) 4 SCC 3: 1974 SCC (L&S) 165], it has been held by this Court that the basic principle which informs both Articles 14 and 16 are equality and inhibition against discrimination. This Court observed in para 85 as under: (SCC p. 38)

"85. … From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment." Court's approach

49. Where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an enactment, and a clear transgression of constitutional principles must be shown. The fundamental nature and importance of the legislative process needs to be recognised by the Court and due regard and deference must be accorded to the legislative process. Where the legislation is sought to be challenged as being unconstitutional and violative of Article 14 of the Constitution, the Court must remind itself to the principles relating to the applicability of Article 14 in relation to invalidation of legislation. The two dimensions of Article 14 in its application to legislation and rendering legislation invalid are now well recognised and these are: (i) discrimination, based on an impermissible or invalid classification, and (ii) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the form of delegated legislation or by way of conferment of authority to pass administrative orders—if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution. The Court also needs to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is." (at pages 721-722)

Since the Court ultimately struck down Section 6-A on the ground that it was discriminatory, it became unnecessary to pronounce on one of the questions referred to it, namely, as to whether

arbitrariness could be a ground for invalidating legislation under Article 14. Indeed the Court said as much in paragraph 98 of the judgment as under (at page 740):

"Having considered the impugned provision contained in Section 6-A and for the reasons indicated above, we do not think that it is necessary to consider the other objections challenging the impugned provision in the context of Article 14."

53. However, in State of Bihar v. Bihar Distillery Ltd., (1997) 2 SCC 453 at paragraph 22, in State of M.P. v. Rakesh Kohli, (2012) 6 SCC 312 at paragraphs 17 to 19, in Rajbala v. State of Haryana & Ors., (2016) 2 SCC 445 at paragraphs 53 to 65 and Binoy Viswam v. Union of India, (2017) 7 SCC 59 at paragraphs 80 to 82, McDowell (supra) was read as being an absolute bar to the use of "arbitrariness" as a tool to strike down legislation under Article 14. As has been noted by us earlier in this judgment, Mcdowell (supra) itself is per incuriam, not having noticed several judgments of Benches of equal or higher strength, its reasoning even otherwise being flawed. The judgments, following McDowell (supra) are, therefore, no longer good law.

54. To complete the picture, it is important to note that subordinate legislation can be struck down on the ground that it is arbitrary and, therefore, violative of Article 14 of the Constitution. In Cellular Operators Association of India v. Telecom Regulatory Authority of India, (2016) 7 SCC 703, this Court referred to earlier precedents, and held:

"Violation of fundamental rights 42. We have already seen that one of the tests for challenging the constitutionality of subordinate legislation is that subordinate legislation should not be manifestly arbitrary. Also, it is settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation.

(See Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India [(1985) 1 SCC 641: 1985 SCC (Tax) 121], SCC at p. 689, para 75.)

43. The test of "manifest arbitrariness" is well explained in two judgments of this Court. In Khoday Distilleries Ltd. v. State of Karnataka [(1996) 10 SCC 304], this Court held: (SCC p. 314, para 13)

"13. It is next submitted before us that the amended Rules are arbitrary, unreasonable and cause undue hardship and, therefore, violate Article 14 of the Constitution. Although the protection of Article 19(1)(g) may not be available to the appellants, the Rules must, undoubtedly, satisfy the test of Article 14, which is a guarantee against arbitrary action.

However, one must bear in mind that what is being challenged here under Article 14 is not executive action but delegated legislation. The tests of arbitrary action which apply to executive actions do not necessarily apply to delegated legislation. In order that delegated legislation can be struck down, such legislation must be manifestly arbitrary; a law which could not be reasonably expected to emanate from an authority delegated with the law-making power. In Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India [(1985) 1 SCC 641 : 1985 SCC (Tax) 121], this Court said that a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. A subordinate legislation may be questioned under Article 14 on the ground that it is unreasonable; 'unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary'.

Drawing a comparison between the law in England and in India, the Court further observed that in England the Judges would say, 'Parliament never intended the authority to make such Rules;

they are unreasonable and ultra vires'. In India, arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. But subordinate legislation must be so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution."

44. Also, in Sharma Transport v. State of A.P. [(2002) 2 SCC 188], this Court held:

(SCC pp. 203-04, para 25)

"25. … The tests of arbitrary action applicable to executive action do not necessarily apply to delegated legislation. In order to strike down a delegated legislation as arbitrary it has to be established that there is manifest arbitrariness. In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression "arbitrarily" means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone." (at pages 736-737)

55. It will be noticed that a Constitution Bench of this Court in Indian Express Newspapers v. Union of India, (1985) 1 SCC 641, stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14.

56. Applying the test of manifest arbitrariness to the case at hand, it is clear that Triple Talaq is a form of Talaq which is itself considered to be something innovative, namely, that it is not in the Sunna, being an irregular or heretical form of Talaq. We have noticed how in Fyzee's book (supra), the Hanafi school of Shariat law, which itself recognizes this form of Talaq, specifically states that though lawful it is sinful in that it incurs the wrath of God. Indeed, in Shamim Ara v. State of U.P., (2002) 7 SCC 518, this Court after referring to a number of authorities including certain recent High Court judgments held as under:

"13…The correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters — one from the wife's family and the other from the husband's; if the attempts fail, talaq may be effected (para 13).

In Rukia Khatun case [(1981) 1 Gau LR 375] the Division Bench stated that the correct law of talaq, as ordained by the Holy Quran, is: (i) that "talaq" must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, "talaq" may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay views which, in their opinion, did not lay down the correct law.

14. We are in respectful agreement with the abovesaid observations made by the learned Judges of the High Courts." (at page 526)

57. Given the fact that Triple Talaq is instant and irrevocable, it is obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which is essential to save the marital tie, cannot ever take place. Also, as understood by the Privy Council in Rashid Ahmad (supra), such Triple Talaq is valid even if it is not for any reasonable cause, which view of the law no longer holds good after Shamim Ara (supra). This being the case, it is clear that this form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore, be held to be violative of the fundamental right contained under Article 14 of the Constitution of India. In our opinion, therefore, the 1937 Act, insofar as it seeks to recognize and enforce Triple Talaq, is within the meaning of the expression "laws in force" in Article 13(1) and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq. Since we have declared Section 2 of the 1937 Act to be void to the extent indicated above on the narrower ground of it being manifestly arbitrary, we do not find the need to go into the ground of discrimination in these cases, as was argued by the learned Attorney General and those supporting him.

.....J.

(Rohinton Fali Nariman)

.....J.

(Uday Umesh Lalit)

New Delhi;

August 22, 2017.

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IN THE SUPREME COURT OF INDIA
Original Civil Jurisdiction

Writ Petition (C) No. 118 of 2016

Shayara Bano … Petitioner
versus
Union of India and others … Respondents

with

Suo Motu Writ (C) No. 2 of 2015

In Re: Muslim Women's Quest For Equality
versus
Jamiat Ulma-I-Hind

Writ Petition(C) No. 288 of 2016

Aafreen Rehman … Petitioner

versus
Union of India and others … Respondents

Writ Petition(C) No. 327 of 2016

Gulshan Parveen … Petitioner
versus
Union of India and others … Respondents

Writ Petition(C) No. 665 of 2016

Ishrat Jahan … Petitioner
versus
Union of India and others … Respondents

Writ Petition(C) No. 43 of 2017

Atiya Sabri … Petitioner
versus
Union of India and others … Respondents

ORDER OF THE COURT

In view of the different opinions recorded, by a majority of 3:2 the practice of 'talaq-e-biddat' – triple talaq is set aside.

..……..…..……CJI.
(Jagdish Singh Khehar)

..……..…..…….……J.
(Kurian Joseph)

..……..…..…….……J.
(Rohinton Fali Nariman)

..……..…..…….……J.
(Uday Umesh Lalit)

..……..…..…….……J.
(S. Abdul Nazeer)

New Delhi; August 22, 2017.

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SUKHENDU DAS VERSUS RITA MUKHERJEE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 7186 of 2016

Bench: Hon'ble Mr. Justice S.A. Bobde and Hon'ble Mr. Justice L. Nageswara Rao

Sukhendu Das .... Appellant Versus Rita Mukherjee .... Respondent

- **The Appellant and the Respondent are District Judges working in the State of West Bengal. Their marriage was performed on 19th June, 1992 as per the Special Marriage Act, 1954 (hereinafter referred to as "the Act"). A girl child was born out of the wedlock on 14th April, 1993. There was matrimonial discord between the Appellant and the Respondent and they were living separately since the year 2000. The Appellant filed an application under Section 27 of the Act seeking a divorce.**
- **This court in a series of judgments has exercised its inherent powers under Article 142 of the Constitution for dissolution of a marriage where the Court finds that the marriage is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably, even if thefacts of the case do not provide a ground in law on which the divorce could be granted [Manish Goel v. Rohini Goel Admittedly, the Appellant and the Respondent have been living separately for more than 17 yearsand it will not be possible for the parties to live together and there is no purpose in compellingthe parties to live together in matrimony [Rishikesh Sharma v. Saroj Sharma47]. The daughter ofthe Appellant and the Respondent is aged about 24 years and her custody is not in issue before us. In the peculiar facts of this case and in order to do complete justice between the parties, we allow the Appeal in exercise of our power under Article 142 of the Constitution of India, For the aforementioned reasons, the Appeal is allowed and the application for divorce filed bythe Appellant under Section 27 of the Act is allowed.**

JUDGMENT

Hon'ble Mr. Justice L. Nageswara Rao :—

1. The Appellant and the Respondent are District Judges working in the State of West Bengal. Their marriage was performed on 19th June, 1992 as per the Special Marriage Act, 1954 (hereinafter referred to as "the Act"). A girl child was born out of the wedlock on 14th April, 1993. There was matrimonial discord between the Appellant and the Respondent and they were living separately since the year 2000. The Appellant filed an application under Section 27 of the Act seeking a divorce.

2. The Appellant alleged that the differences arose because of the improper behavior of the Respondent in not showing due respect to his ailing father. It was further alleged that the Respondent deserted him and refused to give the custody of the child to him. The Appellant further averred in the application that the Respondent did not visit him even when he was seriously ill. The Respondent

is accused of using intemperate language and threatening the Appellant with filing of criminal cases if he perused the petition for divorce which he proposed in the year 2005.

3. The Respondent filed a written statement denying the allegations made in the application filed by the applicant for divorce. She refuted all the averments in the application and sought for dismissal of the application for divorce. The Respondent did not participate in the proceedings before the trial court after filing the written statement. The Chief Judge, City Civil Court, Calcutta by the judgment dated 6th August, 2009 dismissed the application for divorce. The Appeal filed against the said judgment was dismissed by the High Court of Calcutta on 4th April, 2012. The Respondent did not seek to appear before the High Court also. The correctness of the judgment of the High Court is assailed in the above Appeal.

4. After referring to the pleadings in the case, the trial court found that the Appellant failed to prove cruelty on the part of the Respondent. The evidence adduced by the Appellant was scrutinized by the trial court to come to a conclusion that the Appellant did not make out a case for divorce. The High Court, taking note of the fact that the Appellant and the Respondent are judicial officers, made an attempt for conciliation between the parties. However, in spite of the effort of the High Court, both the Appellant and the Respondent did not appear personally before the High Court. Despite taking note of the fact that the Appellant and the Respondent were living separately since the year 2000, the High Court dismissed the Appeal by holding that irretrievable breakdown of marriage cannot be a ground for divorce. The High Court held that the Appellant failed to prove mental cruelty on the part of the Respondent.

5. Notice was issued to the Respondent on 8th October, 2012 to explore the possibility of an amicable resolution to the matrimonial dispute. The parties were directed to appear before the Mediation Centre of the Supreme Court on 21st November, 2012. The Respondent did not appear before the Mediation Centre in spite of service of the Notice. She chose not to appear before this Court. Fresh Notice was ordered on 17th August, 2015 but the Respondent did not appear in spite of receipt of Notice again.

6. Mr. Raja Chatterjee, learned counsel appearing for the Appellant submitted that the Respondent deserted the Appellant about 17 years back and she refused to come back and live with him. Apart from the allegation of desertion, the learned counsel also alleged mental cruelty on the part of the Respondent who threatened the Appellant in the year 2005 that she would get a criminal case filed against him if he did not stop attempts to get the divorce. The learned counsel further submitted that the Appellant and the Respondent have been living apart due to matrimonial discord since 17 years and for all practical purposes the marriage has broken down.

7. The Respondent, who did not appear before the trial court after filing of written statement, did not respond to the request made by the High Court for personal appearance. In spite of service of Notice, the Respondent did not show any interest to appear in this Court also. This conduct of the Respondent by itself would indicate that she is not interested in living with the Appellant. Refusal to participate in proceeding for divorce and forcing the appellant to stay in a dead marriage would itself constitute mental cruelty [Samar Ghosh v. Jaya Ghosh[45]]. The High Court observed that no attempt was made by either of the parties to be posted at the same place. Without entering into the disputed facts of the case, we are of the opinion that there is no likelihood of the Appellant and the Respondent living together and for all practical purposes there is an irretrievable breakdown of the marriage.

45 (2007) 4 SCC 511 [para101 (xiv)]

8. This court in a series of judgments has exercised its inherent powers under Article 142 of the Constitution for dissolution of a marriage where the Court finds that the marriage is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably, even if the facts of the case do not provide a ground in law on which the divorce could be granted [Manish Goel v. Rohini Goel[46]].

   Admittedly, the Appellant and the Respondent have been living separately for more than 17 years and it will not be possible for the parties to live together and there is no purpose in compelling the parties to live together in matrimony [Rishikesh Sharma v. Saroj Sharma[47]]. The daughter of the Appellant and the Respondent is aged about 24 years and her custody is not in issue before us. In the peculiar facts of this case and in order to do complete justice between the parties, we allow the Appeal in exercise of our power under Article 142 of the Constitution of India, 1950.

9. For the aforementioned reasons, the Appeal is allowed and the application for divorce filed by the Appellant under Section 27 of the Act is allowed.

.....J. [S.A. BOBDE]
.....J. [L. NAGESWARA RAO]

NEW DELHI; OCTOBER 09, 2017.

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46 (2010) 4 SCC 393 [para 11]

47 (2007) 2 SCC 263 [para 4 and 5]

DR. (MRS.) MALATHI RAVI, M.D. VERSUS DR. B.V. RAVI, M.D.

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Bench: Hon'ble Mr. Justice Sudhansu Jyoti Mukhopadhaya & Hon'ble Mr. Justice Dipak Misra

Dr. (Mrs.) Malathi Ravi, M.D. ... Appellant
Versus
Dr. B.V. Ravi, M.D. ...Respondent

CIVIL APPEAL NO.5862 OF 2014

(Arising out of S.L.P. (C) No. 17 of 2010)

Marriage as a social institution is an affirmance of civilized social order where two individuals, capable of entering into wedlock, have pledged themselves to the institutional norms and values and promised to each other a cemented bond to sustain and maintain the marital obligation. It stands as an embodiment for continuance of the human race. Despite the pledge and promises, on certain occasions, individual incompatibilities, attitudinal differences based upon egocentric perception of situations, maladjustment phenomenon or propensity for non-adjustment or refusal for adjustment gets eminently projected that compels both the spouses to take intolerable positions abandoning individual responsibility, proclivity of asserting superiority complex, betrayal of trust which is the cornerstone of life, and sometimes a pervert sense of revenge, a dreadful diet, or sheer sense of envy bring the cracks in the relationship when either both the spouses or one of the spouses crave for dissolution of marriage – freedom from the institutional and individual bond.

The case at hand initiated by the husband for dissolution of marriage was viewed from a different perspective by the learned Family Court Judge who declined to grant divorce as the factum of desertion as requisite in law was not proved but the High Court, considering certain facts and taking note of subsequent events for which the appellant was found responsible, granted divorce. The High Court perceived the acts of the appellant as a reflection of attitude of revenge in marriage or for vengeance after the reunion pursuant to the decree for restitution of marriage.

Presently to the factual matrix in entirety and the subsequent events. We are absolutely conscious that the relief of dissolution of marriage was sought on the ground of desertion. The submission of the learned counsel for the appellant is that neither subsequent events nor the plea of cruelty could have been considered. There is no cavil over the fact that the petition was filed under Section 13(1)(ib). However, on a perusal of the petition it transpires that there are assertions of ill-treatment, mental agony and torture suffered by the husband.

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.

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

The 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 [pic]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.

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."

JUDGMENT

Hon'ble Mr. Justice Dipak Misra :—

Leave granted.

2. Marriage as a social institution is an affirmance of civilized social order where two individuals, capable of entering into wedlock, have pledged themselves to the institutional norms and values and promised to each other a cemented bond to sustain and maintain the marital obligation. It stands as an embodiment for continuance of the human race. Despite the pledge and promises, on certain occasions, individual incompatibilities, attitudinal differences based upon egocentric perception of situations, maladjustment phenomenon or propensity for non-adjustment or refusal for adjustment gets eminently projected that compels both the spouses to take intolerable positions abandoning individual responsibility, proclivity of asserting superiority complex, betrayal of trust which is the cornerstone of life, and sometimes a pervert sense of revenge, a dreadful diet, or sheer sense of envy bring the cracks in the relationship when either both the spouses or one of the spouses crave for dissolution of marriage – freedom from the institutional and individual bond. The case at hand initiated by the husband for dissolution of marriage was viewed from a different perspective by the learned Family Court Judge who declined to grant divorce as the factum of desertion as requisite in law was not proved but the High Court, considering certain facts and taking note of subsequent events for which the appellant was found responsible, granted divorce. The High Court perceived the acts of the appellant as a reflection of attitude of revenge in marriage or for vengeance after the reunion pursuant to the decree for restitution of marriage. The justifiability of the said analysis within the parameters of Section 13(1) of the Hindu Marriage Act, 1955 (for brevity "the Act") is the subject-matter of assail in this appeal, by special leave, wherein the judgment and decree dated 11.09.2009 passed by the High Court of Karnataka in MFA No. 9164 of 2004 reversing the decree for restitution of conjugal rights granted in favour of the wife and passing a decree for dissolution of marriage by way of divorce allowing the petition preferred by the respondent-husband, is called in question.

3. The respondent-husband, an Associate Professor in Ambedkar Medical College, Kadugondanahalli, Bangalore, filed a petition, M.S. No. 5 of 2001 under Section 13(1) the Act seeking for a decree for judicial separation and dissolution of marriage. However, in course of

the proceeding the petition was amended abandoning the prayer for judicial separation and converting the petition to one under Section 13(1)(ib) of the Act seeking dissolution of marriage by way of divorce.

4. In the petition filed before the Family court, it was averred by the respondent-husband that the marriage between the parties was solemnized in accordance with Hindu Rites and customs on 23.11.1994. After the marriage the husband and wife stayed together for one and a half years in the house of the father of the husband but from the very first day the appellant-wife was noncooperative, arrogant and her behaviour towards the family members of the husband was unacceptable. Despite the misunderstanding, a male child was born in the wedlock and thereafter, the wife took the child and left the house and chose not to come back to the husband or his family for a period of three years. It was pleaded that there had been a marital discord and total noncompatibility, and she had deserted him severing all ties. It was also alleged that she had left the tender child in the custody of her parents and joined a post graduate course in the Medical College of Gulbarga. All the efforts by the husband to bring her back became an exercise in futility inasmuch as the letters written by him were never replied. Despite the non-responsive attitude of the wife, he, without abandoning the hope for reconciliation for leading a normal married life, went to the house of his in-laws, but her parents ill treated him by forcibly throwing him out of the house.

5. It was the assertion of the husband that after she completed her course, she started staying with her parents along with the child at Bangalore and neither he nor his family members were invited for the naming giving ceremony of the child. As set forth, the conduct of the wife caused immense mental hurt and trauma, and he suffered unbearable mental agony when the family members of his wife abused and ill treated him while he had gone to pacify her and bring her back to the matrimonial home. All his solicitations and beseechments through letters to have normalcy went in vain which compelled him to issue a notice through his counsel but she chose not to respond to the same. Under these circumstances, the petition was filed for judicial separation and thereafter, as has been stated earlier, prayer was amended seeking dissolution of marriage on the ground of desertion since she had deliberately withdrawn from his society.

6. The wife filed objections contending, inter alia, that when she was residing in the matrimonial home, the sister and brother-in-law of the husband, who stayed in the opposite house, were frequent visitors and their interference affected the normal stream of life of the couple. They influenced the husband that he should not allow his wife to prosecute her studies and be kept at home as an unpaid servant of the house. The husband, as pleaded, was torn in conflict as he could not treat the wife in the manner by his sister and brother-in-law had desired and also could not openly express disagreement. At that juncture, as she was in the family way, as per the customs, she came to her parental home and by the time the child was born the sister and brother-in-law had been successful in poisoning the mind of the husband as a result of which neither he nor his relatives, though properly invited, did not turn up for the naming ceremony. All her attempts to come back to the matrimonial home did not produce any result since the husband was acting under the ill-advice of his sister and brother-in-law. It was put forth that he had without any reasonable cause or excuse refused to perform his marital obligations. The plea of mental hurt and trauma was controverted on the assertion that she had never treated him with cruelty nor was he summarily thrown out of the house of her parents.

7. Be it stated, the wife in the same petition filed an application under Section 9 of the Act for restitution of conjugal rights to which an objection was filed by the husband stating, inter alia, that no case had been made out for restitution of conjugal rights but, on the contrary, vexatious allegations had been made. It was further averred that the wife had deserted him for more than five years and she had been harassing him constantly and consistently.

8. In support of their respective pleas the husband and wife filed evidence by way of affidavit and were crossexamined at length by the other side. On behalf of the husband 12 documents were exhibited as Exts. P-1 to P-12 and the wife examined one witness and exhibited four documents, Exts. R-1 to R-4.

9. The family court formulated the following points for consideration: -

"(1) Whether the petitioner proves that respondent assaulted him for a continuous period of not less than 2 years immediately proceeding the presentation of the petition?

(2) Whether the respondent proves that the petitioner without reasonable excuse withdrawn from the society?

(3) Whether the petitioner is entitled for decree of divorce as prayed for?

(4) Whether the respondent is entitled for decree of restitution of conjugal right as prayed for?

(5) What order?"

10. The learned Principal Judge of the family court, appreciating the oral and documentary evidence on record came to hold that the material on record gave an impression that there was no scuffle between the husband and the wife; that even after the birth of the child the husband and his family members used to visit the wife at her parental home to see the child; that there was no material on record to show that when he went to his inlaws house to see the child, he was ill-treated in any manner; that after the child was born he had taken the child along with her for vaccination and spent sometime; that though the husband and his relatives were invited for naming ceremony of the child, they chose not to attend; that the husband was able to recognize his son from the photograph in Ext. R-2; that the plea of the husband that he was not allowed to see the child did not deserve acceptation; that the circumstances did not establish that wife had any intention to bring the conjugal relationship to an end but, on the contrary, she was residing in her parents' house for delivery and then had to remain at Gulbarga for prosecuting her higher studies; that while she was studying at Gulbarga, as is evident from Ext. R-4, the husband stayed there for two days, i.e., 27.5.1999 and 28.5.1999; that from the letters vide Exts. P-3, P-7, P-9 and P-11 nothing was discernible to the effect that the wife went to Gulbarga for her studies without his permission and she had deserted him; that the husband had not disclosed from what date he stopped visiting the house of the wife's parents after the birth of the child; that the letters written by the husband did not reflect the non-cooperative conduct of the wife; that there was no sufficient evidence to come to a definite conclusion that the wife had deserted the husband with an intention to bring the matrimonial relationship to an end; that assuming there was desertion yet the same was not for a continuous period of two years immediately preceding the presentation of the petition; that the husband only wrote letters after 15.9.1999 and nothing had been brought on record to show what steps he had taken for resumption of marital ties with the wife if she had deserted him; that the wife was not allowed to come back to the matrimonial home because of intervention of his sister and brother-inlaw; that the explanation given by

the wife to her nonresponse to the letters was that when she was thinking to reply the petition had already been filed was acceptable; that as the husband was working at Ambedkar Medical College in the Department of Biochemistry and wife had joined in the Department of Pathology which would show that she was willing to join the husband to lead a normal marital life; and that it was the husband who had withdrawn from the society of the wife without any reasonable cause. Being of this view, the learned Family Judge dismissed the application for divorce and allowed the application of the wife filed under Section 23(a) read with Section 9 of the Act for restitution of conjugal rights.

11. After the said judgment and decree was passed by the learned Family Judge, the respondent did not prefer an appeal immediately. He waited for the wife to join and for the said purpose he wrote letters to her and as there was no response, he sent a notice through his counsel. The wife, eventually, joined on 22.8.2004 at the matrimonial house being accompanied by her relative who was working in the Police Department. As the turn of events would uncurtain, the wife lodged an FIR No. 401/2004 dated 17.10.2004 at Basaveshwaranagar alleging demand of dowry against the husband, mother and sister as a consequence of which the husband was arrested being an accused for the offences under Section 498A and 506 read with Section 34 of the Indian Penal Code and also under the provisions of Dowry Prohibition Act. He remained in custody for a day until he was enlarged on bail. His parents were compelled to hide themselves and moved an application under Section 438 of the Code of Criminal Procedure and, ultimately, availed the benefit of said provision. After all these events took place, the husband preferred an appeal along with application for condonation of delay before the High Court which formed the subject-matter of M.F.A. No. 9164/04 (FC). The High Court condoned the delay, took note of the grounds urged in the memorandum of appeal, appreciated the subsequent events that reflected the conduct of the wife and opined that the attitude of the wife confirmed that she never had the intention of leading a normal married life with the husband and, in fact, she wanted to stay separately with the husband and dictate terms which had hurt his feelings. The High Court further came to the conclusion that the husband had made efforts to go to Gulbarga on many an occasion, tried to convince the wife to come back to the matrimonial home, but all his diligent efforts met with miserable failure. As the impugned judgment would reflect, the behaviour of the wife established that she deliberately stayed away from the marital home and intentionally caused mental agony by putting the husband and his family to go through a criminal litigation. That apart, the High Court took the long separation into account and, accordingly, set aside the judgment and decree for restitution of conjugal rights and passed a decree for dissolution of marriage between the parties.

12. We have heard Mr. Shanth Kumar V. Mohale, learned counsel for the appellant and Mr. Balaji Srinivasan, learned counsel for the respondent.

13. Assailing the legal sustainability of the judgment of the High Court, Mr. Shanth Kumar, learned counsel appearing for the appellant, submitted that when the petition for divorce was founded solely on the ground of desertion and a finding was returned by the family court that the ingredients stipulated under Section 13(1)(ib) of the Act were not satisfied making out a case of desertion on the part of the wife, the High Court should have concurred with the same and not proceeded to make out a case for the respondent-husband on the foundation of mental cruelty. It is urged by him that the High Court has taken note of subsequent events into consideration without affording an opportunity to the appellant to controvert the said material and that alone

makes the decision vulnerable in law. Learned counsel would submit that the High Court has erroneously determined the period of communication of letters and the silence maintained by the wife which is factually incorrect and, in fact, the concept of desertion, as is understood in law, has not been proven by way of adequate evidence but, on the contrary, the analysis of evidence on record by the Family Court goes a long way to show that there was, in fact, no desertion on the part of the wife to make out a case for divorce. It is his further submission that the High Court has opined that the marriage between the parties had irretrievably been broken and, therefore, it was requisite to grant a decree for dissolution of marriage by divorce which cannot be a ground for grant of divorce. Learned counsel has placed reliance on the decisions in ***Lachman Utamchand Kirpalani v. Meena @ Mota***[45]***, K. Narayanan v. K. Sreedevi***[46]***, Mohinder Singh v. Harbens Kaur***[47] ***and Smt. Indira Gangele v. Shailendra Kumar Gangele***[48]**.**

14. Mr. Balaji Srinivasan, learned counsel for the respondent-husband, has urged that if the petition filed by the husband is read in entirety, it would be clear that the husband had clearly pleaded about the mental hurt and trauma that he had suffered because of the treatment meted out to him by his wife and her family members. He has drawn our attention to the evidence to show that for a long seven and a half years despite the best efforts he could not get marital cooperation from his wife and as the High Court has accepted the same, the impugned judgment is flawless. He has highlighted about the nonresponsive proclivity of the wife when she chose not to reply to the letters of the husband beseeching her to join his company while she was staying at Gulbarga. He has also drawn our attention to the cross-examination of the husband where he has deposed that after the delivery of the son on 12.1.1998 when she was discharged, he and his mother had gone to bring the wife and the child to their home but she went to her parental home and further neither he nor his family members were invited for the naming ceremony which was performed in October, 1998. Learned counsel has drawn our attention to the subsequent events which have been brought on record by way of affidavit as well as the rejoinder filed by the appellant-wife to the counter affidavit to highlight the subsequent conduct for the purpose of demonstrating the cruel treatment of the wife. It is canvassed by him that the subsequent events can be taken note of for the purpose of mental cruelty by this Court and the decree of divorce granted by the High Court should not be disturbed.

15. To appreciate the rivalised submissions raised at the Bar, we have carefully perused the petition and the evidence adduced by the parties and the judgment of the Family Court and that of the High Court. The plea that was raised for grant of divorce was under Section 13(1)(ib) of the Act. It provides for grant of divorce on the ground of desertion for a continuous period of not less than two year immediately preceding the presentation of the petition. The aforesaid provision stipulates that a husband or wife would be entitled to a dissolution of marriage by decree of divorce if the other party has deserted the party seeking the divorce for a continuous period of not less than two years immediately preceding the presentation of the petition. Desertion, as a ground for divorce, was inserted to Section 13 by Act 68/1976. Prior to the amendment it was only a ground for judicial separation. Dealing with the concept of desertion, this Court in ***Savitri Pandey v. Prem Chandra Pandey***[49] has ruled thus:-

45 AIR 1964 SC 40

46 AIR 1990 Ker 151

47 AIR 1992 P&H 8

48 AIR 1993 MP 59

49 (2002) 2 SCC 73

"Desertion", for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other words it is a total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations i.e. not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalises the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case. After referring to a host of authorities and the views of various authors, this Court in Bipinchandra Jaisinghbai Shah v. Prabhavati[1] held that if a spouse abandons the other in a state of temporary passion, for example, anger or disgust without intending permanently to cease cohabitation, it will not amount to desertion.

16. In the said case, reference was also made to Lachman Utamchand Kirpalani's case wherein it has been held that desertion in its essence means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. For the offence of desertion so far as the deserting spouse is concerned, two essential conditions must be there (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. For holding desertion as proved the inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation.

17. In the case at hand, the Family Court, on the basis of the evidence brought on record, has recorded a finding that there was no desertion for a continuous period of two years. The High Court has reversed it by emphasizing on certain aspects of conduct. Analysing the evidence, we are of the considered opinion that it is not established that the appellant-wife had deserted the husband for a continuous period of not less than two years immediately preceding the presentation of the petition. It is because the petition was presented in the year 2001 and during the cross-examination of the husband it has been admitted by him that he had gone to Gulbarga in May, 1999 for two days. The Family Court, on the basis of material brought on record, has opined that there is no sufficient evidence to come to a definite conclusion that the wife deserted him with intention to bring the matrimonial relationship to an end and further the period of two years was not completed. The High Court, as it seems to us, has not dealt with this aspect in an appropriate manner and opined that the wife had no intention to lead a normal married life with the husband.

Therefore, the allegation of desertion, as enshrined under Section 13(1)(ib) has not been established. The finding on that score as recorded by the learned Principal Judge, Family Court, deserves to be affirmed and we so do.

18. Presently to the factual matrix in entirety and the subsequent events. We are absolutely conscious that the relief of dissolution of marriage was sought on the ground of desertion. The submission of the learned counsel for the appellant is that neither subsequent events nor the plea of cruelty could have been considered. There is no cavil over the fact that the petition was filed under Section 13(1)(ib). However, on a perusal of the petition it transpires that there are assertions of ill-treatment, mental agony and torture suffered by the husband.

19. First we intend to state the subsequent events. As has been narrated earlier, after the application of the wife was allowed granting restitution of conjugal rights, the husband communicated to her to join him, but she chose not to join him immediately and thereafter went to the matrimonial home along with a relative who is a police officer. After she stayed for a brief period at the matrimonial home, she left her husband and thereafter lodged FIR No. 401/2004 on 17.10.2004 for the offences under Sections 498A and 506/34 of the Indian Penal Code and the provisions under Dowry Prohibition Act, 1961 against the husband, his mother and the sister. Because of the FIR the husband was arrested and remained in custody for a day. The ladies availed the benefit of anticipatory bail. The learned trial Magistrate, as we find, recorded a judgment of acquittal. Against the judgment of acquittal, the appellant preferred an appeal before the High Court after obtaining special leave which was ultimately dismissed as withdrawn since in the meantime the State had preferred an appeal before the Court of Session. At this juncture, we make it absolutely clear that we will not advert to the legal tenability of the judgment of acquittal as the appeal, as we have been apprised, is subjudice. However, we take note of certain aspects which have been taken note of by the High Court and also brought on record for a different purpose.

20. The seminal question that has to be addressed is whether under these circumstances the decree for divorce granted by the High Court should be interfered with. We must immediately state that the High Court has referred to certain grounds stated in the memorandum of appeal and taken note of certain subsequent facts. We accept the submission of the learned counsel for the appellant that the grounds stated in the memorandum of appeal which were not established by way of evidence could not have been pressed into service or taken aid of. But, it needs no special emphasis to state that the subsequent conduct of the wife can be taken into consideration. It settled in law that subsequent facts under certain circumstances can be taken into consideration.

21. In ***A. Jayachandra v. Aneel Kaur***[50] it has been held thus: -

> *"If acts subsequent to the filing of the divorce petition can be looked into to infer condonation of the aberrations, acts subsequent to the filing of the petition can be taken note of to show a pattern in the behaviour and conduct."*

22. In ***Suman Kapur v. Sudhir Kapur***[51] this Court had accepted what the High Court had taken note of despite the fact that it was a subsequent event. It is necessary to reproduce the necessary paragraphs from the said decision to perceive the approach of this Court: -

> *"46. The High Court further noted that the appellant wife sent a notice through her advocate to the respondent husband during the pendency of mediation proceedings in the High Court wherein she alleged that the respondent was having another wife in USA whose identity was concealed. This was based on the fact that in his income*

50 (2005) 2 SCC 22

51 (2009) 1 SCC 422

tax return, the husband mentioned the social security number of his wife as 476-15-6010, a number which did not belong to the appellant wife, but to some American lady (Sarah Awegtalewis).

47. The High Court, however, recorded a finding of fact accepting the explanation of the husband that there was merely a typographical error in giving social security number allotted to the appellant which was 476-15-6030. According to the High Court, taking undue advantage of the error in social security number, the appellant wife had gone to the extent of making serious allegation that the respondent had married an American woman whose social security number was wrongly typed in the income tax return of the respondent husband."

23. From the acceptance of the reasons of the High Court by this Court, it is quite clear that subsequent events which are established on the basis of non-disputed material brought on record can be taken into consideration. Having held that, the question would be whether a decree for divorce on the ground of mental cruelty can be granted. We have already opined that the ground of desertion has not been proved. Having not accepted the ground of desertion, the two issues that remain for consideration whether the issue of mental cruelty deserves to be accepted in the obtaining factual matrix in the absence of a prayer in the relief clause, and further whether the situation has become such that it can be held that under the existing factual scenario it would not be proper to keep the marriage ties alive. Learned counsel for the appellant has urged with vehemence that when dissolution of marriage was sought on the ground of desertion alone, the issue of mental cruelty can neither be raised nor can be addressed to. Regard being had to the said submission, we are constrained to pose the question whether in a case of the present nature we should require the respondent-husband to amend the petition and direct the learned Family Judge to consider the issue of mental cruelty or we should ignore the fetter of technicality and consider the pleadings and evidence brought on record as well as the subsequent facts which are incontrovertible so that the lis is put to rest. In our considered opinion the issue of mental cruelty should be addressed to by this Court for the sake of doing complete justice. We think, it is the bounden duty of this Court to do so and not to leave the parties to fight the battle afresh after expiry of thirteen years of litigation. Dealing with the plea of mental cruelty which is perceptible from the material on record would not affect any substantive right of the appellant. It would be only condoning a minor technical aspect. Administration of justice provokes our judicial conscience that it is a fit case where the plentitude of power conferred on this Court under Article 142 deserves to be invoked, more so, when the ground is statutorily permissible. By such exercise we are certain that it would neither be supplanting the substantive law nor would it be building a structure which does not exist. It would be logical to do so and illogical to refrain from doing so.

24. Before we proceed to deal with the issue of mental cruelty, it is appropriate to state how the said concept has been viewed by this Court. In ***Vinit Saxena v. Pankaj Pandit***[52], while dealing with the issue of mental cruelty, the Court held as follows: -

"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

52 (2006) 3 SCC 778

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.

xxx xxx xxx

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."

25. In ***Samar Ghosh v. Jaya Ghosh***[53], this Court has given certain illustrative examples wherefrom inference of mental cruelty can be drawn. The Court itself has observed that they are illustrative and not exhaustive. We think it appropriate to reproduce some of the illustrations:-

"(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.

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(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.

xxx xxx xxx

(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.

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

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

53 (2007) 4 SCC 511

26. In the said case the Court has also observed thus:-

> *"99. … The 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 the other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious 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 straitjacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances…."*

27. In ***Vishwanath Agrawal, s/o Sitaram Agrawal v. Sarla Vishwanath Agrawal***[54], while dealing with mental cruelty, it has been opined thus: -

> *"22. The expression "cruelty" has an inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status."*

28. In the said case, analyzing the subsequent events and the conduct of the wife, who was responsible for publication in a newspaper certain humiliating aspects about the husband, the Court held as follows: -

> *"In our considered opinion, a normal reasonable man is bound to feel the sting and the pungency. The conduct and circumstances make it graphically clear that the respondent wife had really humiliated him and caused mental cruelty. Her conduct clearly exposits that it has resulted in causing agony and anguish in the mind of the husband. She had publicised in the newspapers that he was a womaniser and a drunkard. She had made wild allegations about his character. She had made an effort to prosecute him in criminal litigations which she had failed to prove. The feeling of deep anguish, disappointment, agony and frustration of the husband is obvious."*

29. In ***U. Sree v. U. Srinivas***[55], the Court, taking note of the deposition of the husband that the wife had consistently ill treated him inasmuch as she had shown her immense dislike towards his "sadhna" in music and had exhibited total indifference to him, observed as follows: -

> *"It has graphically been demonstrated that she had not shown the slightest concern for the public image of her husband on many an occasion by putting him in a situation of embarrassment leading to humiliation. She has made wild allegations about the conspiracy in the family of her husband to get him remarried for the greed of dowry and there is no iota of evidence on record to substantiate the same. This, in fact, is*

54 (2012) 7 SCC 288

55 (2013) 2 SCC 114

an aspersion not only on the character of the husband but also a maladroit effort to malign the reputation of the family."

30. In ***K. Srinivas Rao v. D.A. Deepa***[56], while dealing with the instances of mental cruelty, the court opined that to the illustrations given in the case of Samar Ghosh certain other illustrations could be added. We think it seemly to reproduce the observations: -

"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."

31. Presently, we shall advert to the material on record. It is luminous from it that the wife has made allegations that the sister and brother-in-law of the husband used to interfere in the day-to-day affairs of the husband and he was caught in conflict. The said aspect has really not been proven. It has been brought on record that the sister and brother-in-law are highly educated and nothing has been suggested to the husband in the cross-examination that he was pressurized by his sister in any manner whatsoever. It is her allegation that the sister and brother-in-law of the husband were pressurizing him not to allow the wife to prosecute higher studies and to keep her as an unpaid servant in the house. On a studied evaluation of the evidence and the material brought on record it is demonstrable that the wife herself has admitted that the husband had given his consent for her higher education and, in fact, assisted her. Thus, the aforesaid allegation has not been proven. The allegation that the husband was instigated to keep her at home as an unpaid servant is quite a disturbing allegation when viewed from the spectrum of gender sensitivity and any sensitive person would be hurt when his behavior has remotely not reflected that attitude. The second aspect which has surfaced from the evidence is that the wife had gone to the parental home for delivery and therefrom she went to the hospital where she gave birth to a male child. However, as the evidence would show, the husband despite all his co-operation as a father, when had gone to the hospital to bring the wife and child to his house, she along with the child had gone to her parental house. This aspect of the evidence has gone totally unchallenged. Perceived from a social point of view, it reflects the egocentric attitude of the wife and her non-concern how such an act is likely to hurt the father of the child. The next thing that has come in evidence is that the respondent was not invited at the time of naming ceremony. He has categorically disputed the suggestion that he and his family members were invited to the ceremony. It is interesting to note that a suggestion has been given that they did not attend the ceremony as in the invitation card the names of the parents of the husband had not been printed. It has been asserted by the husband that the said incident had caused him tremendous mental pain. View from a different angle, it tantamounts to totally ignoring the family of the husband.

32. Another incident deserves to be noted. The wife went to Gulbarga to join her studies and the husband was not aware of it and only come to know when one professor told about it. Thereafter he went to Gulbarga and stayed in a hotel and met the wife in the hostel on both the days. Despite his request to come to the house she showed disinclination. When he enquired about the child, he was told that the child was in her mother's house. These are the incidents which are antecedent to the filing of the petition.

56 (2013) 5 SCC 226

33. We have already stated the legal position that subsequent events can be taken note of. After the judgment and decree was passed by the learned Family Judge, the husband sent a notice through his counsel dated 14.7.2004 and intimated her as follows: -

> *"According to the operative portion of the order, my client has to welcome you to join him with the child within three months which please note.*
>
> *My client's address is Dr. B.V. Ravi, M.D., residing in No. 428. 2nd Across, 6th Main, 3rd Stage, 3rd Block, Basaveshwaranagar, Bangalore-79 and his Telephone No. 23229865. In obedience to the Hon'ble Court order, you called upon to join Dr. B.V. Ravi to the above said address any day after 18th of July, 2004, as this period upto 17th is inauspicious because of "Ashada"."*

34. As it appears, she did not join and the husband was compelled to send a telegram. Thereafter, on 13.8.2004 a reply was sent on her behalf that she would be joining after 15.8.2004 but the exact date was not intimated. Thereafter, on 14.8.2004 a reply was sent to the legal notice dated 14.7.2004 sent by the husband. It is appropriate to reproduce the relevant two paragraphs: -

> *"In this context, we hereby inform you that our client will be coming to join your client in the above said address along with the child on Sunday the 22nd August 2004 as the auspicious NIJASHRAVANA MONTH commences from 16th August 2004.*
>
> *Further our client expects reasonable amount of care and cordiality from your client's side. Please ensure the same."*

35. The purpose of referring to these communications is that despite obtaining decree for restitution of conjugal rights the wife waited till the last day of the expiration of the period as per the decree to join the husband. There may be no legal fallacy, but the attitude gets reflected. The reply also states that there is expectation of reasonable amount of care and cordiality. This reflects both, a sense of doubt and a hidden threat. As the facts unfurl, the wife stays for two months and then leaves the matrimonial home and lodges the first information report against the husband and his mother and sister for the offences punishable under Sections 498A, 506/34 of the Indian Penal Code and under the provisions of Dowry Prohibition Act. The husband suffers a day's custody and the mother and the sister availed anticipatory bail.

36. The High Court has taken note of all these aspects and held that the wife has no intention to lead a normal marital life. That apart, the High Court has returned a finding that the marriage has irretrievably been broken down. Of course, such an observation has been made on the ground of conduct. This Court in certain cases, namely, ***G.V.N. Kameswara Rao v. G. Jabilli***[57]***, Parveen Mehta v. Inderjit Mehta***[58]***, Vijayakumar R. Bhate v. Neela Vijayakumar Bhate***[59]***, Durga Prasanna Tripathy v. Arundhati Tripathy***[60]***, Naveen Kohli v. Neelu Kohli***[61] ***and Samar Ghosh v. Jaya Ghosh (supra)***, has invoked the principle of irretrievably breaking down of marriage.

37. For the present, we shall restrict our delineation to the issue whether the aforesaid acts would constitute mental cruelty. We have already referred to few authorities to indicate what the concept of mental cruelty means. Mental cruelty and its effect cannot be stated with arithmetical

57 (2002) 2 SCC 296
58 (2002) 5 SCC 706
59 (2003) 6 SCC 334
60 (2005) 7 SCC 353
61 (2006) 4 SCC 558

exactitude. It varies from individual to individual, from society to society and also depends on the status of the persons. What would be a mental cruelty in the life of two individuals belonging to particular strata of the society may not amount to mental cruelty in respect of another couple belonging to a different stratum of society.

The agonized feeling or for that matter a sense of disappointment can take place by certain acts causing a grievous dent at the mental level. The inference has to be drawn from the attending circumstances. As we have enumerated the incidents, we are disposed to think that the husband has reasons to feel that he has been humiliated, for allegations have been made against him which are not correct; his relatives have been dragged into the matrimonial controversy, the assertions in the written statement depict him as if he had tacitly conceded to have harboured notions of gender insensitivity or some kind of male chauvinism, his parents and he are ignored in the naming ceremony of the son, and he comes to learn from others that the wife had gone to Gulbarga to prosecute her studies. That apart, the communications, after the decree for restitution of conjugal rights, indicate the attitude of the wife as if she is playing a game of Chess. The launching of criminal prosecution can be perceived from the spectrum of conduct. The learned Magistrate has recorded the judgment of acquittal. The wife had preferred an appeal before the High Court after obtaining leave. After the State Government prefers an appeal in the Court of Session, she chooses to withdraw the appeal. But she intends, as the pleadings would show, that the case should reach the logical conclusion. This conduct manifestly shows the widening of the rift between the parties. It has only increased the bitterness. In such a situation, the husband is likely to lament in every breath and the vibrancy of life melts to give way to sad story of life.

38. From this kind of attitude and treatment it can be inferred that the husband has been treated with mental cruelty and definitely he has faced ignominy being an Associate Professor in a Government Medical College. When one enjoys social status working in a Government hospital, this humiliation affects the reputation. That apart, it can be well imagined the slight he might be facing. In fact, the chain of events might have compelled him to go through the whole gamut of emotions. It certainly must have hurt his self-respect and human sensibility. The sanguine concept of marriage presumably has become illusory and it would not be inapposite to say that the wife has shown anaemic emotional disposition to the husband. Therefore, the decree of divorce granted by the High Court deserves to be affirmed singularly on the ground of mental cruelty.

39. Presently, we shall proceed to deal with grant of maintenance. Both the appellant and the respondent are doctors and have their respective jobs. The son is hardly sixteen years old and definitely would require financial support for education and other supportive things to lead a life befitting his social status. The High Court, while granting a decree for divorce should have adverted to it. However, we do not think it appropriate to keep anything alive in this regard between the parties. The controversy is to be put to rest on this score also. Considering the totality of circumstances, the status the appellant enjoys and the strata to which the parties belong, it becomes the bounden duty of the respondent to provide for maintenance and education for the son who is sixteen years old. At this juncture, we may note that a proceeding was initiated before the learned Principal Judge, Family Court, Bangalore and in the said proceeding the learned Principal Judge passed the following order: -

"Matter is settled before the mediation centre where in parties have entered into a memorandum of settlement.

Contents of the Memorandum of Settlement are admitted by the Parties. Court is satisfied that the same is voluntary. As per the terms of settlement para 5 clause (i) petitioner has deposited Rs.3,00,000/- in the name of minor child in Karnataka Bank, copy of fixed deposit receipt and R.D. Account pass book are filed along with memo. Hence petition is allowed in terms of settlement. Memorandum of settlement shall be a part of the decree."

40. Learned counsel for the respondent would submit that the amount has been settled. Though there has been a settlement of Rs.3,00,000/- yet that was at a different time and under different circumstances. The present appeal was pending. The duty of this Court is to see that the young son born in the wedlock must get acceptable comfort as well as proper education. It is the duty of the Court also to see that a minor son should not live in discomfort or should be deprived of requisite modern education. We are conscious, the appellant is earning but that does not necessarily mean that the father should be absolved of his liability. Regard being had to the social status and strata and the concept of effective availing of education we fix a sum of Rs.25,00,000/- (twenty five lacs) excluding the amount already paid towards the maintenance and education of the son. The said amount shall be deposited by the respondent within a period of six months before the learned Principal Judge, Family Court at Bangalore and the amount shall be kept in a fixed deposit in a nationalized bank in the joint account of the appellant and the minor son so that she can draw quarterly interest and expend on her son. After the son attains majority the joint account shall continue and they would be at liberty to draw the amount for the education or any urgent need of the son.

41. With the aforesaid directions, we affirm the decree for divorce passed by the High Court. The appeal stands disposed of accordingly but without any order as to costs.

..... J.
[Sudhansu Jyoti Mukhopadhaya]
..... J.
[Dipak Misra]

New Delhi;

June 30, 2014.

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MAHARANI KUSUMKUMARI AND ANR. VS. SMT. KUSUMKUMARI JADEJA AND ANR.

Bench: Hon'ble Mr. Justice L.M. Sharma & Hon'ble Mr. Justice M.M. Punchhi

Petitioner: Maharani Kusumkumari and Anr.
Vs.
Respondent: Smt. Kusumkumari Jadeja and Anr.

1991 SCR (1) 193

1991 SCC (1) 582 JT 1991 (1) 278 1991 SCALE (1)103

Date of Judgment : 01/02/1991

Hindu Marriage Act, 1955: Section II-Petition to declare marriage a nullity-Whether maintainable after death of petitioner's spouse.

Practice and Procedure: Proceedings involving issues relating to marital status-Question dependent upon nature of action and the law governing the same-Provisions of the relevant statute very material.

It was contended on behalf of the appellants that having regard to the very special relationship between husband and wife,a marriage cannot be dissolved or declared to be a nullity unless both of them are parties thereto. The martial status of a person sands on a much higher footing than other positions one may hold in the society and cannot be allowed to be challenged lightly,and that the marriage of a person, therefore, cannot be declared as nullity after his death when he does no have an opportunity to contest. Reliance was placed upon the language of Section 11 of the Hindu Marriage Act.

On behalf of the respondent, it was pointed out that having regard to the language of Section 16 of the Hindu Marriage Act as it it stood before its amendment in 1976,he children born of the respondent would not have been entitled to the benefit of the section in absence of a decree declaring the marriage of their parents as nullity, and this was precisely the reason that the respondent had to commence the present litigation

On the question: whether a petition under Section 11 of the Hindu Marriage Act, 1955 for declaring the marriage of the petitioner as a nullity is maintainable after the death of the petitioner's spouse.

Dismissing the appeal, this Court,

HELD: An application under Section11 of the Hindu Marriage Act, 1955 before its amendment in 1976, was maintainable at the instance of a party to the marriage even after the death of the other spouse.

In the instant case, the proceeding was started in 1974 that is, before the amendment was made in the Hindu Marriage Act,1955. Section II did not contain the words "against the other party". At that time all that was required was that the application had to be filed by a party to the marriage

under challenge. On the plain language of the section as it stood then,it could not be claimed that in absence of the other spouse as a party to the proceedings, the same would not be maintainable.

By the amendment in section 11, in so far the cases where marriage can be declared as nullity, the application of the rule protecting the legitimacy was widened. If that had not been,the children born of such marriages would have been deprived of the advantage on the death of either of the parents.

The intention of the legislature in enacting section 16 was to protect the legitimacy of the children who would have been legitimate if the Act had not been passed in 1955.

There is no reason to interpret section 11 in a manner which would narrow down its field. With respect to the nature of the proceedings, what the court has to do in an application under section 11 is not to bring about any change in the marital status of the parties. The effect of granting a decree of nullity is to discover the flow in the marriage at the time of its performance and accordingly to grant a decree declaring it to be void.

JUDGMENT

CIVIL APPELLATE JURISDICTION: Civil Appeal No.2215 of 1977.

From the Judgement and Order dated 237 1976 of the Madhya Pradesh High Court in Misc. Appeal No.23 of 1976.

T.U. Metha, S.K. Gambhir, Vivek Gambhir and Surinder Karnail for the Appellants.

Uday U. Lalit and A.G.Ratnaparkhi for the Respondents.

The Judgement of the Courtwas delivered by

Hon'ble Mr. Justice L.M. Sharma :—

The question for decision in this appeal by special leave is whether a petition under s.11 of the Hindu Marriage Act, 1955, for declaring the marriage of the petitioner as nullity is maintainable after the death of the petitioners' spouse.

2. The appellant no. 1, hereinafter referred to as the Maharani, was married to Maharaja Rameshwarsighji in1960 and a daughter, the appellant no.2, was born of the wedlock in 1964. The relationship between the husband and the wife thereafter ceased to be cordial and the appellants started living in Bombay and the Maharaja within his estate in Madhya Pradesh. According to the case of the respondent no.1 the Maharaja decided to remarry without legally separating from the appellant Maharani. The respondent who is a relation of the Maharaj's mother, respondent No.2, was misled both by the Maharaja and his mother in believing that the first marriage of the Maharaja had been dissolved and under the belief she married the Maharaja and the couple got several issues. In 1974 when the Maharaja died, an application for grant of Letters of Administration was filed by the appellant Maharani and the respondent applied for probate on the basis of an alleged will which is denied by the appellant. The proceedings are still pending. In this background the respondent no. 1 filed the present application under s. 11 of the Hindu Marriage Act for declaring her marriage as nullity. The Maharaja's mother was impleaded as the sole respondent. When the appellants learnt about the case, they intervened and were joined as parties.

3. The appellants challenged the maintainability of the application on the ground that the marriage could not be declared nullity after the death of the Maharaja. Both the trial court and the High Court have rejected the appellants' plea.

4. Mr. Mehta, the learned counsel for the appellants, has contended that having regard to the very special relationship between husband and wife, a marriage cannot dissolved or declared to be a nullity unless both of them are parties thereto. The marital status of a person stands on a much higher footing than other positions one may hold in the society or may have in relation to a property; and cannot be allowed to be challenged lightly. The marriage of a person, therefore, cannot be declared as a nullity after his death when he does not have an opportunity to contest. He relied upon the language of s.11. After its amendment in 1976 the section read this:

> *"11. Void marriages:- Any marriage solemnized after the commencement of this Act shall be null and void and may , on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i),(iv) and (v) of Section 5."* *(emphasis added)*

5. The present proceeding was started in 1974, that is, before the amendment, and the section did not contain the words which have been underlined by us above. At that time all that was required was that the application had to be filed by a party to the marriage under challenge. On the plain language of the section as it stood then, it could not be claimed that in absence of the other spouse as a party to the proceeding, the same would not be maintainable. The argument of Mr. Mehta is that the section had the same meaning before and after the amendment and the addition of the words in 1976 was merely clarificatory in nature. He strongly relied upon the 69th Report of the Law Commission.

6. The Report recommended several amendments in the Hindu Marriage Act which led to the passing of the Amending Act of 1976.

Reliance was placed on paragraph 6.1A of Chapter 6 of the Report which referred to the divergent views taken by the High Courts of Punjab and Madras on the question of maintainability of a petition under s.11 after the death of the other spouse. The Commission, thereafter, observed thus:

> "*We ought, however, to point out that in such a case, the proper remedy is a suit under the Specific Relief Act. A petition under section 11 of the Hindu Marriage Act cannot be appropriate, because the other spouse is an essential party to any such petition. This should be clarified by an amendment.*"

It has been argued before us that the view of the Madras High Court referred to in the Report is the correct view which was accepted by the Law Commission, and since there was scope for controversy on the language of the section, the legislature agreeing with the Law Commission added the aforementioned additional words by way of clarification. It is urged that such interpretation of the section did not lead to any injustice inasmuch as a suit for such a declaration was and is maintainable in the civil court. Reliance has also been placed on "Rayden and Jackson's Law and Practice in Divorce and Family matters." (15th Edn.), and several English cases in support of the proposition that on the death of a party to a matrimonial action the cause of action does not service. Reference has been made to the case of Butterfield v. Butterfield, I.L.R. (Vol.50) Calcutta 153, where after the wife had obtained a decree nisi for dissolution of

her marriage the husband died. Following the English case of Stanhope v. Stanhope,[1886] 11 P.D.103, it was held that the decree could not be confirmed.

7. The learned counsel for the respondent relied upon certain observation made in other High Courts' judgments supporting his stand. He pointed out that having regard to the language of s. 16, as it stood before the amendment, the children born of the respondent would not have been entitled to the benefit of the section in the absence of a decree declaring the marriage of their parents as nullity, and this was precisely the reason that the respondent had to commence the present litigation.

8. We have considered the argument of Mr. Mehta closely but do not find ourselves in a position to agree with him. It is not correct to suggest that one uniform rule shall apply for deciding the maintainability of all proceedings involving issues relating to marital status. The question will be dependent upon the nature of the action and law governing the same. The provisions of the relevant statute relating to a proceeding in question will be very material. This aspect has been taken note of by Rayden and Jackson also in their book which has been relied upon by Mr. Mehta. The passage at page 650 summarises the position in the following words:

> *"Death of a party: effect on suit. In many cases the fact of the death of one of the parties will render the process meaningless by reason of the circumstances that a marriage brought to an end by death could no longer be dissolved by an Act of the court. But there is no general rule that, where one of the parties to a divorce suit has died, the suit abates, so that no further proceedings can be taken in it. It has been said that it is unhelpful to refer to abatement at all. The real question in such cases is whether, where one of the parties to a divorce suit has died, further proceedings in the suit can or cannot be taken. The answer to that question, when it arises, depends in all cases on two matters and in some cases also on a third. The first matter is the nature of the further proceedings sought to be taken. The second matter is the true construction of the relevant statutory provision or provisions, or of a particular order made under them, or both. The third matter is the applicability of section I (I) of the Law Reforms (Miscellaneous Provisions) Act 1934."*

9. The dispute issue in the present appeal has to be answered by considering the nature of the proceedings and the true construction of the relevant provisions of the Hindu Marriage Act. Under the general law a child for being legitimate has to be born in lawful wedlock, and if the marriage is void or declared to be so by the court, it will necessarily have the effect of bastardising the child born of the parties to such a marriage. By enacting s. 5(i) of the Act, the legislature abolished polygamy, which had always remained permissible and prevalent among the Hindus in the past. The Act was bringing about a very significant departure in this regard; and taking into account the possibility of violation of the law in numerous cases atleast for sometime to come special provisions were included under s.16 of the Act with the object of protecting the legitimacy of the children. The original section before the amendment of 1976 read as follows:

> *"16. Where a decree of nullity is granted in respect of any marriage under section 11 or section 12, any child begotten or conceived before the decree is made who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of having been declared null and void or annulled by a decree of nullity shall be deemed to be their legitimate child notwithstanding the decree of nullity.*

Provided that nothing contained in this section shall be construed as conferring upon any child of a marriage which is declared null and void annulled by a decree of nullity any rights in or to the property of any person other than the parents in any case where, but for the passing of this Act, such child would have been incapable of possession of acquiring any such rights by reason of his not being the legitimate child of his parents."

It will be seen that the benefit of the section was confined to only such cases where a decree of nullity was granted under s. 11 or s.12. it did not extend to other cases. In 1976 s.11 was amended by inserting the words "against the other party", and along with the same s.16 was amended as it read now. the following words in s. 16(i).

"...and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act."

enlarged the applicability of the beneficial provisions, so as not to deny the same to children who are placed in circumstances similar to those of the present respondent. By the amendment in s.11, in so far the cases where marriage can be declared as nullity, the application of the rule protecting the legitimacy was widened. If that had not been done, the children born of such marriage would have been deprived of the advantage on the death of either of the parents. By the simultaneous amendment of the two sections it can safely be deduced that the Parliament did not hold identical views as expressed by the Law Commission's Report.

10. Even if it be assumed that the meaning of the section was not free from ambiguity, the rule of beneficial construction is called for in ascertaining its meaning. The intention of the legislature in enacting s.16 was to protect the legitimacy of the children who would have been legitimate if the Act had not been passed in 1955. There is no reason to interpret s.11 in a manner which would narrow down its field. With respect to the nature of the proceeding, what the court has to do in an application under s.11 is not bring about any change in the marital status of the parties. The effect of granting a decree of nullity is to discover the flaw in the marriage at the time of its performance and accordingly to grant a decree declaring it to be void. we, therefore, hold that an application under s.11 before its amendment in 1976, was maintainable at the instance of a party to the marriage even after the death of the other spouse. Accordingly, this appeal is dismissed with costs.

Appeal dismissed

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DHARMENDRA KUMAR VS. USHA KUMAR

Bench: Hon'ble Mr. Justice A.C. Gupta & Hon'ble Mr. Justice Syed Murtaza Fazalali

Petitioner: Dharmendra Kumar
Vs.
Respondent: Usha Kumar

1977 SCC (4) 12

1977 AIR 2218 1978 SCR (1) 315
Date of Judgment 19/08/1977

Hindu Marriage Act 1955-Section 13(1A)(ii).-23(1)(a)-If divorce can be obtained for absence of restitution of conjugal rights after decree for restitution is granted by a person who refuses to have restitution-Whether such a conduct amounts to a wrong within the meaning of sec. 23 (1) (a) of the Act.

The respondent-wife was granted a decree for restitution of conjugal rights on her application under s. 9 of Hindu Marriage Act, 1955 by Additional Senior Sub-Judge, Delhi the respondent presented a petition under s. 13(1A) (ii) of the Act in the Court of Additional District Judge, Delhi for dissolution of the marriage by a decree of divorce-stating therein that there bad been no restitution of conjugal rights between the parties after the passing of the decree for restitution of conjugal rights. The appellant-husband, in his written statement admitted that there had been no restitution of conjugal rights, between the parties after the passing of the decree in earlier proceedings, but stated that he made attempts to comply with the decree dated 27th August 77 by writing several registered letters inviting the respondent to live with him to which, according to him she never replied. The husband contended that she herself prevented the restitution of conjugal rights and was making a capital out of her own wrong which she was not entitled to do.

Section 13 as it stood before the 1964 amendment permitted only the spouse who had obtained the decree for restitution of conjugal rights to apply for relief by way of divorce. The party against whom the decree was passed was not given that right. The relief which is available to the spouse against whom a decree for restitution of conjugal rights has been passed cannot reasonably be denied to the one who does not insist on compliance with the decree passed in his or her favour. In order to be a "wrong" within the meaning of s. 23(1)(a) the conduct alleged has to be something more than a mere disinclination to agree to an offer of reunion, it must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled. Mere non-compliance with a decree for restitution does not constitute wrong within the meaning of section 23(1)(a)

JUDGMENT

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 949 of 1977.

Appeal by Special Leave from the Judgment and Order dated 19-10-1976 of the Delhi High Court in F.A.0., No. 170 of 1976.

Naunit Lal, R. K. Baweja and Miss Lalita Kohli, for the Appellant.

S. L. Watel, C. R. Somasekharan, R. Watel and M. S. Ganesh, for the Respondent.

The following Judgment of the Court was delivered by

Hon'ble Mr. Justice A.C. Gupta :—

On her application made under section 9 of the Hindu Marriage Act, 1955, the respondent was granted a decree for restitution of conjugal rights by the Additional Senior Sub-Judge, Delhi on August 27, 1973. A little over two years after that decree was passed, on October 28, 1975 she presented a petition under section 13 (IA) (ii) of the Act in the Court of the Additional District Judge, Delhi, for the dissolution of the marriage by a decree of divorce. Section 13 (IA) (ii) as it stood at the material time reads :

> *"Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground-*
>
> *(i) x x x*
>
> *(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of two years or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.*
>
> *The provision was amended in 1976 reducing the period of two years to one year, but this amendment is not relevant to the present controversy. In the petition under section 1 3 (IA)*
>
> *(ii) she-we shall hereinafter refer to her as the petitioner-stated that there had been 'no restitution of conjugal rights between the parties to the marriage after the passing of the decree for restitution of conjugal rights and that there was no other legal ground why the relief prayed for should not be granted. Her husband, the appellant before us, in his written statement admitted that there had been no restitution of conjugal rights between the parties after the passing of the decree in the earlier proceeding, but stated that he made attempts "to comply with the decree (for restitution of conjugal rights) by writing several registered letters to the petitioner" and "otherwise" inviting her to live with him. He complained that the petitioner "refused to receive some of the letters and never replied to those which she received", and according to him the petitioner "has herself prevented the restitution of conjugal rights she prayed for and now seeks to make a capital out of her own wrong". The objection taken in the written statement is apparently based on section 2 3 (1) (a) of the Act. The relevant part of section 2 3 (1) (a) states :*

Decree in proceedings.

> *"23. (1) In any proceeding under this Act, whether defended or not, if the court is satisfied that-*
>
> *(a) any of the grounds for granting relief exists and the petitioner..... is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief....."*

On the pleadings the following issue was raised as issue No. 1

"Whether the petitioner is not in any way taking advantage of her own wrong for the reasons given in the written statement ?"

Subsequently the following additional issue was also framed

"Whether the objection covered by issue No. 1 is open to the respondent under the law ?"

This additional issue was heard as a preliminary issue. The Additional District Judge, Delhi, who heard the matter, relying on a Full Bench decision of the Delhi High Court reported in I.L.R. (1971) 1 Delhi 6, (Ram Kali v. Gopal Dass), and a later decision of a learned single Judge of that court reported in I.L.R. (1076) 1 Delhi 725, (Gajna Devi v. Purshotam Giri) held that no such circumstance has been alleged in the instant case from which it could be said that the petitioner was trying to take advantage of her own wrong and, therefore, the objection covered by issue No. 1 was not available to the respondent The Additional District Judge accordingly allowed the petition and granted the petitioner a decree of divorce as prayed for. An appeal from this decision taken by the husband was summarily dismissed by the Delhi High Court. In the present appeal the husband questions the validity of the decree of divorce granted in favour of the petitioner.

Section 13 (IA) (ii) of the Hindu Marriage Act, 1955 allows either party to a marriage to present a petition for the dissolution of the marriage by a decree of divorce on the ground that there has been no restitution of conjugal rights as between the parties to the marriage for the period specified in the provision after the passing of the decree for restitution of conjugal rights. Sub-section (IA) was introduced in section 13 by section 2 of the Hindu Marriage (Amendment) Act, 1964 (44 of 1964). Section 13 as it stood before the 1964 amendment permitted only the spouse who had obtained the decree for restitution of conjugal rights to apply for relief by way of divorce; the party against whom the decree was passed was not given that right. The grounds for granting relief under section 1 3) including sub-section (IA) however continue to be subject to the provisions of section 23 of the Act. We have quoted above the part of section 23 relevant for the present purpose. It is contended by the appellant that the allegation made in his written statement that the conduct of the petitioner in not responding to his invitations to live with him meant that she was trying to take advantage of her own wrong for the purpose of relief under section 1 3 (1 A) (ii) On the admitted facts, the petitioner was undoubtedly entitled to ask for a decree of divorce. Would the allegation, if true, that she did not respond to her husband's invitation to come and live with him disentitle her to the relief ? We do not find it possible to hold that it would. In Ram Kali's case (supra) a Full Bench of the Delhi High Court held that mere non-compliance with the decree for restitution does not constitute a wrong within the meaning of section 2 3 (1) (a). Relving on and explaining this decision in the later case of Gajna Devi v. Purshotam Giri (supra) a learned Judge of the same High Court observed "Section 23 existed in the statute book prior to the insertion of section 13(1A)..... Had Parliament intended that a party which is guilty of a matrimonial offence and against which a decree for judicial separation or restitution of conjugal rights had been passed, was in view of section 23 of the Act, not entitled to obtain divorce, then it would have inserted an exception to section 13 (1 A) and with such exception, the provision of section 13(1A) would practically become redundant as the guilty party could never reap benefit of obtaining divorce, while the innocent party was entitled to obtain it even under the statute as it was before the amendment. Section 23 of the Act, therefore, cannot be construed so as to make the effect of amendment of the law by insertion of section 13(1A) nugatory advantage of his or her own wrong" occurring in clause(a) of section 23(1) of the Act does not apply to taking advantage of the statutory right to obtain dissolution of marriage which has been conferred on him by section 13(1A).

In such a case, a party is not taking advantage of his own wrong, but of the legal right following upon of the passing of the decree and the failure of the parties to comply with the decree....."

In our opinion the law has been stated correctly in Ram Kali v. Gopal Das (supra) and Gajna Devi v. Purshotam Giri (supra). Therefore, it would not be very reasonable to think that the relief which is available to the spouse against whom a decree for restitution has been passed, should be denied to the one who does not insist on compliance with the decree passed in his or her favour. In order to be a 'wrong' within the meaning of section 23 (1) (a) the conduct alleged has to be something more than a mere disinclination to agree to an offer of reunion, it must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled. In the case before us the only allegation made in the written statement is that the petitioner refused to receive or reply to the letters written by the appellant and did not respond to his other attempts to make her agree to Eve with him. This allegation, even if true, does not amount to misconduct grave enough to disentitle the petitioner to the relief she has asked for. The appeal is therefore dismissed but without any order as to costs.

Appeal dismissed.

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NARAYAN GANESH DASTANE VS. SUCHETA NARAYAN DASTANE

Bench: Hon'ble Mr. Justice Y.V. Chandrachud, Hon'ble Mr. Justice P.K. Goswami & Hon'ble Mr. Justice N.L. Untwalia

Petitioner: Narayan Ganesh Dastane
Vs.
Respondent: Sucheta Narayan Dastane

1975 SCC (2) 326

1975 AIR 1534, 1975 SCR (3) 967
DATE OF JUDGMENT 19/03/1975

Hindu Marriage Act--Section 10(1)(b) and 23(1)(a)(b)--Meaning of cruelty--Burden of proof in matrimonial matters--Whether beyond reasonable doubt--Condonation--of cruelty--Whether sexual intercourse amounts to condonation--Whether condonation is conditional--Revival of cruelty.

Code of Civil Procedure--Section 100 and 103--Powers of High Court in second appeal.

The appellant husband filed a petition for annulment of marriage on the ground of fraud, for divorce on the ground of unsoundness of mind and for judicial separation on the ground of cruelty. The appellant and respondent possess high educational qualifications and they were married in 1956. Two children were born of the marriage one in 1957 and the other in 1959.

The Trial Court rejected the contention of fraud and unsoundness of mind. It, however, held the wife guilty of cruelty and on that ground passed a decree for judicial separation. Both sides went in appeal to the District Court which dismissed the husband's appeal and allowed the wife's. The husband then filed a Second Appeal in the High Court.

The High Court dismissed that appeal.

On appeal to this Court,

Neither s.10 nor s. 23 of the Hindu Marriage Act requires that the petitioner must prove his case beyond reasonable doubt S. 23 confers on the court the power to pass a decree if it is satisfied on the matters mentioned in Clauses (a) to (e) of that Section. Considering that proceedings under the Act are essentially of a civil nature the word 'satisfied' must mean satisfied on a preponderance of probabilities and not satisfied beyond a reasonable doubt. The society has a stake in the institution of marriage and, therefore, the erring spouse is treated not as a mere defaulter but as an offender. But this social philosophy, though it may have a bearing on the need to have the clearest proof of an allegation before it is accepted as a ground for- the dissolution of marriage, it has no bearing on the standard of proof in matrimonial cases. In England, a view was at one time taken that a petitioner in a matrimonial petition must establish his or her case beyond a reasonable doubt but the House of Lords in Blyth v. Blyth has held that the grounds of divorce or the bars to the divorce May be proved by a preponderance of probability

On the question of condonation of cruelty, a specific provision of a specific enactment has to be interpreted, namely s. 10(1) (b). The enquiry, therefore, has to be whether the conduct charged as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent. It is not necessary, as under the English Law, that the cruelty must be of such a character as to cause danger to life, limb or health or as to give rise to a reasonable apprehension of such a danger.

Acts like the tearing of the Mangal Sutra, locking out the husband when he is due to arrive from the office, rubbing of chilly powder on the tongue of an infant child, beating a child mercilessly while in high fever and switching on the light at night and sitting by the bedside of the husband merely to nag him are acts which tend to destroy the legitimate ends and objects of matrimony. The conduct of wile amounts to cruelty within the meaning of s. 10(1) (b) of the Act. The threat that she would put an end to her own life or that she will set the house on fire, the threat that she will make the husband lose his job and have the matter published in newspapers and the persistent abuses and insults hurled at the husband and his parents are all of so grave an order as to 'imperil the appellant's sense of personal safety, mental happiness, job satisfaction and reputation.

JUDGMENT

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2224 of 1970.

From the judgment and order dated the 19th February, 1969 of the Bombay High Court in Second Appeal No. 480 of 1968.

V. M. Tarkunde, S. Bhandare, P. H. Parekh and Manju Jaitely, for the appellant.

V. S. Desai, S. B. Wad and Jayashree Wad, for the respondents.

The Judgment of the Court was delivered by

Hon'ble Mr. Justice Y.V. Chandrachud :—

This is a matrimonial dispute arising out of a petition filed by the appellant for annulment of his marriage with the respondent or alternatively for divorce or for judicial separation. The annulment was sought on the ground of fraud, divorce on the ground of unsoundness of mind and judicial separation on the ground of cruelty.

The spouses possess high academic qualifications and each one claims a measure. of social respectability and cultural sophistry. The evidence shows some traces of these. But of this there need be no doubt,: the voluminous record which they have collectively built up in the case contains a fair reflection of their rancour and acrimony, The appellant, Dr. Narayan Ganesh Dastane, passed his M.Sc. in Agriculture from the Poona University. He was sent by the Government of India to Australia in the Colombo Plan Scheme. He obtained his Doctorate in Irrigation Research from an Australian University and returned to India in April, 1955. He worked for about 3 years as an Agricultural Research Officer and in October, 1958 he left Poona to take charge of a new post as an Assistant Professor of Agronomy in the 'Post-Graduate School, Pusa Institute, Delhi. At present be is said to be working on a foreign assignment.

His father was a solicitor-cum lawyer practising in Poona.

The respondent, Sucheta, comes from Nagpur but she spent her formative years mostly in Delhi. Her father was transferred to Delhi in 1949 as an Under Secretary in the Commerce Ministry of the

Government of India and she came to Delhi along with the rest of the family. She passed her B.Sc. from the Delhi University in 1954 and spent a year in Japan where her father was attached to the Indian Embassy. After the rift in her marital relations, she obtained a Master's Degree in Social Work. She has done field work in Marriage Conciliation and Juvenile Delinquency. She is at present working in the Commerce and Industry Ministry, Delhi.

In April, 1956 her parents arranged her marriage with the appellant. But before finalising the proposal, her father- B. R. Abhyankarwrote two letters to the appellant's father saying in the first of these that the respondent "had a little misfortune before going to Japan in that she had a bad attack of sunstroke which affected her mental condition for sometime". In the second letter which followed at an interval of two days, "cerebral malaria" was mentioned as an additional reason of the mental affectation. The letters stated that after a course of treatment at the Yeravada Mental Hospital, she was cured : "you find her as she is today". The respondent's father asked her appellant's father to discuss the matter, if necessary, with the doctors of the Mental Hospital or with one Dr. P. L. Deshmukh, a relative of the respondent's mother. The letter was written avowdely'in order that the appellant and his people "should not be in the dark about an important episode" in the life of the respondent, which "fortunately, had ended happily".

Dr. Deshmukh confirmed what was stated in the letters and being content with his assurance, the appellant and his father made no enquiries with the Yeravada Mental Hospital. The marriage was performed at Poona on May 13, 1956. The appellant was then 27 and the respondent 21 years of age.

They lived at Arbhavi in District Belgaum from June to October, 1956. On November 1, 1956 the appellant was transferred to Poona where the two lived together till 1958.

During this period a girl named Shubha was born to them on March 11, 1957. The respondent delivered in Delhi where ,her parents lived and returned to Poona in June, 1957 after an absence, normal on such occasions, of about 5 months. In October, 1958 the appellant took a job in the Pusa Institute of Delhi, On March 21, 1959 the second daughter, Vibha, was born. The respondent delivered at Poona where the appellant's parents lived and returned to Delhi in August, 1959. Her parents were living at this time in Djakarta, Indonesia.

In January, 1961, the respondent went to Poona to attend the marriage of the appellant's brother, a doctor-by profession, who has been given an adoption in the Lohokare family. A fortnight after the marriage, on February 27, 1961 the appellant who had also gone to Poona for the marriage got the respondent examined by Dr. seth, a Psychiatrist in charge of the Yeravada Mental Hospital. Dr. Seth probably wanted adequate data to make his diagnosis and suggested that he would like to have a few sittings exclusively with the respondent. For reasons good or bad, the respondent was averse to submit herself to any such scrutiny. Either she herself or both she and the appellant decided that she should stay for some time with a relative of bers, Mrs-Gokhale. On the evening of the 27th, she packed her titbits and the appellant reached her to Mrs. Gokhale's house.

There was no consultation thereafter with Dr. Seth.

According to the appellant, she had promised to see Dr, Seth but she denies that she made any such promise. She believed that the appellant was building up a case that she was of unsound mind and she was being lured to walk into that trap.

February 1961 was the last that they lived together-. But on the day of parting she was three months in the family way. The third child, again a girl, named Pratibha was born on August 19, 1961 when her parents were in the midst of a marital crisis.

Things had by then come to an impossible pass. And close relatives instead of offering wise counsel were fanning the fire of discord that was devouring the marriage. A gentleman called Gadre whose letter-head shows an "M.A. (Phil.) M.A. (Eco.) LL.B.", is a maternal uncle of the respondent. On-March 2, 1961 he had written to tile appellant's father a pseudonymous letter now proved to be his, full of malice and sadism. He wrote :

> *"I on my part consider myself to be the father of 'Brahmadev ..... This is only the beginning. From the spark of your foolish and half-baked egoism, a big conflagration of family quarrels will break out and all will perish therein This image of the mental agony suffered by all your kith and' kin gives me extreme happiness..... You worthless person, who cherishes a desire to spit on my face, now behold that all the world is going to spit on your old cheeks.*
>
> *So why should I loose the opportunity of giving you a few severe slaps on your cheeks and of fisting your ear. It is my earnest desire that the father-in-law should beat your son with foot-ware in a public place."*

On March 11, 1961 the appellant returned to Delhi all alone. Two days later the respondent followed him but she went straight to her parents' house in)Delhi. On the 15th, the appellant wrote a letter to the police asking for protection as he feared danger to his life from the respondent's parents and relatives. On the 19th, the respondent saw the appellant but that only gave to the parties one more chance to give vent to mutual dislike and distrust. After a brief meeting, she left the broken home for good. On the 20th, the appellant once again wrote to the police renewing his request for protection.

On March 23, 1961 the respondent wrote to the appellant complaining against his conduct and asking for money for the maintenance of herself and the daughters. On May 19, 1961 the respondent wrote a letter to the Secretary, Ministry of Food and Agriculture, saying that the appellant had deserted her, that he had treated her with extreme cruelty and asking that the Government should make separate provision for her maintenance. On March 25, her statement was recorded by an Assistant Superintendent of Police, in which she alleged desertion and ill-treatment by the appellant. Further statements were recorded by the police and the Food Ministry also followed up respondent's letter of May 19 but ultimately nothing came out of these complaints and cross complaints. As stated earlier, the third daughter, Pratibha, was born on August 19, 1961. On November 3, 1961 the appellant wrote to respondent's father complaining of respondent's conduct and expressing regret that not even a proper invitation was issued to him when the naming ceremony of the child was performed. On December 15, 1961 the appellant wrote to respondent's father stating that he had decided to go to the court for seeking separation from the respondent. The proceedings out of which this appeal arises were instituted on February 19, 1962.

The parties are Hindus but we do not propose, as is commonly done and as has been done in this case, to describe the respondent as a "Hindu wife in contrast to non-Hindu wives as if wotmen professing this or that particular religion are exclusively privileged in the matter of good sense, loyalty and conjugal kindness. Nor shall we refer to the appellant as a "Hindu husband" as if that species unfailingly projects the image of tyrant husbands. We propose to consider the evidence on its merits, remembering of course the peculiar habits, ideas, susceptibilities and expectations of persons belonging to the strata

of society to which these two belong. All circumstances which constitute the ,occasion or setting for the conduct complained of have relevance but we think that no assumption can be made that respondent is the oppressed and appellant the oppressor. The evidence in any case ought to bear a secular examination.

The appellant asked for annulment of his marriage by a decree of nullity under section 12(1) (c) of 'The Hindu Marirage Act', 25 of 1955, ("The Act") on the ground that his consent to the marriage was obtained by fraud. Alternatively, he asked for divorce under section 13 (1) (iii) on the ground that the respondent was incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition. Alternatively, the appellant asked for Judicial separation under section 10(1) (b) on the ground that the respondent had treated him with such cruelty as to cause a reasonable apprehension in his mind that. it would be harmful or injurious for him to live with her.

The appellant alleged that prior to the marriage, the respondent was treated in the Yeravada Menfal Hospital for Schizophrenia but her father fraudulently represented that she was treated for sun-stroke and cerebral malaria. The trial court rejected this contention. It also rejected the contention that the respondent was of unsound mind.It,however, held that the respondent was guilty of cruelty and on that ground it passed a decree for judicial separation.

Both sides went in appeal to the District Court which dismissed the appellant's appeal and allowed the respondent's, with the result that the petition filed by the appellant stood wholly dismissed.

The appellant then filed Second Appeal No. 480 of 1968 in the Bombay High Court. A learned single Judge of that court dismissed that appeal by a judgment dated February 24, 1969.

This Court granted to the appellant special leave to appeal, limited to the question of judicial separation on the ground of cruelty.

We are thus not concerned with the question whether the appellant's consent to the marriage was obtainede by fraud or whether the respondent bad been of unsound mind for the requisite period preceding the presentation of the petition.

The decision-of the-High Court on those questions must be treated as final and can not be reopened. In this appeal by special leave, against the judgment rendered by the High Court in Second Appeal, we would not have normally permitted the parties to take us through the evidence in the case. Sitting in Second Appeal, it was not open to the High Court itself to reappreciate evidence. Section 100 of the Code of Civil Procedure restricts the jurisdiction of the High Court in Second appeal to questions of law or to substantial errors or defects in the procedure which may possibly have produced error or defect in the decision of the case upon the merits. But the High Court came to the conclusion that both the courts below had "failed to apply the correct principles of law in determining the issue of cruelty". Accordingly, the High Court proceeded to consider the evidence for itself and came to the conclusion independently that the appellant had failed to establish that the respondent had treat him with cruelty. A careful consideration of the evidence by the High Court ought to be enough assurance that the finding of fact is correct and it is not customary for this Court in appeals under Article 136 of the Constitution to go into minute details of evidence and weigh them one against the other, as if for the first time. Disconcertingly, this normal process is beset with practical difficulties.

In judging of the conduct of the respondent, the High Court assumed that the words of abuse or insult used by the respondent "could not have been addressed in vacuum. Every abuse, insult, remark or

retort must have been probably in exchange for remarks and rebukes from the husband..... a court is bound to consider the probabilities and infer, as I have done, that they must have been in the context of the abuses, insults, rebukes and remarks made by the husband and without evidence on the record with respect to the conduct of the husband in response to which the wife behaved in a particular way on each occasion, it is difficult, if not impossible to draw inferences against the wife."

We find this approach difficult to accept. Under section 103 of the Code of Civil Procedure, the High Court may, if the evidence on the record is sufficient, determine any issue of 'fact necessary for the disposal of the appeal which has not been determined by the lower appellate court or which has been wrongly determined by such court by reason of any illegality, omission, error or defect such as is referred to in sub-section (1) of section 100. But, if the High Court takes upon itself the duty to determine an issue of fact its power to appreciate evidence would be subject to the same restraining conditions to which the power of any court of facts is ordinarily subject. The limits of that power are not wider for the reason that the evidence is being appreciated by the High Court and not by the District Court. While appreciating ,evidence, inferences may and have to be drawn but courts of facts have to remind themselves of the line that divides an inference from guesswork.

If it is proved, as the High Court thought it was, that the respondent had uttered words of abuse and insult, the High Court was entitled to infer that she had acted in retaliation, provided of course there was evidence, direct or circumstantial, to justify such an inference. But the High Court itself felt that there was no evidence on the record with regard to the conduct of the husband in response to which the wife could be said to have behaved in the particular manner. The High Court reacted to this situation by saying that since there was no evidence regarding the conduct of the husband, "it is difficult, if not impossible, to draw inferences against the wife". If there was no evidence that the husband had provoked the wife's utterances, no inference could be drawn against the husband.

There was no question of drawing any inferences against the wife because, according to the High Court, it was established on the evidence that she had uttered the particular words of abuse and insult. The approach of the High Court is thus erroneous and its findings are vitiated. We would have normally remanded the matter to the High Court for a fresh consideration of the evidence but this proceeding has been pending for 13 years and we thought that rather than delay the decision any further, we should undertake for ourselves the task which the High Court thought it should undertake under section 103 of the Code. That makes it necessary to consider the evidence in the case.

But before doing so, it is necessary to clear the ground of certain misconceptions, especially as they would appear to have influenced the judgment of the High Court. First, as to the nature of burden of Proof which rests on a petitioner in a matrimonial petition under the Act. Doubtless, the burden must lie on the petitioner to establish his or her case for, ordinarily, the burden lies on the party which affirms a fact, not on the party which denies it., This principle accords with commonsense as it is so much earlier to prove a positive than a negative. The petitioner must therefore prove that the respondent has treated him with cruelty within the meaning of section 10 (1) (b) of the Act.

But does the law require, as the High Court has held, that the petitioner must prove his case beyond a reasonable doubt ? In other words, though the burden lies on the petitioner to establish the charge of cruelty, what is the standard of proof to be applied in order Lo judge whether the burden has been discharged ?

The normal rule which governs civil proceedings is that a fact can be said to be estabilshed if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act, section

3, a fact issaid to be proved when the court either believes it to exist or considersits existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where. the preponderance of probabilities lies. Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on a promissory note "the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue"(1) ; or as said by Lord Denning, "the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear" (2).

But whether the issue is one of cruelty or of a loan on a promote, the test to apply is whether on a preponderance of robabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged. Proof beyond reasonable doubt is proof by a higher standard which generally governs criminal trials or trials involving inquiry into issues of a quasi-criminal nature. A criminal trial involves the liberty of the subject which may not be taken away on a mere preponderance of probabilities. If the probabilities are so' nicely balanced that a reasonable, (1) Per Dixon,J.in Wright v.Wright (1948)77 C.L.R.191at p. 210. (2) Blyth v. Blyth, [1966] 1 A.E.R. 524 at 536. not a vascillating, mind cannot find where the preponderance lies, a doubt arises regarding the existence of the fact to be proved and the benefit of such reasonable doubt goes to the accused. It is wrong to import such considerations in trials of a purely civil nature.

Neither section 10 of the Act which enumerates the grounds on which a petition for judicial separation may be presented nor section 23 which governs the jurisdiction of the court to pass a decree in any proceeding under the Act requires that the petitioner must prove his case beyond a reasonable doubt. Section 23 confers on the court the power to pass a decree if it is "satisfied" on matters mentioned in clauses (a) to (e) of the section. Considering that proceedings under the Act are essentially of a civil nature, the word "satisfied" must mean "satisfied on a preponderance of probabilities" and not "satisfied beyond a reasonable doubt". Section 23 does not alter the standard of proof in civil cases.

The misconception regarding the standard of proof in matrimonial cases arises perhaps from a loose description of the respondent's conduct in such cases as constituting a "matrimonial offence". Acts of a spouse which are calculated to impair the integrity of a marital union have a social significance. To mar' or not to marry and if so whom, may well be a private affair but the freedom to break a matrimonial tie is not. The society has a stake in the institution of marriage and therefore the erring spouse is treated not as a mere defaulter but as an offender.]But this social philosophy, though it may have a bearing on the need to have the clearest proof of an allegation before it is accepted as a ground for the dissolution of a marriage, has no bearing on the standard of proof in matrimonial cases.

In England, a view was at one time taken that the petitioner in a matrimonial petition must establish his case beyond a reasonable doubt but in Blyth v. Blyth(P), the House of Lords held by a majority that so far as the grounds of divorce or the bars to divorce like connivance or condonation are concerned, "the case; like any civil case, may be proved by a preponderance of probability". The High Court of

Austraila in Wright v. Wright (2) , has also taken the view that "the civil and not the criminal standard of persuasion applies to matrimonial causes, including issues of adultery". The High Court was therefore in error in holding that the petitioner must establish the charge of cruelty "beyond reasonable doubt". The High Court adds that "This must be in accordance with the law of evidence", but we are not clear as to the implications of this observation.

Then, as regards the meaning of "Cruelty". The High Court on this question begins with the decision in Moonshee Bazloor Rubeem v. Shamsoonnissa Begum(3), where the Privy Council observed:

> *"The Mohomedan law, on a question of what is legal cruelty between Man and Wife, would probably not differ materially from our own of which one of the most recent exposition is the following :- 'There must be actual violence (1) [1966] A.E.R. 524 at 536. (2) 1948, 77 C.L.R. 191 at 210. (3) 11 Moore's Indian Appeals 551. of such a character as to endanger personal health or safety; or there must be a reasonable apprehension of it'."*

The High Court then refers to the decisions of some of the Indian Courts to illustrate "The march of the Indian Courts with the Englishs Courts" and cites the following passage from D. Tolstoy's "The Law and Practice of Divorce and Matrimonial Causes" (Sixth Ed., p. 61):

> *"Cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of such a character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger."*

The High Court concludes that "Having regard to these principles and the entire evidence in the case, in my judgment, I find that none of the acts complained of against the respondent can he considered to be so sufficiently grave and weighty as to be described as cruel according to the matrimonial law."

An awareness of foreign decisions could be a useful asset in interpreting our own laws. But it has to be remembered that we have to interpret in this case a specific provision of a specific enactment, namely, section 10(1) (b) of the Act. What constitutes cruelty must depend upon the terms of this statute which provides :

> *"10(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the district court praying for a decree for judicial separation on the ground that the other party-*
>
> *(b) has treated the petitioner with such cruelty as to cause areasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party;"*

The inquiry therefore has to be whether the conduct charged a,.- cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent.

It is not necessary, as under the English law, that the cruelty must be of such a character as to cause "danger" to life, limb or health or as to give rise to a reasonable apprehension of such a danger. Clearly, danger to life, limb or health or a reasonable apprehension of it is a higher requirement than a reasonable apprehension that it is harmful or injurious for one spouse to live with the other. The risk of relying on English decisions in this field may be shown by the learned Judge's reference to a passage from Tolstoy (p. 63) in which the learned author, citing Horton v. Horton(1), says :

> *"Spouses take each other for better or worse, and it is not enough to show that they find life together impossible, even if there results injury to health." (1) [1940] P. 187.*

If the danger to health arises merely from the fact that the spouses find it impossible to live together as where one of the parties shows an attitude of indifference to the other, the charge of cruelty may perhaps fail. But under section 10(1) (b), harm or injury to health, reputation, the working career or the like, would be an important consideration in determining whether the conduct of the respondent amounts to cruelty. Plainly, what we must determine is not whether the petitioner has proved the charge of cruelty having regard to the principles of English law, but whether the petitioner proves that the respondent has treated him with such cruelty as to cause a reasonable apprehension in his mind that it will be harmful or injurious for him to live with the respondent.

One other matter which needs to be clarified is that though under section 10(1) (b), the apprehension of the petitioner that it will be harmful or injurious to live with the other party has to be reasonable, it is wrong, except in the context of such apprehension, to import the concept of a reasonable man as known to the law of negligence for judging of matrimonial relations. Spouses are undoubtedly supposed and expected to conduct their joint venture as best as they might but it is no function of a court inquiring into a charge of cruelty to philosophise on the modalities of married life. Some one may want to keep late hours to finish the day's work and some one may want to get up early for a morning round of golf. The court cannot apply to the habits or hobbies of these the test whether a reasonable man situated similarly will behave in a similar fashion. "The question whether the misconduct complained of constitutes cruelty and the like for divorce purposes is determined primarily by its effect upon the particular person complaining of the acts. The question is not whether the conduct would be cruel to a reasonable person or a person of average or normal sensibilities, but whether it would have that effect upon the aggrieved spouse,. That which may be cruel to one person may be laughed off by another, and what may not be cruel to an individual under one set of circumstances may be extreme cruelty under another set of circumstances."(1) The Court has to deal, not with an ideal husband and ideal wife (assuming any such exist) but with the particular man and woman before it. The ideal couple or a near-ideal one will probably have no occasion to go to a matrimonial court for, even if they may not be able to drown their differences, their ideal attitudes may help them overlook or gloss over mutual faults and failures. As said by Lord Reid in his speech in Gollins v. Gollins (2).

> *"In matrimonial cases we are not concerned with the reasonable man, as we are in cases of negligence. We are dealing with this man and this woman and the fewer a priori assumptions we make bout them the better. In cruelty cases one can hardly ever even start with a presumption that the parties are reasonable people, because it is hard to imagine any cruelty case ever arising if both the spouses think and behave as reasonable people."*

We must therefore try and understand this Dr. Dastane and his wife Sucheta as nature has made them and as they have shaped their lives.

(1) American Jurisprudence, 2nd Ed., Vol. 24, p. 206.

(2) [1963] 2 A.E.R. 966,970.

The only rider is the interdict of section 23 (1) (a) of the Act that the relief prayed for can be decreed only if the court is satisfied that the petitioner is not in any way taking advantage of his own wrong. Not otherwise. We do not propose to spend time on the trifles of their married life. Numerous incidents

have been cited by the appellant as constituting cruelty but the simple trivialities which can truly be described as the reasonable, wear and tear of married life have to be ignored. It is in the context of such trivialities that one says that spouses take each other for better or worse. In many marriages each party can, if it so wills, discover many a cause for complaint but such grievances arise mostly from temperamental disharmony. Such disharmony or incompatibility is not cruelty and will not furnish a cause for the dissolution of marriage. We will therefore have regard only to grave and weighty incidents and consider these to find what place they occupy on the marriage canvas.

The spouses parted company on February 27, 1961, the appellant filed his petition on February 19, 1962 and the trial began in September, 1964. The 3-1/2 years' separation must naturally have created many more misunderstandings and further embitterment. In such an atmosphere, truth is a common casualty and therefore we consider it safer not to accept the bare word of the appellant either as to what the respondent said or did or as to the genesis of some of the more serious incidents. The evidence of the respondent too would be open to the same criticism but the explanation of her words and deeds, particularly of what she put in cold print, must come from her oral word and that has to be examined with care.

The married life of these spouses is well-documented, almost incredibly documented. They have reduced to writing what crossed their minds and the letters which they have written to each other bear evidence of the pass to which the marriage had come. Some of these were habitually written as the first thing in the morning like a morning cup (if tea while some were written in the silence of mid-night soon after the echo of harsh words had died down. To think that this young couple could indulge in such an orgy of furious letter-writing is to have to deal with a problem out of the ordinary for it is seldom that a husband and wife, while sharing a common home, adopt the written word as a means of expression or communication.

The bulk of the correspondence is by the wife who seems to have a flair for letter-writing. She writes in some style and as true as "The style is the man", her letters furnish a clue to her personality. They are a queer mixture of confessions and opprobrious accusations. It is strange that almost every one connected with this couple his a penchant for writing. The wife, apart from her voluminous letters, has written an autobiographical account of her unfortunate experiences in the Yeravada Hospital, calling it "Mee Antaralat Tarangat Asta" ("while I was floating in space").

The husband's father idealised the Shiva-Parvati relationship in a book called : "Gauriharachai Goad Kahani" ("The sweet story of Gaurihar"). Quite a few of the wifes relatives including a. younger sister of hers and of course her maternal uncle have set their pen to paper touching some aspect or the other of her married life. Perhaps, it was unfortunate that the promised millennium that did not come began with a letter. That was the letter of April 25, 1956 which the wife's lather wrote to the husband's father while the marriage negotiations were in progress. The marriage took place on May 13, 1956.

Nothing deserving any serious notice happened till August, 1959 except that the letters Exs. 556, 238, 243 and 244 show that quite frequently the respondent used to get into fits of temper and say things for which She would express regret later. In the letter Ex. 556 dated November 23, 1956 she admits to having behaved "very badly"; in Ek. 238 dated March 26, 1959 she admits that she was behaving like an "evil star" and had harassed the appellant; in Ex. 243 dated May 5, 1959 she says that she was aware of her "lack of sense" and asks for forgiveness for having insulted the appellant, his parents, his sister and her husband; and in Ex. 244 dated May 22, 1959 she entreats the appellant that he should not feel guilty for the insults hurled by her at his parents.

The period from August 1959 to March 1960 was quite critical and the correspondence covering that period shows that an innate lack of self-control had driven the respondent to inexorable conduct. By the letter. Ex. 256 dated February 16, 1960 the appellant complained to the respondent's father who was then in Indonesia that the respondent kept on abusing him, his parent and sister and that he was extremely unhappy. The appellant says in the letter that differences between a husband and wife were understandable but that it was impossible to tolerate the respondent constantly accusing him and his relatives of wickedness. The appellant complains that the respondent used to say that the book written by his father should be burnt to ashes, that the appellant should apply the ashes to his forehead, that the whole Dastane family was utterly mean and that she wished that his family may be utterly ruined. The appellant was gravely hurt at the respondent's allegation that his father's 'Sanad' bad been once forfeited. The appellant tells the respondent's father that if he so desired he could ask her whether anything stated in the letter was untrue and that he had conveyed to her what be was stating in the letter. It may be stated that the respondent admits that the appellant had shown her this letter before it was posted to her father. On March 21. 1960 the respondent wrote a letter (Ex. 519) to the appellant's parents admitting the truth of the allegations made by the appellant in Ex. 256.

On June 23, 1960 the respondent made a noting in her own hand stating that she had accused the appellant of being a person with a beggarly luck, that she had said that the food eaten at his house, instead of being digested would cause worms in the stomach and that she had given a threat :

"murder shall be avenged with murder".

During June 1, 1960 to December 15, 1960 the marital relations were subjected to a stress and strain which ultimately wrecked the marriage. In about September, 1960 the appellants father probably offered to mediate and asked the appellant and the respondent to submit to him their respective complaints in writing. The appellant's bill of complaints is at Ex. 426 dated October 23, 1960. The letter much too long to be reproduced, contains a sorry tale. The gist of the more important of the appellant's grievances in regard to the period prior to June, 1960 is this : (1)' The respondent used to describe the appellant's mother as a boorish woman; (2) On the day of 'Paksha' (the day oil which oblations are offered to ancestors) she used to abuse the ancestors of the appellant; (3) She tore off the 'Mangal- Sutra'; (4) She beat the daughter Shubha while she was running a high temperature of 104'; (5) One night she started behaving as if she was 'possessed'. She tore off the Mangal-Sutra once again and said that she will not put it on again; and (6) She used to switch on the light at midnight and sit by the husband's bedside nagging him through the night, as a result he literally prostrated himself before her on several occasions.

The gist of the incidents from May to October, 1960 which the appellant describes as 'a period of utmost misery' is this. (1) The respondent would indulge in every sort of harassment and would blurt out anything that came to her mind; (2) One day while a student of the appellant called Godse was sitting in the outer room she shouted :

"You are not a man at all"; (3) In the heat of anger she used to say that she would pour kerosene on her body and would set fire to herself and the house; (4) She used to lock out the appellant when he was due to return from the office. On four or five occasions he had to go back to the office without taking any food; (5) For the sheer sake of harassing him she would hide his shoes, watch, keys and other things.

The letter Ex. 426 concludes by saying : , "She is a hard headed, arrogant, merciless, thoughtless, unbalanced girl devoid of sense of duty. Her ideas about a husband are : He is a dog tied at doorstep

who is supposed to come and go at her beck and call whenever ordered. She behaves with the relatives of her husband as if they were her servants. When I see her besides herself with fury, I feel afraid that she may kill me at any moment. I have become weary of her nature of beating the daughters, scolding and managing me every night uttering abuses and insults."

Most of these incidents are otherwise, supported, some by the admissions of the respondent herself, and for their proof we do not have to accept the bare word of the appellant.

On July 18, 1960 the respondent wrote a letter (Ex. 274) to the appellant admitting that within the bearing of a visitor she had beaten the daughter Shubha severely. When the appellant protested she retorted that if it was a matter of his prestige, be should not have procreated the children.

She has also admitted in this letter that in relation to her daughters she bad said that there will be world deluge because of the birth of those "ghosts". On or about July 20. 1960 she wrote another letter (Ex. 275) to the appellant admitting that she had described him as "a monster in a human body", that she had and that be'should not have procreated children. that he should "Pickle them and preserve them in a jar" and that she had given a threat that she would see to it that he loses his job and then she would publish the news in the Poona newspapers. On December 15, 1960 the appellant wrote a letter (Ex. 285) to the respondent's father complaining of the strange and cruel behaviour not only of the respondent but of her mother. He says that the respondent's mother used to threaten him that since she was the wife of an Under Secretary she knew many important persons and could get him dismissed from service, that she used to pry into his correspondence in his absence and that she even went to the length of saying that the respondent ought to care more for her parents because she could easily get another husband but not another pair of parents.

The respondent then went to Poona for the appellant's brother's marriage, where she was examined by Dr. Seth of the Yeravada Hospital and the spouses parted company on February 27, 1961.

The correspondence subsequent to February 27, 1961 shall have to be considered later in a different,, though a highly important, context. Some of those letters clearly bear the stamp of being written under legal advice. The parties had fallen out for good and the domestic war having ended inconclusively they were evidently preparing ground for a legal battle.

In regard to the conduct of the respondent as reflected in her admissions, two contentions raised on her behalf must be considered. It is urged in the first place that the various letters containing admissions were written by her under coercion. There is no substance in this contention. In her written statement, the respondent alleged that the appellant's parents had coerced her into writing the letters. At the trial she shifted her ground and said that the coercion proceeded from the appellant himself. That apart, at a time when the marriage had gone asunder and the respondent sent to the appellant formal letters resembling a lawyer's notice, some of them by registered post, no allegation was made that the appellant or his parents had obtained written admissions from her. Attention may be drawn in this behalf to the letters Exs. 299 and 314 dated March 23 and May 6, 1961 or to the elaborate complaint Ex. 318 dated May 19, 1961 which she made to the Secretary to Government of India, Ministry of Food and Agriculture.

Prior to that on September 23, 1960 she had drawn up a list of her complaints (Ex. 424) which begins by saying : "He has oppressed me in numerous ways like the following." But she does not speak therein of any admission or writing having been obtained from her. Further, letters like Exs. 271 and 272 dated respectively June 23 and July 10, 1960 which besides containing admissions on her part also

contain allegations against the appellant could certainly not have been obtained by coercion. Finally, considering that the respondent was always surrounded by a group of relatives who had assumed the role of marriage-counsellors, it is unlikely that any attempt to coerce her into making admissions would have been allowed to escape unrecorded. After all, the group here consists of greedy letter-writers.

The second contention regarding the admissions of the respondent is founded on the provisions of section 23(1)(a) of the Act under which the court cannot decree relief unless it is satisfied that "the petitioner is not in any way taking advantage of his own wrong'. The fulfilment of the conditions mentioned in, section 23(1) is so imperative that the legislature has taken the care to provide that "then, and in such a case, but not otherwise, the court shall decree such relief accordingly". It is urged that the appellant is a bigoted and egocentric person who demanded of his wife an impossibly rigid standard of behaviour and the wife's conduct must be excused as being in selfdefence. In other words, the husband is said to have provoked the wife to say and act the way she did and he cannot be permitted to take advantage of his own wrong. The appellant, it is true, seems a stickler for domestic discipline and these so-called perfectionists can be quite difficult to live with. On September 22, 1957 the respondent made a memorandum (Ex. 379) of the instructions given by the appellant, which makes interesting reading:

"Special instructions given by my husband.

(1) On rising up in the morning, to look in the minor.

(2) Not to fill milk vessel or tea cup to the brim.

(3) Not to serve meals in brass plates cups and vessels.

(4) To preserve carefully the letters received and if addresses of anybody are given therein to note down the same in the note book of addresses.

(5) After serving the first course during meals, not to repeatedly ask 'what do you want?' but to inform at the beginning of the meals how much and which are the courses.

(6) As far as possible not to dip the fingers in any utensils.

(7) Not to do any work with one hand.

(8) To keep Chi. Shuba six feet away from the primus stove and Shegari.

(9) To regularly apply to her 'Kajal' and give her tomato juice, Dodascloin etc. To make her do physical exercise, to take her for a walk and not to lose temper with her for a year.

(10) To give him his musts and the things he requires when he starts to go outside.

(11) Not to talk much.

(12) Not to finish work somehow or the other; for example to write letters in good hand writing, to take a good paper, to write straight and legibly in a line.

(13) Not to make exaggerations in letters.

(14) To show imagination in every work. Not to note down the milk purchased on the calendar."

Now, this was utterly tactless but one cannot say that it called for any attack in self-defence. The appellant was then 28 and the respondent 22 years of age. In that early morning flush of the marriage' young men and women do entertain lavish expectations of each other do not and as years roll by they

see the folly of. their ways. But we think that the wife was really offended by the instructions given by the appellant. The plea of self-defence seems a clear after-thought which took birth when there was a fundamental failure of faith and understanding.

Reliance was then placed on certain letters to show that the husband wanted to assert his will at any cost, leaving the wife no option but to retaliate. We see no substance in this grievance either. The, plea in the written statement is one of the denial of conduct alleged and not of provocation. Secondly, there are letters on the record by which the wife and her relatives had from time to time complimented the husband and his parents for their warmth, patience and understanding.

Counsel for the respondent laid great emphasis on the letter, Ex. 244 dated May 22, 1959 written by her to the appellant in which she refers to some "unutterable question" put by him to her. It is urged that the appellant was pestering her with a demand for divorce and the "unutterable question" was the one by which he asked for divorce. No such inference can in our opinion be raised. The respondent has not produced the letter to which Ex. 244 is reply; in the written statement there is hardly a suggestion that the appellant was asking her for a divorce; and the appellant was not asked in his evidence any explanation in regard to the "unutterable question".

These defences to the charge of cruelty must accordingly be rejected. However, learned counsel for the respondent is right in stressing the warning given by Denning L.J., in Kaslefsky v. Kaslefsky that : "If the door of cruelty were opened too wide, we should soon find ourselves granting divorce for incompatibility of temperament. This is an easy path to tread especially in undefended cases. The temptation must be resisted test we slip into a state of affairs where the institution of marriage itself is imperilled." But we think that t1o hold in this case that the wife's conduct does not amount to cruelty is to close for ever the door of cruelty so as to totally prevent any access thereto. This is not a case of mere austerity of temper, petulance of manners, rudeness of language or a want of civil attention to the needs of the husband and the household. Passion and petulance have perhaps to be suffered in silence as the price of what turns out to be an injudicious selection of a partner. But the respondent is the mercy of her inflexible temper. She delights in causing misery to her husband and his relation-, and she willingly suffers the calculated insults which her relatives hurled at him and his parents : the false accusation that, "the pleader's Sanad of that old bag of your father was forfeited"; "I want to see the ruination of the whole Dastane dynasty", "burn (1)[1950] 2 A.E.R. 398,403.

the book written by your father and apply the ashes to your forehead"; "you are not a man" conveying that the children were not his; "you are a monster in a human body. "I will make you lose your job and publish it in the Poona newspapers"-these and similar outbursts are not the ordinary wear and tear of married life but they became, by their regularity a menace to the peace and well-being of the household. Acts like the tearing of the Mangal-Sutra, locking out the husband when he is due to return from the office, rubbing chillie powder on the tongue of an infant child, beating a child mercilessly while in high fever and switching on the light at night and sitting by the bedside of the husband merely to nag him are acts which tend to destroy the legitimate ends and objects of matrimony. Assuming that there was some justification for occasional sallies or show of temper, the pattern of behaviour which the respondent generally adopted was grossly excessive.

The conduct of the respondent clearly amounts to cruelty within the meaning of section 10(1) (b) of the Act. Under that provision, the relevant consideration is to see whether the conduct is such as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for him to live with the respondent. The threat that she will put an end of her own life or that she will

set the house on fire, the threat that she will make him lose his job and have the matter published in newspapers and the, persistent abuses and insults hurled at the appellant and his parents are all of so grave an order as to imperil the appellant's sense of personal safety. mental, happiness, job satisfaction and reputation. Her once-too-frequent.

apologies do not reflect genuine contrition but were merely impromptu device to tide over a crisis temporarily. The next question for consideration is whether the appellant had at any time condoned the respondent's cruelty. Under section 23(1) (b) of the Act, in any proceeding under the Act whether defended or not, the relief prayed for can be decreed only and only if "where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty".

The respondent did not take up the plea in her written statement that the appellant bad condoned her cruelty. Probably influenced by that omission, the trial court did not frame any issue on condonation. While granting a decree of judicial separation on the ground of cruelty, the learned Joint Civil Judge, Junior Division, Poona, did not address himself to the question of condonation. In appeal, the learned Extra Assistant Judge, Poona, having found that the conduct of the respondent did not amount to cruelty, the question of condonation did not arise. The High Court in Second Appeal confirmed the finding of the 1st Appellate Court on the issue of cruelty and it further held that in any case the alleged cruelty was condoned by the appellant.

The condonation, according to the High Court, consisted in the circumstance that the spouses co-habited till February 27, 1961 and a child was born to them in August, 1961.

Before us, the question of condonation was argued by both the sides. It is urged on behalf of the appellant that there is no evidence of condonation while the argument of the respondent is that condonation is implicit in the act of co-habitation and is proved by the fact that on February 27, 1961 when the spouses parted, the respondent was about 3 months pregnant. Even though condonation was not pleaded as a defence by the respondent it is our duty, in view of the provisions of section 23(1) (b), to find whether the cruelty was condoned by the appellant. That section casts an obligation on the court to consider the question of condonation, an obligation which has to be discharged even in undefended cases. The relief prayed for can be decreed only if we are satisfied "but not otherwise", that the petitioner has not in any manner condoned the cruelty. It is, of course, necessary that there should be evidence on the record of the case to show that the appellant had condoned the cruelty.

Condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation there must be, therefore, two things : forgiveness and restoration(1). The evidence of condonation in this case is, in our opinion, as strong and satisfactory as the evidence of cruelty. But that evidence does not consist in the mere fact that the spouses continued to share a common home during or for some time after the spell of cruelty. Cruelty, generally, does not consist of a single, isolated act but consists in most cases of a series of acts spread over a period of time. Law does not require that at the first appearance of a cruel act, the other spouse must leave the matrimonial home lest the continued co-habitation be construed as condonation. Such a construction will hinder reconciliation and thereby frustrate the benign purpose of marriage laws.

The evidence of condonation consists here in the fact that the spouses led a normal sexual life despite the respondent's Acts of cruelty. This is not a case where the spouses, after separation, indulged in a stray act of sexual intercourse, in which case the necessary intent to forgive and restore may be said to be lacking. Such stray acts may bear more than one explanation. But if during co-habitation

the spouses, uninfluenced by the conduct of the offending spouse, lead a life of intimacy which characterises normal matrimonial relationship, the intent to forgive and restore the offending spouse to the original status may reasonably be inferred. There is then no scope for imagining that the conception of the child could be the result of a single act of sexual intercourse and that such an act could be a stark animal act unaccompanied by the nobler graces of marital life. One might then as well magine that the sexual act was undertaken just in order to kill boredom or even in a spirit of revenge. Such speculation is impermissible. Sex plays an important role in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfilment. Therefore, evidence showing that the spouses led a normal sexual life even after a series of acts of cruelty by one spouse is proof that the other spouse condoned that cruelty. Intercourse, of course, is not a necessary ingredient of condonation because there may be evidence otherwise to show that the offending spouse has been forgiven and has been received back into the position previously occupied in the home. But intercourse in circumstances as obtain here would raise a strong inference of condonation with its dual requirement, forgiveness and restoration. That inference stands uncontradicted, the appellant not having explained the circumstances in which he came to lead and live a normal sexual life with the respondent, even after a series of acts of cruelty on her part.

But condonation of a matrimonial offence is not to be likened to a full Presidential Pardon under Article 72 of the Constitution which, once granted, wipes out the guilt beyond the possibility of revival. Condonation is always subject to the implied condition that the offending spouse will not commit a fresh matrimonial offence, either of the same variety as the one condoned or of any other variety.

> *"No matrimonial offence is erased by condonation. It is obscured but not obliterated" (1). Since the condition of forgiveness is that no further matrimonial offence shall occur, it is not necessary that the fresh offence should be ejusdem generis with the original offence(2). Condoned cruelty can therefore be revived, say, by desertion or adultery."*

Section 23 (1) (b) of the Act, it may be urged, speaks of condonation but not of its revival and therefore the English doctrine of revival should not be imported into matters arising under the Act. Apparently, this argument may seem to receive some support from the circumstances that under the English law, until the passing of the Divorce Reform Act, 1969 which while abolishing the traditional bars to relief introduces defences in the nature of bars, at least one matrimonial offence, namely, adultery could not be revived if once condoned (3). But a closer examination of such an argument would reveal its weakness. The doctrine of condonation was established by the old ecclesiastical courts in Great Britain and was adopted by the English Courts from the canon law. 'Condonation' is a technical word which means and implies a conditional waiver of the right of the injured spouse to take matrimonial proceedings. It is not 'forgiveness' as commonly understood (4). In England condoned adultery could not be received because of the express provision contained in section 3 of the Matrimonial Causes Act, 1963 which was later incorporated into section 42(3) of the Matrimonial Causes Act, 1965. In the absence of any such provision in the Act governing the charge of cruelty, the word 'condonation' must receive the meaning which it has borne for centuries in the world of law(").

'Condonation' under section 23 (1) (b) therefore means conditional forgiveness, the implied condition being that no further matrimonial offence shall be committed.

(1) See Words and Phrases Legally Defined (Butterworths) 1969 Ed., Vol I, p. 305, ("Condonation").

(2) See Halsbury's Laws of England, 3rd Ed., Vol. 12, p. 3061.

(3) See Rayden on Divorce, 11th Ed. (1971) pp. 11, 12, 23, 68, 2403.

(4) See Words and Phrases Legally Defined (Butterworths) 1969 Ed., p. 306 and the Cases cited therein.

(5) See Ferrers vs Ferrers (1791) 1 Hag. Con 130 at pp. 130, 131.

It therefore becomes necessary to consider the appellant's argument that even on the assumption that the appellant had condoned the cruelty, the respondent by her subsequent conduct forfeited the conditional forgiveness, thereby reviving the original cause of action for judicial separation on the ground of cruelty. It is alleged that the respondent treated the appellant with cruelty during their brief meeting on March 19, 1961, that she refused to allow to the appellant any access to the children, that on May 19, 1961 she wrote a letter (Ex. 318) to the Secretary to the Government of India, Ministry of Food and Agriculture, New Delhi, containing false and malicious accusations against the appellant and his parents and that she deserted the appellant and asked the Government to provide her with separate maintenance.

These facts, if proved, shall have to be approached and evaluated differently from the facts which were alleged to constitute cruelty prior to its condonation. The incidents on which the appellant relied to establish the charge of cruelty had to be grave and weighty. And we found them to be so. In regard to the respondent's conduct subsequent to condonation, it is necessary to bear in mind that such conduct may not be enough by itself to found a decree for judicial separation and yet it may be enough to revive the condoned offence. For example, gross familiarities short of adultery(1) or desertion for less than the statutory period (2) may be enough to revive a condoned offence. The incident of March 19, 1961 is too trifling to deserve any notice. That incident is described by the appellant himself in the complaint (Ex. 295) which he made to the police on March 20, 1961. He says therein that on the 19th morning, the respondent went to his house with some relatives, that those relatives-instigated her against him, that they entered his house though he asked them not to do so and that she took away certain household articles with her. As shown by her letter (Ex. 294) dated the 19th itself, the articles which she took away were some petty odds and ends like a do]], a slate, a baby hold-all, two pillows, a bundle of clothes and a baby-cart. The police complaint made by the appellant betrays some hypersensitivity.

As regards the children, it does seem that ever since February 27, the appellant was denied a chance to meet them. His letters Exs. 307. 309 and 342 dated April 20, April 21 and November 23, 1961 respectively contain the grievance that the children were deliberately not allowed to see him., From his point of view the grievance could be real but then the children, Shubha and Vibha, were just 4 and 2 years of age in February, 1961 when their parents parted company.

Children of such tender age need a great amount of looking after and they could not have been sent to meet their father unescorted. The one person who could so escort them was the mother who bad left or bad to leave the matrimonial home for good. The appellant's going to the house of the respondent's parents where he was living was in the circumstances an impracticable proposition. Thus, the wall that divided the parents denied to the appellant access to his children.

(1) Halsbury's Law-, of England, 3rd Ed., Vol. 12, p. 306, para 609.

(2) Beard vs. Beard [1945] 2 A.E.R. 306.

The allegations made by the respondent in her letter to the Government, Ex. 318 dated May 19, 1961 require a close consideration. It is a long letter, quite an epistle, in tune with the, respondent's proclivity

as a letter-writer. By that letter, she asked the Government to provide separate maintenance for herself and the children. The allegations contained in the letter to which the appellant's counsel has taken strong exception are these : (1) During the period that she lived with the appellant, she was subjected to great harassment as well as mental and physical torture; (2) The appellant had driven her out of the house on February 27, 1961; (3) The appellant had deserted her and had declared that he will not have any connection with her and that he will not render any financial help for the maintenance of herself and the children. He also refused to give medical help to her in her advanced stage of pregnancy; (4) The appellant had denied to her even the barest necessities of life like food and clothing; (5) The parents of (he appellant were wicked persons and much of her suffering was due to the influence which they had on the appellant; (6) The appellant used to threaten her that he would divorce her, drive her out of the house and even do away with her life, (7) The plan to get her examined by Dr. Seth of the Peravada Mental Hospital was an insincere wicked and evil move engineered by the appellant, his brother and his father, (8) On her refusal to submit to the medical examination any further, she was driven out of the house with the children after being deprived of the valuables on her person and in her possession; and (9) The appellant had subjected her to such cruelty as to cause a reasonable apprehension in her mind that it would be harmful or injurious for her to live with him.

Viewed in isolation, these allegations present a different and a somewhat distorted picture. For their proper assessment and understanding, it is necessary to consider the context in which those allegations came to be made. We will, for that purpose, refer to a few letters.

On March 7, 1961 the respondent's mother's aunt, Mrs. Gokhale wrote a letter (Ex. 644) to the respondent's mother. The letter has some bearing on the events which happened in the wake of the separation which took place on February 27, 1961. It shows that the grievance of the respondent and her relatives was not so much that a psychiatrist was consulted as that the consultation was arranged without any prior intimation to the respondent. The letter shows that the appellant's brother Dr. Lohokare, and his brother-in-law Deolalkar, expressed regret that the respondent should have been got examined by a psychiatrist without previous intimation to any of her relatives. The letter speaks of a possible compromise between the husband and wife and it sets out the terms which the respondent's relatives wanted to place before the appellant. The terms were that the respondent would stay at her parents' place until her delivery but she would visit the appellant off and on; that the children would be free to visit the appellant; and that in case the appellant desired that the respondent should live with him, he should arrange that Dr. Lohokare's mother should stay with them in Delhi for a few days. The last term of the proposed compromise Was that instead of digging the past the husband and wife should live in peace and happiness. The letter bears mostly the handwritting of the respondent herself and the significance of that circumstance is that it was evidently written with her knowledge and consent. Two things are clear from the letter : one, that the respondent did not want to leave the appellant and two, that she did not either want to prevent the children from seeing the appellant. The letter was written by one close relative of the respondent to another in the ordinary course of events and was not, so to say, prepared in order to create evidence or to supply a possible defence. It reflects a genuine attitude, not a make believe pose and the feelings expressed therein were shared by the, respondent whose handwriting the letter bears.

This letter must be read along with the letter Ex. 304 which the respondent sent to the appellant on April 18, 1961. She writes :

> *"I was sorry to hear that you are unwell and need treatment. I would always like never to fail in my wifely duty of looking after you, particularly when you are ailing, but you*

will, no doubt, agree that even for this, it will not be possible for me to join you in the house out of which you have turned me at your father's instance. 'This is, therefore, just to keep you informed that if you come to 7/6 East Patel Nagar, I shall be able to nurse you properly and my parents will ever be most willing to afford the necessary facilities under their care to let me carry out this proposal of mine."

There is no question that the respondent had no animus to desert the appellant and as stated by her or on her behalf more than once, the appellant had on February 27, 1961 reached her to Mrs. Gokhale's house in Poona, may be in the hope that she will cooperate with Dr. Seth in the psychiatric exploration. She did not leave the house of her own volition.

But the appellant had worked himself up to believe that the respondent had gone off her mind. On March 15, 1961 he made a complaint (Ex. 292) to the Delhi Police which begins with the recital that the respondent was in the Mental Hospital before marriage and that she needed treatment from a psychiatrist. He did say that the respondent was "a very loving and affectionate person" but he qualified it by saying : "when excited, she appears to be a very dangerous woman, with confused thinking".

On April 20, 1961 the appellant wrote a letter (Ex. 305) to the respondent charging her once again of being in an "unsound state of mind". The appellant declared by that letter that he will not be liable for any expenses incurred by her during her stay in her parents' house. On the same date he wrote a letter (Ex. 307) to the respondent's father reminding him that he, the appellant, had accepted a girl "who had returned from the Mental Hospital". On April 21, 1961 he wrote it letter (Ex. 309) to the Director of Social Welfare, Delhi Administration, in which he took especial care to declare that the respondent "was in the Poona Mental Hospital as a lunatic before the marriage". The relevance of these reiterations regarding the so-called insanity of the respondent, particularly in the last letter, seems only this, that the appellant was preparing ground for a decree of divorce or of annulment of marriage. He was surely not so naive as to believe that the Director of Social Welfare could arrange to "give complete physical and mental rest" to the respondent. Obviously, the appellant was anxious to disseminate the information as widely as possible that the respondent was of unsound mind.

On May 6, 1961 the respondent sent a reply (Ex. 314) to the appellant's letter, Ex. 305, dated April 20, 1961. She expressed her willingness to go back to Poona as desired by him, if he could make satisfactory arrangements for her stay there. But she asserted that as a wife she was entitled to live with him and there was no purpose in her living at Poona "so many miles away from Delhi, without your shelter". In regard to the appellant's resolve that he will not bear the expenses incurred by her, she stated that not a pie remitted by him will be illspent and that, whatever amount he would send her will be, accounted for fully. It is in this background that on May 19, 1961 the respondent wrote the letter Ex. 318 to the Government. When asked by the Government to offer his explanation, the appellant by his reply Ex. 323 dated July 19, 1961 stated that the respondent needed mental treatment, that she may have written the letter Ex. 318 in a "madman's frenzy" and that her father had "demoralised" her. In his letter Ex. 342 dated November 23 , 1961 to the respondent's father, he described the respondent as "'your schizophrenic daughter".

Considered in this context, the allegations made by the respondent in her letter Ex. 318 cannot revive the original cause of action. These allegations were provoked by the appellant by his persistent and purposeful accusation, repeated times without number, that the respondent was of unsound mind. He snatched every chance and wasted no opportunity to describe her as a mad woman which, for the purposes of this appeal, we must assume to be wrong and unfounded. He has been denied leave to

appeal to this Court from the finding of the High Court that his allegation that the respondent was of unsound mind is baseless. He also protested that he was not liable to maintain the respondent.

It is difficult in these circumstances to accept the appellant's argument either that the respondent deserted him or that she treated him with cruelty after her earlier conduct was condoned by him. It is true that the more serious the original offence, the less grave need be the subsequent acts to constitute a revival(1) and in cases of cruelty, "very slight fresh evidence is needed to show a resumption of the cruelty. for cruelty of character is bound to show itself in conduct and behaviour, day in and day out, night in and night out". But the conduct of the respondent after condonation cannot be viewed apart from the conduct of the appellant after condonation. Condonation is conditional forgiveness but the grant of such forgiveness does not give

(1) Cooper vs. Cooper (1950) W.N. 200 (H.L.)

(2) Per Scott L. J. in Batram vs. Batram (1944) p. 59 at p. 60.

to the condoning spouse a charter to malign the other spouse. If this were so, the condoned spouse would be required mutely to submit to the cruelty of the other spouse without relief or remedy. The respondent ought not to have described the appellant's parents as "wicked" but that perhaps is the only allegation in the letter Ex. 318 to which exception may be taken. We find ourselves unable to rely on that solitary circumstance to allow the revival of condoned cruelty.

We therefore hold that the respondent was guilty of cruelty but the appellant condoned it and the subsequent conduct of the respondent is not such as to amount to a revival of the original cause of action. Accordingly, we dismiss the appeal and direct the appellant to pay the costs of the respondent.

Appeal dismissed.

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LACHMAN UTAMCHAND KIRIPLANI VS MEENA ALIAS MOTA

Bench: Hon'ble Mr. Justice Bhuvneshwar P. Sinha, CJ, Hon'ble Mr. Justice Sudhi Ranjan Das, Hon'ble Mr. Justice K. Subbarao, Hon'ble Mr. Justice Raghubar Dayal, Hon'ble Mr. Justice N. Rajagopala Ayyangar

Lachman Utamchand Kiriplani
Vs.
Meena alias Mota

AIR 1964 SC 40

Equivalent citations: 1964 AIR 40, 1964 SCR (4) 331
DATE OF JUDGMENT: 14/08/1963

Husband and wife-judicial separation-Desertion without just-cause-offer to return to matrimonial home must be shown to be bona fide-Petition for judicial separation-Burden of proof-Hindx Marriage Act, 1955 (25 of 1955), s. 10(1)(a).

Where an application is made under s. 10(1)(a) of the Hindu Marriage Act, 1955, for a decree for judicial separation on the ground of desertion, the legal burden is upon the petitioning spouse to establish by convincing evidence beyond any reasonable doubt that the respondent intentionally forsook and abandoned him or her without reasonable cause. The petitioner must also prove that there was desertion throughout the statutory period and there was no bona fide attempt on the respondent's part to return to the matrimonial home and that the petitioner did not by his or her action by word or conduct provide a just cause to the other spouse to desist from, making any attempt at reconciliation or resuming cohabitation; -but where, however, on the facts it is clear that the conduct of the deserted spouse has had no such effect on the mind of the deserting spouse there is no rule of law that desertion terminates by reason of the conduct of the deserted spouse.

An offer to return to the matrimonial home after sometime, though desertion had started, if genuine and sincere and represented his or her true feelings and intention, would bring to an end the desertion because thereafter the animus deserendi would be' lacking, though the factum of separation might continue; but on the other hand, if the offer was not sincere and there was in reality no intention to return, the mere fact that letters were written expressing such an intention would not interrupt the desertion from continuing.

In the present case, the evidence was clear that the respondent left her matrimonial home with the permission of her husband and his parents and that it was not possible to infer from the evidence given by Dr. Lulla that the respondent decided to abandon the appellant. The letters demonstrated beyond any reasonable doubt that the wife did not demonstrated beyond band with the requisite animus, but on the other hand, showed her willingness to go over to Bombay as soon as she regained her health. In view of the false allegations made by the appellant in his letter dated April 1, 1954, in which he charged the respondent with unchastity and leading a fast and reckless life, from that date the desertion, if any, on the part of the respondent came to an end and from that date the appellant was guilty of desertion.

JUDGMENT

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 292 of 1961. Appeal from the judgment and decree dated July 16, 1959, of the Bombay High Court in Appeal from the Original Decree No. 802 of 1957.

J. C. Bhatt and N. N. Keswam, for the appellant.

C. B. Agarwala, C. M. Mehta and V. J. Merchant, for the respondent.

August 14, 1963. The Judgment of B. P. Sinha, C.J., S. K.Das, Raghubar Dayal and N. Rajagopala Ayyangar,JJ. was delivered by Ayyangar, J. Subba Rao, J. delivered a dissenting opinion.

Hon'ble Mr. Justice N. Rajagopala Ayyangar :—

This is an appeal against the judgment of the High Court of Bombay reversing the judgment and decree of the City Civil Court at Bombay by which a decree for judicial separation granted by' the trial judge was reversed and it comes before us on a certificate of fitness granted by the High Court under Art. 133(1) (c) of the Constitution. The appellant, the husband, filed a petition in the City Civil Court, Bombay, under s. 10(1) (a) of the Hindu Marriage Act, 1955 (which we shall hereafter refer to as the Act), praying for a decree against the respondent, his wife, for judicial separation on the ground that in terms of that provision she had "deserted" him for "a continuous period of not less than two years immediately preceding the presentation of his petition". The petition was presented on September 20, 1956, and the material allegation was that the wife had left the matrimonial home on February 26, 1954, and had not thereafter come back to him and that this constituted "desertion" within the meaning of the provision just cited. The learned trial Judge held that the appellant had established to the satisfaction of the Court that the respondent-wife had left the matrimonial home with the intention of permanently breaking it up and that such desertion continued during the requisite period of two years and in consequence granted the decree for judicial separation, as prayed for. The wife preferred an appeal, to the High Court and the learned judges disagreeing with the finding of the learned trial judge that the leaving, by the wife, of the matrimonial home was with the intention of deserting the appellant, reversed the decree of the trial judge and directed the dismissal of the appellant's petition with costs. It is the correctness of this reversal that is canvassed in the appeal before us.

Even at the outset we might state that the decision of the appeal does not depend so much on any substantial question of law but rather on an appreciation of the facts on two matters on the basis of which the learned Judges of the High Court have decided the case against the appellant: (1) whether the appellant had established that the respondent had an irrevocable determination to break up the matrimonial home when she admittedly left the petitioner on February 26, 1954, and did not return to him thereafter, it being common ground that the onus of proving this to the reasonable satisfaction of the Court was on the appellant, and (2) whether the respondent had a justifiable cause for not returning to the husband the existence of which prevented her admitted absence from the matrimonial home from constituting "desertion" as to serve as the foundation for an order for judicial separation under s. 10(1) (a) of the Act.

Before, however, dealing with these two points which from the crux of the matter in dispute in the appeal, it is necessary to summarise, briefly, the history of the married life of the parties. The parties are Sindhi Hindus of the: Bhai Bund community. The appellant is a practicing doctor while the respondent is said to have had read up to the High school classes. While the appellant's father and his family were people of but moderate means, the respondent's father was a very affluent business,Man-

his business spreading over almost the entire South .East Asia. He had business houses in Singapore, Dakarta, ,Hong Kong, Manila etc. Besides, while the appellant and his parents appear to have been of an orthodox and conservative outlook and bent of mind, the respondent and her parent's apparently did not set much store by orthodoxy, and were liberal and modern. It looks to us as if it is possible that the trouble between the spouses was in part at least due to these variations.

The parties were married at Hyderabad in Sind (now in Pakistan) on November 11, 1946. The appellant was living with his father and mother and his two sisters and after her marriage the respondent commenced to live with him in this household. The parties are not agreed as to whether their marital life was happy even to start with, for while it was the case of the husband that the same was unhappy even from the very beginning, the respondent's version was that for the first month or so her relationship with her husband was happy, but nothing much turns on this because from soon thereafter both of them agree in saying -that they were not pulling on well together. It is not necessary either to tract the source of the friction between the spouses or narrate the incidents which are related in connection therewith as they are hardly relevant for the decision of the real points arising in the appeal. The only other circumstance to be noted in connection with the early period of their married life was that on July 19, 1947, a son, Ashok, was born to the respondent who, it may be mentioned, is now living with the appellant.

It is common experience that in some cases, the birth of a child puts an end to minor misunderstandings and bickerings between the spouses, for the parties concentrate on lavishing in common their love on the child and thus the two are brought together but in the case on band, it does not seem to have had this effect and the relation between the parties does not appear to have been smoothened by Ashok's birth. With the partition of the sub-continent the parties migrated to India.

The appellant, his parents and his two sisters who were all living with him moved over to Bombay along with the respondent and their young child but apparent-

ly. the accommodation which they could 'then secure was pot sufficient for this large family, and as a result the appellant took the respondent, his child and his two sisters to Colombo and left them in the care of his maternal uncle, one Narian Das, to stay there till he could find a sufficiently commodius home in Bombay. The respondent stayed for a very short time at Colombo and though she admitted that she was treated with kindness and affection by this uncle, apparently all was not well in the relationship between the appellant's sisters and the respondent. What emerged out of this was that she left Colombo without informing either Narian Das or the appellant and came over to India. She came to Poona and Lonavala and started staying with her mother who was there. There is a complaint by the appellant against her leaving his uncle without informing him and on the other hand there is a complaint by the respondent about the way in which her sisters-in-law behaved towards tier ,but we pass over these incidents and the respective cases ,as, not having any material bearing on the points at issue in the appeal. The appellant having come to know of her ,arrival at Lonavala, it is common ground that he went there and induced her to come over and stay with him at ,Bombay. This was sometime towards the end of January, 1948.

The period from January, 1948, to 1954 might be dealt with together. During this period she was staying most of the time with the appellant at Bombay but his complaint is that she used to leave him very often and that pressure had to be exerted or inducements offered to get her back to Bombay to stay with him. This is, -of course, denied by the respondent whose story is that every time it was with his consent that she went and that she came back of her own accord. It is not, however, necessary

to decide which of these versions is correct, though the learned trial judge who had an opportunity of seeing these two as witnesses was inclined to accept the version of the husband in respect of any matter on which he, was contradicted by his wife. It is only necessary to add that though during these 4 or 5 years or so, the parties were living together most of the time the relations between them had not become normalised. Besides, it might be mentioned that the relationship between the parents of the two spouses were also strained and similarly the relationship between the appellant and his wife's parents as also between the respondent and her husbands parents.

We next come to a crucial event. On February 26, 1954, the respondent left the appellant's house at Bombay (Colaba) and went to Poona. She was taken from the house by her father who had come there in the evening and she traveled with him to poona by train. It is the case of the appellant that the respondent left his home with the main items of her jewellery and clothes without the knowledge and consent of himself and his parents and at a time when there was no one in the house except a maid-servant and that he came to know of the respondent's departure only from the maid-servant, when he later returned to the house. On the other hand, it is the case of the respondent that she left the house after permission had been obtained by her father from her fatherin-law and after she herself had obtained the permission of her husband and that at the time of the departure when her father came to take her, her father-in-law, mother-in-law and the appellant were all present in the house and that the jewels etc., were given to her by her mother-in-law who bade her good-bye and wished her a happy journey. The learned trial judge accepted the appellant's story that the respondent did not seek or obtain anyone's permission for quitting the house and that she left the house without the knowledge or consent 'of anyone. The materiality of the acceptance of the appellant's version stems from the fact that in order to 'constitute desertion the withdrawal of the deserting spouse from the matrimonial home should be without reasonable cause and "without the consent or against the wish of such party" [vide Explanation to s. 10(1) of the Act]. On the other hand, the learned Judges of the High Court were inclined to accept the wife's version that she had the consent of her husband to leave the home. For reasons we shall set out in its proper place we are in agreement with the learned trial Judge and do not share the views of the learned judges who accepted the wife's version of this event. We shall, however, revert to it after completing the narrative of the events leading up to the filing of the petition.

It is the case of the appellant that he came to know a few days after her leaving him that his wife was staying at Poona with her parents. According to his evidence he considered that, having regard to the manner in which his wife left him, no useful purpose would be served by any trip of his to Poona to persuade her to come back. It was his further case that a friend of his-one Dr. Lulla, an M.R.C.P. of London who was employed as a doctor in a hospital in a suburb of Bombay-suggested that the two of them go to Poona and try to induce the respondent to come back to Bombay. This proposal, he says, he accepted and the appellant as well as Dr. Lulla who has been. examined as a witness on his side have testified to the fact that in the last week of May, 1954, both of them went to Poona one evening, met the respondent at her parents' house and appealed to her to come back to Bombay to live with the appellant. According to the evidence of both these witnesses, the respondent, when requested to come back to Bombay, stated that she was determined never again to come back to her husband's house. The respondent denied the entire story and stated that neither the appellant nor Dr. Lulla ever came to Poona during her stay there, nor of course ever talked to her. The learned trial Judge who had the opportunity of seeing Dr. Lulla in the box entertained a very favorable opinion of his respectability and credibility and accepted in toto his evidence that the respondent intimated to him her fixed determination not to come back to the appellant. In the background of the previous history of the relationship between

the parties and the manner in which the respondent left, the husband's home on February 26, 1954, as found by the trial Judge, he recorded a finding that the factum of desertion which was not in dispute was accompanied by "'animus deserendi' which had been satisfactorily established by the declaration she made to the appellant and his friend. The learned Judges of the High Court were not disposed to differ from the learned trial judge as regards the reality of the visit to Poona of Dr. Lulla accompanied by the appellant and their meeting the respondent there. They were, however, not in-

clined to attach any value to Dr. Lulla's testimony as regards the statement made by the respondent because of two factors: (1) the time lag between May, 1954, when he met her and April, 1957, when he gave evidence; the learned judges were inclined to hold that the witness could not properly remember correctly the dialogue after that interval ; (2) the fact that Dr. Lulla could not reproduce verbatim the questions put to the respondent and the answers she gave was considered by them as a circumstance which would detract from the acceptability of, the evidence regarding the matters about which he deposed. For these reasons the learned Judges found that though Dr. Lulla might have visited the respondent in May, 1954, as spoken to by him, there was no proper proof before the Court that the respondent had given expression to a determination not to return to the husband. We shall deal later with this appreciation of Dr. Lulla's evidence and the weight to be attached to it, but, to continue the narrative, the respondent left India for Singapore on July 7, 1954, and returned from abroad in April, 1956. During this period there has been some correspondence between the parties by way of telegrams and letter which have considerable relevance on the issues involved in the case and the points in controversy between the parties.

Before, however, referring to the events of that period a few more incidents which happened prior to the departure of the respondent from India have to be noticed After Dr. Lulla's meeting the respondent at the end of May, 1954, the next event of some importance is that the respondent and her father came to Bombay during June, 1954, for the purpose of the respondent obtaining a passport to enable her to leave India. At that time, it is common ground, that the respondent stayed with her paternal uncle-one Tola Ram-whose house was in Colaba and about five minutes' walk from the appellant's residence. It is the case of the appellant that when the respondent and her father came over to Bombay in June they stayed there for about a month. This however, is denied by the respondent and her father who say that the duration of their stay at Bombay at Tola Ram's house was only for a little over a fortnight. It matters little which version is correct but one thing is clear that notwithstanding the admitted stay in Bombay for two weeks or more she never went to her husband's house either to see him or even to see her son, Ashok, then a boy of about 7 years. The learned Judges of the High Court have not adverted to this circumstance which we consider has material bearing in deciding between the rival versions as to whether the respondent did or did not leave the husband's home with his permission and consent and the blessings of the parents-in-law. It is also to be noticed, and about this there is no dispute, that in the application for the passport and in the passport itself it was not the appellant's name or address that was given as her Indian residential address but that of Tola Ram in Colaba. As stated earlier, the respondent left Bombay by air for abroad on . July 7, 1954. Before taking off she was in Bombay for nearly 24 hours before the plane's departure. It is not in dispute that even then, she did not visit her husband or her child though she was staying at Tola Ram's. From Bombay the respondent reached Singapore by air and it is admitted that she sent no intimation or information to the appellant either regarding her departure, the place to which she had gone or the proposed duration of her stay. The appellant having come to know through other sources of the respondent having gone to Singapore, sent her a cablegram on the 20th July reading :

"Extremely surprised at your suddenly secretly leaving India without my knowledge and consent. Return immediately first plane"..

to which the respondent replied also by a cablegram "Returning within a few months".

These telegrams would, at least, make one thing clear that the appellant's case that he had no knowledge of the respondent leaving India was not an after-thought and is probably true. On receipt of this telegram dated the 23rd July the appellant replied the next day "You must return immediately".

of course, the respondent did not return but her case was that she replied by a letter dated August 2, 1954. There is a controversy between the parties as to whether this letter was really written at all, or if written, was posted and to the proper address. It is, however, common ground, and found by both the Courts, that the appellant did not receive any letter from the respondent bearing that date or written at about that time or with the contents which according to her were the contents of that letter. The learned trial judge was inclined to the view that the respondent did write a letter on that date but he was not satisfied that the copy which she produced which has been marked as Ex. 4 in the case represented either a true copy of it or carried the contents of that letter. He, therefore, discarded Ex. 4 from consideration. The learned judges of the High Court on the other hand, took the view that a letter was written by the respondent on that date and they were prepared to accept her story that the original of that letter which was stated to be in manuscript-written in her own hand,. was copied from the typescript which she produced and which was marked as Ex. 4. The evidentiary value of that letter was stated to consist in its disclosure of the state of mind of the respondent and the learned judges held that its contents indicated the readiness and willingness on the part of the respondent to join her husband and therefore negatived any animus to desert or to continue the desertion, if there was any such intention originally on her part. We shall reserve the discussion of the evidentiary value of this letter to a later stage but shall here merely set out the material parts of it:

"I really feel surprised why you want me to return to Bombay by first plane without any reason.

Dear, I was particularly pained to read that I have suddenly and secretly left the place without your consent. What has prompted you to write this I really do not understand.

Dear, how comes this change. You know I was not keeping good health and considerably gone down in spirit and weight for reasons which I do not like to discuss here since You are fully aware. It was you who suggested that I should go over and stay at my father's place and at your suggestion I did so. You are fully aware that I was accompanying my father to Singapore for a few months for a change and you gave consent. As soon as I feel better I shall return to Bombay."

The appellant not having received this letter (if it was written) and not having received any reply to his cable dated July 24, 1954, asking the respondent to return immediately to India, was, according to him, hearing stones that she was moving from place to place. He thereupon' sent her a cablegram on February 24, 1955, and addressed it to both her Singapore and Djakarta addresses as he was not quite sure as to where exactly she was. That telegram read :

"Since your secret departure you not replying my telegrams, letters. Myself shocked. You wandering different countries leading reckless life spoiling my reputation. Your most disgraceful behaviour ruining my life." At the time the cable was received the respondent was still at Singapore and on the 26th she replied by cable :

"Your allegations in your cable dated 24th not correct. Cannot understand your attitude. I have departed with your knowledge with my father because of ailing health due to reasons you are well

aware. Keeping quiet life with my parents. Have not received your letter ; only telegrams which have been replied by cable and letter."

and to this the appellant replied also by cable:

"Your telegram dated 26th February contains all foul lies. Myself shocked at your fabricating false stories to justify your secretly quitting home and flouting my repeated instructions."

But even before the receipt of this last cable from the appellant the respondent wrote to him a letter from Singapore dated March 3 in which, after setting out the text of the cablegrams exchanged, she made a positive assertion that she wrote a, letter to him on August 2, 1954. The rest of the letter was concerned with inviting him to come abroad and stay with her and her father at Hong Kong to which place she said she was leaving the next day and she promised him real pleasure if he stopped working for his parents and commenced having pleasure with the respondent in her father's house. After the dispatch of this letter on the 3rd of March the respondent received the appellants cable in which he reiterated his allegation that she had left his house secretly and without his knowledge and was thereafter flouting his instructions., On March 10, 1955, she sent him a cable from Hong Kong refuting this allegation and adverting to the invitation' contained in her letter dated March 3, 1955, she, said.

"Why don't you come out of Bombay house-hold atmosphere and see for yourself. Cannot understand, what you mean by flouting repeated instructions."

The letter of the 3rd was dispatched by the respondent by registered post and when this was received as well as the cables from the respondent, the appellant wrote in reply a letter sent by registered post dated April 1, 1955, in which he passed severe strictures against her conduct and in her continuing abroad without obeying his instructions. We shall have to deal in somewhat great detail with the contents of this letter. Ordinarily read it might seem to indicate that the appellant was charging the respondent with improper behaviour even amounting to sexual immorality. While in the witness box the appellant specifically repudiated that he intended any Such imputation and, in fact, made it clear that he was neither basing his petition on any allegation of immorality nor that he ever intended to impute any such conduct to her. The learned trial judge accepted this explanation of the appellant and interpreted the letter as the outpourings of an angry and grieved husband and was not, therefore, inclined to read the expressions used therein as imputing unchastity to her. On the other hand, the learned judges of the High Court analysed the text of the letter and considered that it clearly made false and unfounded imputations of unchastity on the respondent and for that reason they held that even if the respondent be held to have had an animus deserendi when she quitted her husband's home on February 26, 1954, and continued to retain that animus, still having regard to the false and malicious amputations of unchastity made by the appellant in his letter dated April 1, 1955, they held that she had justifiable cause for not returning to him thereafter and this formed one of the prime grounds for directing the dismissal of the appellant's petition for judicial separations We shall have to discuss these conflicting views and the different -interpretations of this letter, in the light of the evidence adduced in the case when dealing with it. We shall, however, pass this over for the present and continue the narrative.

The respondent received this letter while she was still at Hong Kong. But the next day she left for Manila and she replied from the latter place on April 12, 1955. The main points made in this reply were : (1) She left the house of the appellant with the consent of himself and his parents, (2) The reason for her leaving Bombay to stay with her parents was that her health was poor and -she wanted to recoup it

by a trip abroad. The stay abroad was therefore only for the improvement of her health., (3) The reason for her vacationing with her parents being for the improvement of her health and for no other-not for leading the gay life which was suggested in the appellant's letter dated April 1, 1955. She added :

"As soon as my health has completely improved I shall, of course, come back to you and to our son." This, was the end of the correspondence between the parties. It is common ground that she did not inform the appellant as to when she would be returning to India which was in April, 1956. Nor did she inform the appellant after her arrival in the country, nor did she go to his home-Bombay-to meet him or her son. just about the time some relations of the respondent were vacationing for the summer in Kashmir and she accompanied them there and spent the summer in the valley. No communications passed between the appellant and the respondent during this period either. It was after this that the petitioner filed the petition out of which this appeal arises, on September 20, 1956. After the respondent was served with notice of the petition some attempt was made to effect a reconciliation but it is not necessary to notice this because if there had been desertion, as required by law and the duration of that desertion amounted to two years, the terms of s. 10(1) of the Act are satisfied and the fact that thereafter the guilty spouse repents or recants is not by itself a ground for refusing the relief to which the injured spouse is entitled (Compare s. 23(1) of the Act). From the above narration it will be seen that there are three points of contested fact on which the decision 2 3 -2 S. C. India/61 of this appeal would turn : (1) whether the respondent left the appellant's home on February 26, 1954, with his consent or whether she did so without such consent., (2) What was the intention or animus of the respondent-in leaving her matrimonial home, and in regard to this the interview with Dr. Lulla and the other matters to which we have referred earlier and which transpired before the respondent left India on July 7, 1954, would have relevance., (3) The proper interpretation of the letter of April 1, 1955, writ-ten by the appellant to the respondent and whether in the circumstances of the case it would afford legal justification for the respondent's refusal thereafter to return to the matrimonial home, and to these questions we shall immediately address ourselves.

Before doing so, however, it might be convenient to refer briefly to the law on the topic. The relevant statutory provision may first be set out. Reading only the portion that is material s. 10(1)enacts "10. (1) Either party to a marriage whether solemnized before or after the commencement of this Act, may present a petition to the district court praying for a decree for judicial separation on the ground that the other party-

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

This sub-section is followed by an Explanation which runs :

"Explanation.-In this section, the expression 'desertion', with its grammatical variations and cognate expressions, means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the willful neglect of the petitioner by the other party to the marriage."

The question as to what precisely constitutes "desertion" came up for consideration before this Court in an appeal from Bombay where the. Court had to consider the provisions of s. 3(1) of the Bombay Hindu Divorce Act, 1947, whose language is in pari material with that of s.

10(1) of the Act. In the judgment of this Court in Bipin Chander v. Prabhawati[45] there is an elaborate consideration of the several English decisions in which the question of the ingredients of desertion

45 [1956] S.C.R. 838.

were considered and the following summary of the law in Halsbury's Laws of England (3rd Edn.), Vol. 12, was cited with approval :

"In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases. The position was thus further explained by this Court:

"If a spouse abandon the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned : (1) the absence of consent and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid.....

Desertion is a matter of inference to be drawn from the facts 'and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference ; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact there has been a separation, the essential question always is whether that act could be attributable to an animus descrendi. The offence of desertion commences when the fact of separation and the animus deserendi co-exist. But it is not necessary that they should commence at the same time. The de facto separation may havecommenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time."

Two more matters which have a bearing on the points in dispute in this appeal might also be mentioned. The first relates to the burden of proof in these cases, and this is a point to which we have already made a passing reference. It is settled law that the burden of proving desertion-the "factum" as well as the "animus deserenai is on the petitioner, and he or she has to establish beyond reasonable doubt, to the satisfaction of the Court the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause. In other words, even if the wife, where she is the deserting spouse, does not prove just cause for her living apart, the petitioner-husband has still to satisfy the Court that the desertion was without just cause.

As Denning, L.J., observed : (Dunn v. Dunn)[46] : "The burden he (Counsel for the husband) said was on her to prove just cause (for living apart). The argument contains a fallacy which has been put forward from time to time in many branches of the law. The fallacy lies in a failure to' distinguish between a legal burden of proof laid down by law and a provisional burden raised by the state of the evidence..... The legal burden throughout this case is on the husband, as petitioner, to prove that his wife deserted him without cause. To discharge that burden, he relies on the fact that he asked her to join him and she refused. That is a fact from which the court may infer that she deserted him without cause, but it is not bound to do so. Once he proves that fact of refusal, she may seek to rebut the inference of desertion by proving that she had just cause for her refusal ; and indeed, it is usually wise for her to do so, but there is no legal burden on her to do so. Even if she does not affirmatively prove just cause, the court has still, at the end of the case, to ask itself: Is the legal burden discharged? Has

46 [1948] 2 All. E.R. 822, 823.

the husband proved that she deserted him without cause? Take this case. The wife was very deaf, and for that reason could not explain to the court her reasons for refusal. The judge thereupon considered reasons for her refusal which appeared from the facts in evidence, though she had not herself stated that they operated on her mind. Counsel for the husband says that the judge ought not to have done that. If there were a legal burden on the wife he would be right, but there was none. The legal burden was on the husband to prove desertion without cause, and the judge was right to ask himself at the end of the case: Has that burden been discharged?"

This, in our opinion, is as well the law in this country under the Act.

The other matter is this. Once desertion, as defined earlier, is established there is no obligation on the deserted husband (taking the case where he is the deserted spouse) to appeal to the deserting spouse to change her mind, and the circumstance that the deserted husband makes no effort to take steps to effect a reconciliation with the wife does not debar him from obtaining the relief of judicial separation, for once desertion is proved the deserting spouse, so long as she evinces no sincere intention to effect a reconciliation and return to the matrimonial home, is presumed to continue in desertion. of course, the matter would wear a different complexion and different considerations would arise where before the end of the statutory period of 2 years or even thereafter before the filing of the petition for judicial separation the conduct of the deserted spouse was such as to make the deserting spouse desist from making any attempt at reconciliation. If he or she so acts as to make it plain to the deserting spouse that any offer on the part of the latter to resume cohabitation would be rejected, then the deserting spouse could obviously not be blamed for not bringing the desertion to an end. Or again, if before the end of the period of two years or the filing of the petition his or her conduct is such as to provide a just cause for the deserting spouse for not resuming cohabitation, the petition cannot succeed, for the petitioner would have to establish that the desertion was without just cause during the entire period referred to in s. 10(1)(a) of the Act: before he can succeed.

There were a few submissions made to us by learned counsel for the appellant regarding the nature of the "just cause", particularly whether this should amount to "cruelty" or other matrimonial offence etc., based on a construction of certain other provisions of the Act, but as these have no substance and were not persisted in, we consider it unnecessary even to refer to them.

We shall now proceed to consider the facts in the light of these principles with a view to find out whether the appellant has proved that the respondent had deserted him without just cause for the requisite period. We start with the admitted circumstance that the respondent left the husband's home on February 26, 1954. It was not suggested that the husband threw her out or that she left because of any expulsive conduct on his part. There is therefore no suggestion or case that she left for any justifiable cause. The next question that would fall for determination is whether she left with his consent. As we have stated earlier, on this point the learned judges of the High Court have recorded a finding different from that of the trial Judge. The case of the respondent was that she had the consent of her parents-in-law and also of the husband, and she even went to the length of suggesting that it was he who suggested that she might go abroad with her father in order to improve her health. Now as to the obtaining the consent of the respondent's parents-in-law, the evidence was this. The respondents father who was her second witness deposed as follows: There had always been disinclination on the part of the appellant and his parents in permitting the respondent to go over to her parents' place on most earlier occasions. When permission was thus sought for such a purpose, there had always been friction and trouble. In connection with his taking his daughter with him when he intended to leave India in July, 1954 he sought their permission on more than two occasions but the same was refused.

Subsequently a friend and a neighbour of his at Poona--one Maganmalpromised to intercede with the appellants father. The latter spoke to the appellant's father and obtained permission and informed the witness.

The entire story of Maganmal having spoken to appellant's father and obtained the latter's permission was denied by the appellant as false and the learned trial Judge was not inclined to believe the story as true. Maganmal who gave evidence as D.W. 3 admitted that he could not claim to be any close friend of the petitioner's father and, in fact, he admitted to what might ordinarily constitute a state of unfriendliness between them. Kanayalal who had married the appellant's sister was the adopted son of one Nanikram who was stated to have died leaving a will by which he disposed of his properties in favour of a trust. The trustees, including Maganmal who was one of the trustees, upheld the validity of the will and claimed the properties for the trust, but Kanayalal challenged the truth and validity of the will and claimed the property as the heir of Nanikram. It was stated by Maganmal that himself and the appellant's father became acquainted with each other when they happened to meet in connection with this trust estate and when the appellant's father came to him to sponsor the interests of his son-in-law. This apart, the talk between himself and the appellant's father as a result of which the permission is said to have been granted was thus stated by Maganmal in his evidence:

"I (Maganmal) talked to the petitioner's father in Bombay in collection with the securing of permission for the respondent at the most for five months. I straightaway talked to the petitioner's father about the securing of the permission for the respondent. There was no other topic discussed between myself and the petitioner's father. The talk between myself and the petitioner's father took place in the compound of Ishardas Temple when I and the petitioner's father came out of the temple. I took the petitioner's father aside when I had a talk with the petitioner's father."

This would not be a very credible story, because if to the requests of the respondent's father on two or three occasions the appellant's father had refused permission it does not stand to reason that to a person situated as Maganmal was in relation to him he would have yielded merely because it was mentioned by Maganmal. The learned trial Judge who had an opportunity of seeing Maganmal in the box was not impressed with his evidence and for the reasons we have set out earlier regarding the relationship between the appellant's father and Maganmal learned trial judge considered that the story of Maganmal being deputed to obtain permission and his having obtained permission was false. We are inclined to agree with the learned trial judge in this appreciation of the oral testimony. If Maganmal's evidence is rejected then the entire superstructure of the respondent's case about the consent of the appellant's parents must fall to the ground. In this connection there arc a few other matters to mention. It was common ground that the appellant's father was, at the time of the trial, away at Tokyo on business and he was not in a position to be examined as a witness. The learned judges of the High Court, however, drew an inference adverse to the appellant from (1) his not calling his mother as a witness, and (2) the non-examination of maidservant who was stated to have been in the house at the time when the respondent left it on February 26, 1954. We do not agree with the learned judges of the High Court in the inference so drawn. If Maganmal's evidence is rejected, as it must, the father of the respondent who supported the story of Maganmal's intervention would not come out with flying colours and if his evidence as to this part is rejected we consider that it was not incumbent on the appellant to adduce the negative evidence of his mother etc., at the risk of an adverse inference being drawn against him in the event oil his not doing so.

Besides, there are some circumstances which lead to the inference that the story spoken to by the respondent about her parents-in-law being per sent at the time of her departure and their loading her

with gifts of jewellery and clothes is not credible. If really the respondent had left the house with the consent and goodwill of the appellant's parents or if as she would have it in some of her letters, it was the appellant himself who suggested her going abroad with her father to recoup her health. there could be no explanation for the conduct of the respondent in ,not going over to the house of the appellant during her stay in Bombay in June, 1954, for a fortnight or more when she was there in connection with her passport, and when she stayed admittedly within a few minutes' walk of the appellant's place. There would also be no explanation for her failure to inform the appellant and his parents about her departure from Bombay on July 7, 1954. It is only necessary to add that even in the first cable which the appellant sent her on coming to know of her departure from India the appellant complained that she had left India secretly without his knowledge and consent to which there was no contradiction in the reply by cable that she sent on July 22, 1954, though in her later cablegrams and letters she asserted that she had such a consent. There are several other matters which have been mentioned by the learned trial judge, such as the discrepancies in the several versions that the respondent spoke to from time to time and between these and the evidence given by her father and that of Maganmal coupled with her case as set out in the -pleadings as circumstances for discarding the entire story as false, but to these it is not necessary for us to advert in view of the broad features we have pointed out which have led us to the conclusion that the respondent did not leave the house of the appellant with his consent but that she did so of her own accord and without his knowledge.

The next matter for enquiry is as to the animus which prompted the respondent to leave the appellant's house. There was admittedly no incident which led to the departure from the matrimonial home which could throw light on that question nor is there any contemporaneous declaration of the respondent. The learned trial judge has set out the history of the relationship of the parties ever since their marriage up to 1954 as the background in which the simple act of leaving should be viewed for the purpose of determining the animus with which that act was done. The learned Judges of the High Court considered that this was not a proper approach to the question. Without deciding on the correctness of the approach of the learned trial judge, we shall proceed on the basis that the learned judges were right in discarding the earlier history of the relationship between the parties as irrelevant for determining whether the respondent in removing herself from her husband's house did or did not intend her withdrawal to be permanent and with a view to disrupt their marriage and terminate their married life. We shall consequently confine ourselves to the events and matters which transpired after she left the appellant's home to determine what her intention was at the time when she left it. The first matter to which reference must be made is the fact that after reaching Poona on February 26, 1954, until the end of May of that year she never wrote any letter to her husband. If, as we have found earlier, she left the appellant's house without his Consent or even knowledge, the failure on her part to intimate to him as to where she had gone would certainly be a relevant circumstance indicative of the animus which impelled her to leave the home. This is, no doubt, a slight circumstance, but she has really no explanation to offer for her silence and particularly so when taken in conjunction with the case that she put forward that she left her husband's place with the blessings of her parents-in-law and almost at the suggestion of her husband in order that her health might improve.

The next circumstance which, however, is very much more important, is her declaration on the occasion when the appellant and Dr. Lulla visited her at Poona towards the end of May. The learned trial judge, as stated earlier, has accepted that Dr. Lulla and the appellant did visit her at Poona as spoken to by them and that her story denying this meeting is false. The learned Judges of the High Court also did not accept her denial of the meeting, but they however refused to attach any importance to the

evidence of Dr. Lulla for the reason that he was unable to specify the exact words of the questions put to her and her answers. We do not agree with the learned judges about the value to be attached to the evidence of Dr. Lulla. The relevant portion of Dr. Lulla's evidence runs thus :

"I told her (the respondent) to go back to Bombay and then settle the differences whatever they were between the petitioner and the respondent but she said that she was not prepared to go back for ever. There was no further talk between myself and the respondent. The petitioner had a talk with the respondent first and then I had a talk with the respondent. I cannot recollect what the petitioner actually told the respondent. The respondent did not mention the differences which she had with the petitioner' She only stated that she was not prepared to come back to the petitioner for ever."

Now, it will be seen that this evidence is categorical. It Consists of two parts: The first is as regards the gist of the conversation between the appellant, and the respondent when they were together. He admits he was not present when they talked to each other and it is the question and answer at that stage, i.e., between the appellant and the respondent that the witness is unable to state to the Court. The second part of the evidence is in relation to the questions that he himself put to the respondent. There is, no ambiguity in his evidence either about the questions which he put nor about the answers which she gave. The comment of the learned judges that the witness was unable to reproduce the exact words of the question put to the respondent and the words of her answer does not obviously apply to this second part of the witness's testimony. If Dr. Lulla be treated as a truthful witness, and even the learned judges of the High Court did not express any view to the contrary, it is clear that the respondent had specifically stated to him that she would never come back to her husband's home. There is thus clear evidence and satisfactory proof that besides the factum of desertion there was also the animus descrendi at the time when she left the husband's house or at least at the time of this meeting -it Poona at the end of May, 1954.

The matter does not rest here for there is further proof of her animus afforded by her conduct up to the time of her leaving India for abroad on July 7, 1954. We are, here, referring to three matters: (1) Her presence in Bombay for a fortnight or for a month, whichever it be, at her uncle Tola Ram's place five minutes walk from the appellant's residence and her failure to call on the appellant even for the purpose of seeing her boy Ashok; (2) her conduct in giving her address in India as Tola Ram's place in the application for a passport and in the passport itself; and (3) her failure to inform the appellant of her departure from Bombay and her not calling on him even when she was leaving India for a stay of a considerable duration abroad. If then the conduct of the respondent was an act of desertion with the requisite animus when it started, the question next to be considered is whether it continued for the duration of two years before the presentation of the appellant's petition under s. 10(1)(a) of the Act to satisfy the requirements of the statute. We have already set out the correspondence which passed between the parties. In the first telegram which was exchanged between them and which started immediately the appellant got information that the respondent had left India-towards the end of July, 1954-he required the respondent to return to India immediately. In her replies she stated that she would return, not immediately-we are not, here, concerned so much with the reasons which she gave for not so returning-but after her health improved. If her offer to return after sometime was genuine and sincere and represented her then true feelings and intention it cannot be disputed that the desertion would be brought to an end because thereafter the animus deserendi would be lacking, though the factum of separation might continue. On the other hand, it cannot also be disputed that if the offer was not sincere and there was in reality no intention to return, the mere fact that letters were written expressing such an intention would not interrupt the desertion from continuing. The question

for inquiry would, therefore, be whether these offers by the respondent to return were sincere. In this connection it is riot without significance that there are admittedly several occasions on which the respondent could have returned to India but she did not do so until April 1956. One of these was when one. Mr. Choith Rama relation of the parties-returned to India. It is admitted by both the respondent as well as her father that it was possible for the respondent to have returned to India with Choith Ram but it was stated that she did not do so because she had not been invited to some wedding in the appellant's house. We consider this explanation not satisfactory or convincing. If, as -we have found, she had left the appellant's house without his consent, and she expressed her determination not to return to him when the appellant and Dr. Lulla met her in May in Poona, and when in spite of repeated assertions in her letters and telegrams that she would be coming back, but she fails so to return when she had occasion and opportunity to do so, we consider that her acts and conduct in failing to return are entitled to more weight as evidence of her true intention than her assurances contained in her letters. We are not, therefore, prepared to hold that bona fide intended to return to her husband when in her letters and telegrams, to which we have already adverted, she expressed her intention to return to him. Besides, it would be seen that even after she returned to India in April, 1956, she did not go straight to her husband's house or even inform him of her return to India but on the other hand went away to Kashmir and that state of things continued until the petition was filed on September 20, 1956. If nothing more happened between the parties it is clear that the petitioner would be entitled to the relief which he sought as there was satisfactory proof of desertion as defined by the statute for the full term of two years.

The point, however, that forms one of the major bases of the judgment of the learned Judges and which was strenuously sought to be supported by Mr. Aggarwala, learned counsel for the respondent, was based upon the letter of the appellant dated April 1, 1955, as affording a justification in law for her refusal to come back to join him.

Before proceeding to deal with the contents of the letter and the other points urged in relation to it, it might perhaps be useful to set out the legal position in the light of which the entire matter has to be considered. As stated by Scott. L. J., in Tickler v. Tickler[47], quoting the words of Lord Romer in an earlier decision :

"The question whether a deserting spouse has a reasonable cause for trying to bring the desertion to an end and the corresponding question whether desertion without cause has existed for the necessary period must always be a question of fact."

The question for consideration in such cases is "Is the conduct of the deserted spouse such as to excuse the deserting spouse from making any attempt to put an end to the desertion or from attempting any reconciliation?" (Vide also Brewer v. Brewer[48]. The basis of this rule rests on this, that such conduct on the part of the deserted spouse would legally operate as a consent to the existing separation and would have the effect of absolving the deserting spouse from any obligation to return to the matrimonial home or 964. to make amends for her improper conduct, for the petitioner in a petition for judicial separation grounded on desertion by the other spouse has to prove that for the period of two years specified in s. 10(1) (a) of the Act the respondent has without cause been in desertion and that intention must be proved to exit through out that period. If, therefore, during that period the respondent has just cause to remain apart he or she would not be in desertion and the petition for judicial separation would fail.

47 [1943] 1 All E.R. 7, 59.

48 [1961] 3 All E.R. 957,

It would be seen that we have here the interaction of two distinct matters which have to coexist in order that desertion might come to an end. In the first place, there must be conduct on the part of the deserted spouse which affords just and reasonable cause for the deserting spouse not to seek reconciliation and which absolves her from her continuing obligation to return to the matrimonial home. In this one has to have regard to the conduct of the deserted spouse. But there is one other matter which is also of equal importance, that is, that the conduct of the deserted spouse should have had such an. impact on the mind of the deserting spouse that in fact it causes her to continue to live apart and thus continue the desertion. But where, however, on the facts it is clear that the conduct of the deserted spouse has had no such effect on the mind of the deserting spouse there is no rule of law that desertion terminates by reason of the conduct of the deserted spouse. It appears to us that the principle that the conduct of the deserted spouse which is proved not to have caused the deserting spouse to continue the desertion does not put an end to the desertion appears to be self-evident and deducible from the legal concepts underlying the law as to desertion. The position is besides supported by authority. We might usefully refer to the following passage in the judgment of Willmer, L.J., in Brewer v. Brewer[49] where, explaining certain observations of Lord Macmillan in Pratt v. Pratt [50], he said :

"It remains for consideration however, exactly what Lord Macmillan meant when he spoke of the husband 'making it plain' to his deserting wife that he will not receive her back. He cannot have meant, I apprehend, that a deserting wife is entitled to take advantage of any chance statement that her husband may have made, irrespective of whether it had any effect on her mind. It seems to me that what Lord Macmillan must have meant was that a deserted husband cannot complain if what he has said or done has in fact caused hi-, wife to desist from making any attempt at reconciliation which she otherwise would have made. If this view be right, it becomes obvious at once that the question whether the conduct of the husband was such .is to bring the wife's desertion to an end cannot be treated, as counsel for the wife (at any rate at one point of his argument) appeared to invite us to treat it, as an abstract question of law. It becomes necessary to consider the facts of the particular case, in order to ascertain what in fact was the impact on the mind of the deserting spouse of anything which was said or done by the deserted spouse."

We should add that this expresses our own view of the legal position.

We shall now proceed to consider the letter of the appellant dated April 1, 1955, and its significance for the purposes of the defence of the respondent in the light of these principles. The questions that arise on this letter fall into two broad classes : (1) The exact meaning and construction of the expressions used in the letter, and (2) its impact on the mind of the respondent. As to the meaning of the letter the rival contentions are these. According to the appellant the letter was merely the outpourings of an angry and grievously injured husband who found his wife persisting in keeping away from him and expressing happiness at her stay in and movement from place to place in foreign countries. In this connection the expressions used in the letter were put to the appellant in great detail during his cross examination and the burden of his explanation was that he never intended to impute any unchastity to the respondent. It is not necessary to set out the entirety of the letter but we would make a few extracts for the purpose of judging whether the letter could bear the interpretation which the appellant asserted was his intention in writing that letter:

"They (the appellant's parents) have overlooked all your faults and treated you with love and kindness like their own daughter and have made all possible efforts to raise you up from your low turpitude and

49 [1961] 3 All. E.R. 957.

50 [1939] A.C. 417, 420.

make you a decent woman It is your perverted funny notions of pleasure giving vent to your past and present associations, both in India and abroad, that are the root cause of all your evil and irrational deeds. ... Just think how often have I counseled you against your unceasing pleasure hunt which has brought only shame and misery to our whole family It is a wonder that you find pleasure in leaving home, leaving your husband, wandering from country to country, leading reckless life under the guise of being in the company of your relations and uncles whom you find readily available at every port. And you have gone SO far in this direction, that you find yourself unable to break your past links and get out of the muddle created by you and seek pleasure and happiness in your own home by being a faithful and devoted wife In spite of all my efforts, you have completely deserted me and chosen the path of pleasure and perversion,at any cost. You are only looking for some cloak to cover your guilt and continue to live your life of degradation with impunity. I refuse to furnish you with that cloak and I refuse to be drawn into your game."

As we have stated earlier, the appellant expressly disclaimed in the witness box that he ever considered her unchaste or that in that letter or otherwise he imputed unchastity to her. The learned trial judge believed the appellant's testimony as to what he intended to convey by this letter and was of the view that the contents were reasonably capable of being understood in the manner suggested by the appellant. We cannot say that this is not a possible interpretation of the letter and that it must be held that it was intended to impute unchastity to the wife. We must, however, hasten to point out that the intention of the writer is neither very relevant nor, of course, decisive of the matter. The question is what the words were reasonably capable of being understood, and if they have been so understood it is no answer that the writer did not intend his words to have that meaning. In view of what we are about to say, it would not be really necessary for us to say whether, reasonably understood. the words would not impute sexual immorality to the respondent, but we shall assume that the learned Judges of the High Court were right in their interpretation of the. letter and the insinuations it contained. The question, however, is how she understood and what her reactions were.

The next question for consideration therefore relates to the impact of this letter on the respondent, for it is ultimately that that would determine, in the present case the legal effect of the conduct of the appellant in terminating or not terminating the desertion that up to then continued. As to this, the position stands thus : The evidence of the respondent was that she received the letter at Hong Kong, and she stated :

"I read that a bit. On the next day I left for Manila. .... There I was appraised of the contents of the letter and then I was shocked at the contents of the letter and my health became worse at Manila."

The letter is stated to have been received in the evening and she was to leave Hong Kong for Manila at 10 a.m. the next day. According to one portion of her evidence she read a part of the letter on the day she received it but she had no time to read the whole letter, but she corrected herself later and stated that the entire letter was then read, but that she understood only a portion of the letter on the day it was received and the rest of it explained to her in Manila. It was her cousin--one Khem Chand-who is said to have been asked to read and explain the letter because she did not understand fully its contents. This was at Hong Kong and he read that letter during the night after he returned home from office. Before he finished reading that letter she said she went to bed. He was reading, that letter till late that night. She, however, slept by then. Khem Chand she said, promised to explain the contents the next morning but there was no time 1eft for this as she left for Manila that day. It is apparent from this state of evidence that it did not have very much upon the respondent or that she under-stood the letter as really charging her with immorality. It' is just possible 24-2 S. C. India/64 that she understood

its contents as merely an admonition ,by the husband at her being away from him and at her conduct in asking him to go over to Hong Kong instead -of returning to him immediately, as he desired in his telegrams. She apparently attached not much significance to this letter and that is clear from the way in which she got the letter read and explained to her partly at Hong Kong and the rest at Manila. And this notwithstanding that her father was there to assist her in understanding the contents of that letter and its implications.

This is so far as the oral testimony of the respondent is concerned, but possibly of more significance and of higher evidentiary value than the inference to be drawn from the statements in her deposition in Court is the reply that she sent from Manila to this letter on April 12, 1955. It is necessary to examine with some care the contents of this reply. It is addressed to him.as 'My dearest husband'. It consists of five paragraphs. In the first she acknowledges as letter dated April 1, 1955. of the contents of that letter those regarding which she deals in the 1st paragraph are: (1) his statement that he had not received any letter from her dated August 2, 1954 and (2) a denial of the fact that she left his house without his knowledge and consent and an assertion that he and his parents consented that she should go and stay 'With her relations for a while. The second paragraph is again taken up with the same matter and repeats (1) that she .did not leave the house without his knowledge and consent, and (2) she left the house only for reasons of her health. The third paragraph states that her health had improved but that she would like to stay a little longer with her parents in order to improve it more and then she would return to him and to her "dear son Ashok". The next paragraph is concerned with denying the unfounded accusations contained in his letter and these are characterised as "merely the product of his hallucination" and that she would ignore them because they are not based on truth and in the final paragraph she ends by repeating that site was vacationing with her parents only for the improvement of her health and for no other purpose and lie would kindly allow her to stay with her parents a little longer for her welfare and advantage and she winds up the letter by assuring him "As soon as my health is completely improved I shall of course come back home to you and to our son".

Now to the question as to what is the impact of the appellant's letter on the mind of the respondent. In the face of this letter could it be said that she understood the appellant's letter as a justification for her to stay apart? For this purpose it is not necessary to consider whether she understood it as imputing unchastity to her or not. As we have already pointed out, it is doubtful whether she did so. If it were so it would not be reasonable for her to read the letter at Hong Kong in part or not understanding it there and not attaching any significance to it as an imputation of a serious character against her morality. But in whatever way she understood it, it is obvious that it did not have any effect on her mind in the matter of persuading her or impelling her to stay apart from her husband, for we find in her reply repeated assertions that she intended to come back to the husband. We do not, therefore, agree with the learned judges of the High Court that the appellant's letter of April 1, 1955, would constitute an interruption of her desertion which had commenced from February-May, 1954, by its being a just cause for her to remain away from the matrimonial home.

As already stated, the letter of April 12, 1955, was the last letter which passed between the parties and though she stayed abroad for nearly a year thereafter she did not write to the appellant and even when she came to India in April, 1956, she did not go to her matrimonial home as she had promised to do in this last letter of hers just referred to. A point similar to the one dealt with by us in relation to the telegram of the respondent dated June 24, 1955, and her letter dated March 3, 1955, arising out of the statements contained in them that she intended to return to the husband on coming over to India and the effect of such a statement in terminating the desertion has also to be considered with reference to

the promise to return to the husband contained in this letter of hers dated April 12, 1955. As already pointed out, if the offer to return was genuine and sincere and was made with the intention of being kept and as indicative of a desire felt to return to the matrimonial home it would constitute a break in the desertion and thus disentitle the appellant to any relief under s. 10(1) of the Act because in the face of such an intention the desertion of two years duration could not be established. We are, however, satisfied that the intention expressed in this letter to return to the husband was not genuine or sincere. This is shown beyond doubt by the following facts: (1) She wrote no letter to the appellant after April 12, 1955, right up to the date of the petition, (2) she did not intimate to him about her arrival in India-a fact strongly suggesting her disinclination to meet him and to go to his house, (3) that even after she returned to India nearly a year after her letter of April 12, 1955, she did not go to her husband nor was any attempt made by her to contact her husband through friends before the filing of the petition. The facts therefore and her conduct outweigh any assertion contained in this letter and they convince us that she did not entertain any genuine desire to return to her husband's home when she wrote those words in her letter to him dated April 12, 1955.

It was not contested that if desertion started in February May, 1954, as we have found, and was not put an end to and if no justifiable cause for the continuance of the desertion was afforded by the appellant's letter of April 1, 1955, there was no other defence to the petition of the appellant under s. 10(1) of the Act.

The result is that the appeal is allowed, the judgment of the High Court reversed and the decree for judicial, separation passed by the learned trial judge restored with costs here and in the High Court.

SUBBA RAO J.-I regret my inability to agree. This appeal by certificate presents a facet of the social and sociological problem of a young Hindu woman landed by marriage in a joint family and of her predicament therein. As Rajagopala Ayyangar, J., has traced the course of the litigation, it is not necessary to cover the ground overagain. Two questions arise for consideration, namely, (1) whether there was desertion by the respondent without reasonable cause of her matrimonial home; and (2) whether the appellant had prevented the respondent during the statutory period from bringing the desertion to an end. Before I consider the evidence in the case, it will be convenient to notice the relevant aspects of the law pertaining to the doctrine of desertion. The Hindu Marriage Act, 1955 (Act 25 of 1955), hereinafter called the Act, codified the law in that regard. The material provisions of the Act read thus : .

Section 10. (1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the District Court praying for a decree for judicial separation on the around that the other party-

(a) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition.

Explanation.-In this section, the expression "desertion", with its grammatical variations and cognate expressions, means, the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party,, and includes the willful neglect of the petitioner by the other party to the marriage."

Under this section a spouse can ask for judicial separation if the other spouse has deserted her or him for a continuous period of not less than two years. This provision introduces a revolutionary change in the Hindu law of marriage. It is given retrospective effect. A spouse in India except in some states, who

never expected any serious consequences of desertion, suddenly found himself or herself on May 18, 1955, in the predicament of his or her marriage being put in peril. If by that date the prescribed period of two years had run out, he or she had no locus penitential and could retrieve the situation only by mutual consent. Section 10(1)(a) does not proprio vigore bring about dissolution of marriage. It is a stepping stone for dissolution. On the deserted spouse obtaining a decree for judicial separation, the said spouse can bring about divorce by efflux of time under s. 13 (1) (viii) of the Act. The expression "desertion" came under the judicial scrutiny of this Court in Bipin Chander jaisinghbhai Shah v. Prabha (1) [1956] S.C.R. 838.

wati(1). There, the question arose under s. 3 (1)(d) of the Bombay Hindu Divorce Act, 1947 (Bom. 22 of 1947)., This Court, on the facts of that case, held that there was no desertion. The said section read :

"(1) A husband or wife may sue for divorce on any of the following grounds, namely.....

(d) that the defendant has deserted the plaintiff for a continuous period of four years.

"Desertion" was defined in s. 2(b) in these terms: "'Desert' means to desert without reasonable cause and without the consent or against the will of the spouse." Sinha, J., as he then was, speaking on behalf of the Court after considering the relevant textbooks and decisions on the subject, summarized the law thus, at p. 851 "For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned : (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively.

The learned judge dealt with the mode of putting an end to the state of desertion as follows, at p., 852 :

"Hence, if a deserting spouse takes advantage of the locus penitantiae thus provided by law and decides to come back to the deserted spouse by a bonafide offer of resuming the matrimonial home with all the implications of marital life, before the statutory p eriod is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end and if the deserted spouse unreasonably refuses the offer, the latter may be in desertion and not the former."

Based on that reasoning the learned Judge proceeded to lay down the duty of. the deserted spouse during the crucial period "Hence it is necessary that during all the period that there has been a desertion the deserted spouse 'must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable."

Adverting again to the burden of proof and the nature of evidence required to prove desertion, the learned judge made the following observations, at p. 852 :

"It is also well settled that in proceedings for divorce the plaintiff must, prove the offence of desertion like any other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law, the courts insist upon corroborative evidence, unless its absence is accounted, for to the satisfaction of the Court."

Collating the aforesaid observations, the view of this Court may be stated thus : Heavy burden lies upon a petitioner who seeks divorce on the ground of desertion to prove four essential conditions, namely.' (1) the factum of separation; (2) animus deserendi; (3) absence of his or her consent; and (4)

absence of his or her conduct 'giving reasonable cause to the deserting spouse to leave the matrimonial home. The offence of desertion must be proved beyond any reasonable doubt and as a rule prudence the evidence of the petitioner shall be corroborated. In short this Court equated the proof required in a matrimonial case to that in a criminal case. I am bound by this decision. I would, therefore, proceed to discuss the law from the point reached by this Court in the said decision.

There is some controversy on the question on Whom the burden of proof lies to establish that the deserting spouse has just cause or not to leave the matrimonial home. The judgment of this Court is clear and unambiguous and it throws the burden on the petitioner seeking divorce. This view is consistent with that expressed in leading judgment of English Courts.

In Pratt v. Pratt(1) the House of Lords considered the said aspect. Lord Macmillan stated, at p. 438, thus:

"In my opinion, what is required of a petitioner for divorce on the ground of desertion is proof that throughout th e whole course of 3 years the respondent [1939] 3 All E.R. 437.

has without cause been in desertion.....In fulfilling its duty of determining whether,on the evidence, a case of desertion without cause has been proved, the Court ought not, in my opinion, to leave out of account the attitude of mind of the petitioner. if, on the facts, it appears that a petitioning husband has made it plain to his deserting wife that he will not receive her back, or if he has repelled all the advances which she may, have made towards a resumption of married life, he cannot complain that she has persisted without cause in her desertion".

On the question of just cause, Lord Romer made some pertinent remarks, at p. 443, which are relevant to the present enquiry. There, as here, though under different circumstances, the deserting spouse, the wife, after previous correspondence did not call on her husband.

In that context, Lord Romer observed:

It would, in my opinion, be quite unreasonable to bold that the respondent, guilty though she was of the serious matrimonial offence of desertion, should be expected to present herself at her husband's door without any knowledge of how she would be received, 'and therefore at the risk of being subjected to the indignity of having admission refused by her husband or by one of his servants..... It could not be expected that she should suddenly make an unheralded entry into his house."

Though it was necessary, in order to put an end to her desertion, for the wife to take some active step towards returning to the matrimonial home, Lord Romer held that she had taken such steps by writing letters and that the fact that 'she. did not physically appear in the matrimonial home did not make is any the less a just cause on her part. In Dunn v. Dunn[51], Denning L.J., as he then was, laid down the scope of burden of proof in such a case, at P-823, thus:

"The legal burden throughout this case is on the husband, as petitioner, to prove that his wife deserted him without cause. To discharge that burden, he relies on the fact that he asked her to join him and she refused. That is a fact from which the court may infer that she deserted him without cause, but it is not bound to do so. Once he proves the fact of refusal, she may seek to rebut the inference of desertion by proving that she had just cause for her refusal ; and indeed, it is usually wise for her to do so, but there is no legal burden on her to do so. Even if she does not affirmatively prove just cause, the court has still, at the end of the case, to ask itself : Is the legal burden discharged? Has the husband proved that she deserted him without cause?"

51 [1948] 2 All E.R. 822.

This passage brings out the well known distinction between legal burden and onus of proof. Legal burden always remains on the petitioner ; and onus of proof shifts and is a continuous process. But, as the learned Lord points out, the court has to hold on the evidence whether the legal burden to establish desertion without cause has been established by the petitioner.

In Day v. Day[52], the husband petitioned for divorce on the ground that his wife had deserted him. The wife relied on the fact that the husband committed adultery and that, therefore, the desertion was not without cause. The Court held that the burden was upon the petitioning husband to prove that his adultery was not the cause of his wife's desertion and that he had proved the same, as the facts proved established that she had formed her intention not to resume cohabitation independently of his adultery. The legal position is stated thus, at p. 853 :

"On the facts of the present case that involves the husband proving affirmatively that the mind of the wife was not in any way affected by her knowledge of the husband's adultery. Clearly the burden is a heavy one, and doubtless in many cases it will be one that a petitioner will not be able to discharge."

In Brewerv. Brewer[53], the Court of Appeal explained the views expressed by Lord Macmillan and Lord Romer in Pratt v. Pratt(1). Willmer, L.J. after quoting the observations of Lord Macmillan in Peatt's case[54], proceeded to state:

"This passage, although not necessary for the decision of that case, was expressly approved and adopted by Lord Romer in Cohen v. Cohen(1), and must, I think, be accepted as authoritative having regard to the fact that all the other members of the House expressed their concurrence with Lord Romer."

The case-law here and in England throws the burden of proof on the petitioning spouse to prove that desertion was without cause.

Another aspect of the question may now be touched upon. The definition of desertion under s. 10of the Act, the argument proceeds, is much wider than that under the English law or under the Bombay Act considered by this Court. Emphasis is laid upon the following words in the explanation to s. 10(1) of the Act :

"includes the willful neglect of the petitioner by the other party to the marriage."

The expression "includes", the argument proceeds, enlarges the scope of the word "desertion", and takes in by definition the conscious neglect on the part of the offending spouse, without the requisite animus deserendi. This argument, if accepted, would impute an intention to the Parliament, which was entering the field for the first time, to bring about a revolutionary change not sanctioned even in a country like England where divorce or separation for desertion had long been in vogue. We would be attributing to the Parliament an incongruity, for, in the first part of the explanation it was importing all the salutary restrictions on the right to Judicial separation. but in the second part it would be releasing the doctrine, to a large extent, of the said restrictions. By such a construction the legislation would be made to defeat its own purpose. On the other hand, the history of the doctrine of "desertion" discloses some limitations thereon conceived in the interests of society and the Parliament by the inclusive definition couched in wide language could not have intended to remove those limitations. The inclusive definition is only intended to incorporate therein the doctrine of "constructive desertion" known to English law and the language is designedly made wide to cover the peculiar circumstances of

52 [1957] 1 All E.R. 848.

53 [1961] 3 All E.R. 957.

54 [1939] 2 All E.R. 437.

our society. In Rayden[55] on Divorce, 7th Edn., the expression "constructive desertion" is defined thus, at p. 155 :

"Desertion is not to be tested by merely ascertaining which party left the matrimonial home first. If one spouse is forced by the conduct of the other to leave home it may be that the spouse responsible for the driving out is guilty of desertion. There is no substantial difference between the case of a man who intends to cease cohabitation and leaves his wife, and the case of a man who compels his wife by his conduct, with the same intention, to leave him. This is the doctrine of constructive desertion."

Adverting to the question of animus in the case of constructive desertion, the learned author proceeded to observe, at p. 156, thus :

"It is as necessary in cases of constructive desertion to prove both the factum and the animus on the part of the spouse charged with the offence of desertion as it is in cases of simple desertion. The practical difference between the two cases lies in the circumstances which will constitute such proof, for, while the intention to bring the matrimonial consortium to an end exists in both cases, in simple desertion there is an abandonment, whereas in constructive desertion there is expulsive conduct."

The ingredients of desertion as well as constructive desertion are the same, namely, animus and factum, though in one case there is actual abandonment and in the other there is expulsive conduct. Under certain circumstances the deserted spouse may even stay under the same roof or even in the same bed-room. In our society, it is well known that in many a home the husband would be guilty of expulsive conduct towards his wife by completely neglecting her to the extent of denying her all marital rights, but still the wife, because of social and economic conditions, may continue to live under the same roof. The words "willful neglect" in the explanation were certainly designed to cover constructive desertion in the English law. If so, it follows that willful conduct must satisfy the ingredients of desertion as indicated above. Hence, the appellant could not take advantage of the inclusive definition unless he established all the ingredients of constructive desertion, namely, animus, factum and want of just cause.

There is yet another legal contention which may be disposed of before I consider the facts. It is based on s. 9 of the Act, which reads :

(1) when either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply by petition to the District Court, for restitution of conjugal rights and the Court on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly. (2) Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which shall not be a ground for judicial separation or for nullity of marriage or for divorce."

The contention on behalf of the appellant is that s. 9(2) of the Act affords a dictionary for the expression "without reasonable cause" and that it shows that reasonable cause in the explanation could only, be that cause which will be a legal ground for the offending spouse to resist the petition by the other for restitution of conjugal rights. It is further contended that under cl. (2) thereof such legal ground could only be the legal ground on which there could be judicial separation or nullity of marriage and, therefore, the reasonable cause in the explanation to s. 10should also be only such grounds like cruelty etc. There is a fallacy in this argument. An illustration will bring it out. A husband files an application against the wife for restitution of conjugal rights under s. 9 of the Act. The wife can plead, inter alia, that the husband is not entitled to restitution of conjugal rights as lie has deserted her without

55 [1940] 2 All. E.R. 331, 335.

reasonable cause. Section 9(2) of the Act does not afford any dictionary for ascertaining the meaning. of the expression "reasonable cause". We have to fall back again for its meaning on the principles laid down by decided cases and the facts of each case. That apart, s. 9 and s. 10 deal with different subjects-one with restitution of conjugal rights and the other with judicial separation. We cannot import the provisions of the one into the other, except in so far as the sections themselves provide for it. The explanation does not expressly or by necessary implication equate reasonable cause with a legal ground for sustaining a plea against an action for restitution of conjugal rights. Indeed, it is a limitation on one of such legal grounds. There is an essential distinction between the scope of the two sections. The Legislature even in socially advanced countries lean,, on the side of sanctity of marriage ; therefore, under s. 9 of the Act, our Parliament imposes stringent conditions to non-suit a claim for restitution of conjugal rights. On the same reasoning, under s. 10 of the Act, it does not permit separation of spouses on the ground of desertion except when the desertion is without reasonable cause. The expression "reasonable cause" must be so construed as to bring about a union rather than separation. The said expression is more comprehensive than cruelty and such other causes. It takes in every cause which in a given situation appears to be reasonable to a Court justifying a spouse to desert the other spouse. This view is consistent with the English law on the subject. In Halsbury's Laws of England, 3rd Edn., Vol. 12, the author says, in para. 484, at p. 257 thus :

"Any matrimonial offence, if proved, is a ground for the other spouse withdrawing from cohabitation. Further conduct which falls short of a matrimonial offence, that is conduct not amounting to cruelty or adultery, may excuse desertion."

In Edwards v. Edwards[56] this idea was succinctly brought out. There it was stated that conduct short of cruelty or other matrimonial offence, might afford cause for desertion. So too, in an earlier decision in Yeatman v. Yeatman[57] it was held that reasonable cause was not necessarily a distinct matrimonial offence on which a decree or judicial separation or dissolution of marriage could be founded. I am, therefore. of the opinion that s. 9 of the Act does not throw any light on the construction of the expression "without reasonable cause" and that whether there is a reasonable cause or not in a given case shall be decided only on the evidence and the peculiar circumstances of that case.

The result of the said discussion may be stated thus The legal burden is upon the petitioning spouse to establish by convincing evidence beyond any reasonable doubt that the respondent abandoned him or her without reasonable cause. The petitioner must also prove that there was desertion throughout the statutory period and there was no bona fide attempt on the respondent's part to return to the matrimonial home and that the petitioner did not prevent the other spouse by his or her action by word or conduct from cohabitation. The expression "willful neglect" included in the section does not introduce a new concept in Indian law unknown to the English law, but is only an affirmation of the doctrine of constructive desertion. The said doctrine is not rigid but elastic and without doing violence to the principles governing it, it can be applied to the peculiar situations that arise in an Indian society and home. No inspiration could 'be derived from s. 9 of the Act in order to construe the scope of the expression "without reasonable cause" and whether there is a reasonable cause or not is a question of fact to be decided on the facts of each case. I shall now proceed to consider the facts of the case. The main question is whether the appellant has proved that the respondent deserted him within the meaning of the term as explained above. To ascertain that fact from a correct perspective it is necessary to notice broadly the marital life of the couple since their marriage. The appellant is an

56 L.R [1950] P. 8.

57 L.R. [1868] 1. P. & D. 489.

M.B.,B.S. and a medical practitioner carrying on his profession in Bombay. He belongs to a well-to-do family, his father being a businessman. The family is comparatively old-fashioned in habits and customs. The respondent is the daughter of one Vasanmal, a businessman, who had -branches in Singapore, Hongkong, Jakarta and Manila. Though he spent most of. his time in foreign countries in connection with his business, he always left his family in India and he used to visit his family in India whenever he could conveniently do so. Though the learned counsel for the appellant attempted to argue that the members of Vasanmal's family, including the respondent, were leading a fast life, there is nothing on the record, except some vague suggestions here and there, to support the said argument. It may be accepted that the respondent's father is comparatively a richer man than the appellant. On November 10, 1946, the appellant and the respondent were married at Hyderabad (Sind). On July 19, 1947, a male child was born to them and was named Ashok. Unfortunately for the couple, their even course of life was disturbed by the partition of India. In October, 1947, they had to migrate, as many others did, from Pakistan to India. Though the respondent's father was maintaining a family house at Lonavla, about 70 miles from Bombay, the members of the appellant's family including the respondent, went to the Colombo and were staying with the appellant's mother's brother. In or, about December, 1947, the appellant, along with his mother, left Ceylon for Bombay leaving the respondent and appellant's sisters in his uncle's house at Colombo. The respondent's version is that, as her sisters-in-law ill-treated her, she was not happy there and therefore she had to leave that place, along with her child, in January, 1948, to her parents' house at Lonavla. At the end of January, 1948, the appellant and his mother went to Lonavla and brought the respondent to Bombay. At the end of the first week of February, 1948, the respondent went back to Lonavla and came back to Bombay in or about August or September, 1948, and was living with the appellant for about 3 months. In or about that time, the respondent's parents shifted their residence from Lonavla to Poona and settled down there. Poona is about 100 miles from Bombay. In December, 1948, the respondent visited her parents at Poona and returned back to Bombay in February, 1949. According to her from February 26, 1954, she was living with the appellant in his house at Bombay and she a permitted to go and see her parents ; but according to the a pellant, she was going now and thento her parents' house. Much is made of her frequent visits to her parents' home, but it is ignore that the frequent visits were only made during the difficult days the evacuees were passing through. But the fact remains that from 1949 for about 4 years she was continuously living with her husband in his house. It is common case that the couple were not happy in their married life. The husband and wife give their versions of the reasons for this estrangement. The husband, as P.W. 1, attempts to throw the blame wholly on the wife He says that the respondent was disrespectful and indifferent to him, that she was proud and arrogant, that she refused to wear the clothes which were made for her by his parents on the ground that they were made of inferior stuff, that she was very disobedient and disrespectful to his parents, that she used to leave for her parents' house very often and sometimes without informing him, that she had no love or affection for him, that when she was in her parents' house she used to play cards, and drank at the parties given by her father, that she did not like to have children and that she was rude and insulting in her behaviour towards him and his parents. In the cross-examination lie admits that lie saw her drinking only twice or thrice at her father's parties, but none of his friends saw her drinking nor did she drink from 1947. He further admits that he saw her playing cards without stakes, but he had not seen personally her playing cards after 1946 or 1947. He admits that the relationship between his mother and the respondent's parents was not cordial. He describes her acts of disobedience thus:

"On the next day of our marriage, it was customary that she should put on the saree which we got made for her. We had such a saree already prepared. She refused to put on such a saree saying that the

same was too inferior to be put on by her. She on many occasions ordered him to do certain things for her. For example, on one day I told her that she should not spread her sarees on the sofa but she should keep the sarees wrapped and keep them in a cupboard. On the next day the same thing was repeated, namely, that she kept her saree spread on the sofa. I called her and requested her to wrap it. She asked me as to why I should not do the same. I protested and told her that I was speaking to her in a polite way and why she should order me to do things, whereupon she told me that her friends' husbands even do boot-polish and why I should not do even such trifling things."

A perusal of his evidence discloses that though he is an educated man he belongs to the old, school and takes offence for the most trivial things which another would ignore. A perusal of his entire evidence also discloses that he is highly respectful to his parents and that he was particular that his wife also should be obedient to them and particularly to his mother. Though the learned counsel for the appellant painted the respondent in his opening address as a highly sophisticated woman, addicted to all the evils of drink, dance etc., the evidence of the appellant, even if entirely accepted, shows that she is not highly educated, that she has not been ad. dieted to any bad habits such as drink, playing cards, smoking etc., and that she was living in the family house of her husband, though now and then she was going to her parents' house. ID the cross-examination the appellant also stated that he had to take the respondent in 1953 or 1954 to Dr. Marfatia, a psychiatrist, for treatment, indicating thereby that was under some nervous or mental strain.

Now let us see what the respondent says about her life in her husband's house. She says that at the time of her marriage her father gave a dowry of Rs. 25,000.00 and several presents and gifts, including clothes worth about Rs. 10,000.00, but her mother-in-law was not satisfied with the amount of dowry given by her father ; that her parentsin-law would not ordinarily permit her to visit her parents' house, that whenever such permission was asked for they used to refuse a number of times, but would allow her to go only once in a way ; that she, was abused for trivial things, such as when handkerchief '& were missing ; that the treatment of her mother-in-law and sisters-in-law from the beginning was cruel and when they made complaints to the appellant, he used to abuse her; that in Ceylon also they ill-treated her; that between 1949 and 1954 she was allowed to go to her parents' house only on two occasions, that is, once on the wedding of one of her sisters and the second time on the wedding of her cousin and during those occasions . she stayed with them only for a few days; that she'" refused permission to go to Poona even when her uncle died; that her parents-in-law,, not only said many 25-2 S C India/64 dirty things of her but they did not allow her to speak to her son ; that when her father-in-law scolded her son, he started weeping and she was scolded for interfering : that this incident happened in 1953 and that since then her husband ceased to talk with her ; that she was also prevented by her mother-in-law from doing any work for her husband or for her son, that she was also beaten by her husband sometimes ; that she was not allowed to see her child when he was ill; that in 1951 she heard that her husband attempted to remarry and even asked her to sign a paper giving her consent for him to do so that she was made to sleep on a bench in the drawing room till about the year 1952 and thereafter on the floor as her mother-in-law did not provide her with a bed. Her evidence discloses that she had no freedom in her husband's house, that she was abused and insulted by her parents-in-law and sisters-in-law, that she was not given the usual comforts which she expected in her husband's home, that she was not allowed to look after her husband and her child, that the husband took the side of his mother whenever there was trouble between her and her mother-in-law. There may be some exaggeration in this version, but by and large this evidence fits in what generally happens in an old-fashioned house where a girl with modern upbringing goes to stay as a daughter-in law of the house. It may therefore

be accepted that she was lead,rig a miserable life in her husband's house and she must have been under a terrible nervous strain.

What does the father of the respondent, who was painted as villain of the piece, say about this unfortunate situation in which his daughter was placed? Whatever may be said about him, his evidence discloses that he is very much attached to his daughter and he attempted to do what an affectionate father could possibly do in the circumstances. He supports -the evidence given by his daughter in regard to dowry and the reluctance of her parents-in-law to send her to his house whenever he requested the them to do so and also he speaks to the complaint made to him by his daughter about the ill-treatment meted out to her by her in-laws and also the want of cordiality between his family and the family of the appellant. I have gone through his evidence carefully He does not impress me as one who was out to wreck the life of his daughter out of pride or anger, but a loving father who tried his best to make her happy and to reconcile the couple, if possible. Whenever there was trouble he tried to persuade them to live together and whenever she was unhappy he tried to take her to his home and give her the necessary warmth of love and affection.

Neither the mother-in-law nor the father-in-law nor the sisters-in-law were examined in the case. If the mother inlaw had been examined, more details could have elicited, but unfortunately she was kept back, in my opinion, for obvious reasons.

The said evidence broadly gives the picture of the respondent's unhappy life in her husband's house and the mental strain she was putting up there.

In those circumstances in the month of November, 1953, respondent's father came to India and was very anxious to take her to his house at Poona and thereafter, with him, to foreign countries for a short time to enable her to recoup her health. With that object, the father approached the appellant's family cautiously and through mediators to at their permission. He says, in his evidence, that after he came to India he met the respondent at her husband's place of residence and observed that she was very pale, that she had lost weight and appeared to be much worried and unhappy. He asked the appellant and his parents to allow her to be taken to Poona, but the permission was not granted. Two or three months thereafter, he again came to Bombay two or three times and made similar requests, but they were all turned down. On one occasion, the respondent described to him her miserable condition under her husband's roof and be consoled her that he would get her the permission to visit him. He requested one Manganmal to intercede on his behalf with the appellant's father and get his permission to take the respondent to his house and thereafter abroad for recoupment of health. About a week thereafter, Manganmal told him that he had seen the appellant's father and made the request on his behalf, but the appellant's father wanted to confer with his wife and so he asked him to see him again a week thereafter. A week thereafter, he saw the appellant's father and repeated the request. The appellant's father requested him to see him 3 or 4 days thereafter. He went to him again, when the appellant's father gave the necessary permission. The witness promised to go to him on February 26, 1954 to fetch his daughter. He went there at 4.30 p.m. on that day and left ,or Poona by the Deccan Queen at about 5.30 p.m. on the same day. At the time when he went to appellant's house to fetch the respondent, the appellant's father and mother were present, but the appellant was not there. The respondent took the permission of her parents-in-law and accompanied him. This version is natural. It is unthinkable that a man of the status of respondent's father would carry away his daughter from her husband's house without taking the permission of her husband or her parents-in-law. It is not likely that the respondent would have run away from the house of her husband in the absence of her husband and parents in-law taking away the jewels with her as was suggested on behalf -of the

appellant. There is nothing in the cross-examination worth the name to belie the version given by this witness. It was the most natural thing any father in the position of the respondent's father would do in the said circumstances. I do not see any Justification to reject his evidence. The respondent in her evidence supports the evidence given by her father and, in addition, she says that on February 26, 1954, she took the permission of her husband before leaving the place. She asked him to allow her to take-her son, but lie refused to give the permission. It is said that while she said that her husband was in the house, her father said that he was not there. But she clearly says in her evidence that her husband was in another room and that she went to that room to take his permission. Obviously, the husband was not willing to face his father-in-law. Manganmal, who interceded on behalf of the respondent's father with the appellant's father, gives evidence as D.W. 3. He is the Managing Director of Chotirmall & Co., with branches in India and in foreign countries. He is a friend of the respondent's father. He corroborates the evidence of the respondent's father. He says in his evidence that he went to the appellant's house and asked his father to allow the respondent to stay with her father while he was in India, as, she had not been to her father's house for years. In the cross-examination it was suggested that he was not a friend of the appellant's father, that he, along with others, was a co-trustee with Kanayalal, a son-in-law of the appellant's father, of Nanikram's trust, and that in the dispute that was raised by Kanayalal's father, Nanikram, in respect of the subject-matter -of the trust, Kanayala was supporting his father whereas Manganmal was supporting the trust. He admits that he does not claim to be a friend of the appellant's father and that there was conflict of views between him and Kanayalal in respect of the trust, but adds that on that account there was no lack of cordiality between himself and the appellant's father. He is a respectable witness. He gave straightforward answers to the questions put to him. He did, not support the respondent's father completely in that he did not say that he asked for permission for the respondent's father taking the respondent to foreign countries. Presumably the further request was made by the respondent's father himself and not by this witness. If he had come to lie in the witness-box, he would have added the further request also. There is nothing unusual in the respondent's father requisitioning the services of this gentleman in preference to others more close to the appellant's father, for this witness is a respectable man and very well known to him and in A position and was also willing,, to intercede on his behalf. I do not see any reason why the evidence of this witness should be rejected.

As against this evidence, the appellant says that on February 26, 1954, he was not present when the respondent left his house, that no one, except the maid-servant was present in the house when the respondent left the house, that in the evening at about 6 O'clock he discovered that the respondent had left his house leaving some message with the maid-servant and taking away all her jewels and valuable clothes. He further says that he wrote some letters to his wife soon thereafter, but he did not receive any reply from her. But this was denied by the respondent; and there is nothing except his word for this. This is a remarkable story. If his wife had left him when nobody was present in the house, he would not have taken it so philosophically as he asks us to believe. On his own showing, he went to Poona only two or three months thereafter. He does not even tell us what was the message that she left with the maid-servant. The maid-servant was not examined. Neither his father nor his mother nor his sister were put in the witness-box. When three witnesses, the respondent, her father and a friend of her father, definitely gave evidence that the appellant's parents were approached and that they gave their consent, it was the duty of the appellant to examine them. No doubt some sort of explanation was given that the father was in Japan, but none in respect of his mother or the maid-servant. When the burden was upon the appellant to establish desertion, it is strange indeed that he should have thought fit to keep back the best evidence from the witnessbox. When the respondent and her father

depose that: they took the consent of the appellant's parents and if the parents of the appellant did not choose to come to the witness-box to deny it, a court ordinarily should accept the evidence of the father and the daughter unless their evidence is ex facie unnatural or -inherently improbable. But that cannot be said in this case, for what the respondent's father is said to have done is the most natural in the circumstances. It is said that the City Civil. Judge had seen the respondent's father, Manganmal and the respondent in the witness-box and he did not accent their evidence and that, therefore, the High Court should not have taken a different view. On this aspect of the case, after considering the evidence of the witnesses, the High Court says thus "The parents of the petitioner were available to give evidence in this case. but they have not been examined: nor has any explanation been given why the maidservant with whom a message was left by the opponent when she left the house, has not been examined in the case. We are left in this case with the two diametrically opposite version of the two interested parties:..... Having regard to these circumstances, we are of the view that the departure of the opponent from the house of the petitioner was, if not with his express permission, with his consent and full knowledge though such consent was given on account, of Some exasperation on his part."

I entirely agree with this view. It is consistent with the evidence given by the respondent's witnesses and also with the circumstances of the case and subsequent conduct of the parties. The appellant and his parents must have given the consent, though not willingly, either because of the importunities of the respondent's father or because of, the social pressure put oft them through the intervention of a respectable outsider. But they did not like the respondent's parents and therefore they did not like the respondent going to their house. It was a permission reluctantly given and she was afraid that it would be wit& draw.-Li. That is why there was no correspondence between the couple during all the days she was staying at Poona and she did not even meet the appellant or his parents when she was boarding the ship at Bombay. I would therefore, bold that the respondent left her matrimonial home with the permission of the appellant and his parents for the purpose of staying with her father at Poona and thereafter to leave for foreign countries for short stay to recoup her health. Strong reliance is placed upon an incident that is alleged to have taken place in May 1954. According to the appellant, he and his friend, Dr. Lulla, went to Poona to persuade her to come back to his house, but she definitely told, them that she would never return to his house. It is said that this incident would show that she had decided to leave him permanently. In the petition this May incident was not specifically 'mentioned nor was it stated that it afforded a cause of action. There was no mention of the appellant and his friend Dr. Lulla going to her and her, stating to them that she would never return to his house. Before the High Court the learned counsel appearing for the appellant did not seek to rely upon this meeting 2nd the reply alleged to have been given by the respondent as furnishing a cause of action for founding a claim for relief of judicial separation. This incident was relied upon: only in support of the appellant's case that the respondent, was intransigent throughout and was unwilling to go back: to the petitioner. Indeed, the learned counsel appears to admit that the evidence of the appellant and Dr. Lulla was not clear as to what was the precise question asked and what was the exact answer given by the respondent. It would, therefore, be seen that this incident did not loom large either in the pleadings or in the arguments before the High Court. But it became a sheet-anchor of the appellant's case before us. Let me, therefore, consider this aspect of the case in some detail.

The appellant says in his evidence that he went to Poona along with Dr. Lulla towards the end of May 1954, that he saw the respondent at Poona and inquired of her to why she left his house secretly and that she told him that she had decided not to come back to him. This is interested evidence and is inconsistent with my finding that she left his house with his consent as well as with the consent of his

parents. His evidence is supported by the evidence of Dr. Lulla. But the respondent contradicts this evidence. She denies the incident altogether. She is also A interested witness. Dr. Lulla, as D.W.3, says that he went to Poona along with the appellant, that the appellant tiled to persuade the respondent to come back to him, that thereafter he also tried to persuade her to come back to the appellant, but she told them both that she had made up her mind not to go back for ever. He is a doctor with a fairly good practice and a friend of the appellant. But his crossexamination discloses that he did not ask the respondent why she left the appellant, that he was with the respondent at Poona only for a few minutes, that he could not recollect what the appellant told the respondent actually and that she only stated that she was not prepared to come back to the appellant for ever. It also shows that they went to Poona without any intimation, that they had decided to meet her alone, that they thought that they could persuade her in a few minutes' time to come back to the appellant, and that, therefore, when they' left for Poona they did not make any arrangements for the next day, for they expected to return back by the midnight train. This evidence is attacked on many grounds. It is said that Dr. Lulla is a friend of the appellant and, therefore, he went to him in getting rid of his wife as the appellant was not happy with her. It is pointed out that if this incident had happened, this would have been mentioned in the earlier correspondence, in the notice issued and in the plaint filed. It is also argued that his entire evidence was artificial and appears to be improvised for the occasion, for the way he went about the business appears to be very casual. It is asked whether Dr. Lulla, who was going on a serious attempt of reconciliation, would go to Poona without the appellant informing the respondent or her father that they were coming if his intention was to meet her alone, how did he expect that her parents would not be there when he went? And how did he also think that the estrangement that was prolonged could have been put an end to in a few minutes? If he was serious about it as he pretends he was, he would have gone there with preparations for a stay of one or two days after making necessary arrangements in respect of his professional work. There is much to be said for this argument. I have come across in my experience highly respected persons lying, in the witness-box to help a friend or save one from a trouble. But the City Civil Judge accepted his evidence. The High Court says about his evidence thus:

"The learned trial judge appears to have been considerably impressed by the testimony of Dr. Lulla. He regarded Dr. Lulla as an independent person who was not likely 'to tell an untruth to support the case of the petitioner. The learned judge also took the view, having regard to the contradictory statements made by the opponent in her evidence that the testimony of the opponent was not reliable. Sitting in appeal it will be difficult or us to ignore the appreciation of evidence by the learned trial judge. It must, however, be observed that Dr. Lulla was deposing to an incident which took place about three years prior to the date on which he gave evidence, and he did not claim to remember the exact words in which the conversation took place between the petitioner and the opponent or between the petitioner and himself. Dr. Jethmqlani, who appears on behalf of the petitioner, does not seek to rely upon this meeting and the replies alleged to have been given by the opponent as furnishing a cause of action for founding a claim to relief for judicial separation. .. .. in the absence of evidence as to what precisely were the questions put to and the answers given by the opponent, it is difficult to hold, even on the view that there was in the month of May 1954 a meeting between the petitioner and Dr. Lulla on the one hand and the opponent on the other as alleged by the petitioner, that the opponent had in unmistakable terms informed the petitioner and Dr. Lulla that she had no desire to return at any time to the matrimonial home."

This finding appears to me to be couched in euphemistic terms. Though the learned judges were not inclined to disturb the finding of the learned trial judge that Dr. Lulla met the respondent along

with the appellant, they were not willing to accept his evidence that she told them that she would not return to the matrimonial home for ever. I feel a real doubt whether the appellant and Dr. Lulla met the respondent at all. But let me assume for the purpose of this case, as the High Court was inclined to assume, that they went there. But Dr. Lulla admits in his evidence that he did not remember the exact words used by the respondent in speaking to the appellant; if so, he could not have also remembered the exact words used by her in answering the appellant's question. Afterall the emphasis is on the solitary word "ever". The witness was speaking to an incident that took place about 3 years before he gave evidence and in respect of a conversation that took place for a few minutes. It is not advisable to rely upon his memory in regard to the words alleged to have been used by the respondent, particularly when he comes to give evidence on behalf of a friend when the tendency would be to give the necessary twist to a conversion of which one could not remember the exact words. The High Court as Well as the learned Advocate, who appeared for the appellant in the High Court, did not, rightly, rely upon the phraseology used in the alleged conversation between the appellant and the respondent. Even if the incident had taken place, it fits in with my earlier finding, namely, -that the respondent's father had taken the permission of the appellant's parents, though given with reluctance. The appellant might have had second thoughts and intended to go back on the consent and to persuade the respondent to come back to his home and not leave India. With that intention he might have taken his friend Dr. Lulla to Poona, where the respondent was living. She might have refused to return as the appellant was going back on his consent. She must have been obviously very angry and must have curtly refused to come back. Even if she had used the word "ever"-which I believe is only a gloss added to her statement intentionally or by lapse of memory-it must have been said in a huff. If every statement made by a spouse in a huff in a short conversation with her husband were taken in its face value, many a home would be broken. I cannot, therefore, give any value to the evidence of Dr. Lulla. I would hold that it is very doubtful whether this incident had taken place, that even if it did, the evidence given by Dr. Lulla could not be taken to be a reproduction of the actual words used by the respondent, and that, even if she had used those words, it was only a statement made in a huff in a short interview and could not be taken as a final word on the subject as to compel a court to hold that she deserted her husband without reasonable cause.

Some emphasis is also made on her conduct in not meeting her husband or his.parents when she came to Bombay to board the ship and also on her not giving her husband's house as the address in the relevant papers prepared for the journey. It was argued that the place where she was staying at Bombay was very near to that of her husband and it is unthinkable that she would not have gone there, if she was going abroad with permission, to see her husband or his parents or her child. This argument misses the real point. Here we are considering the case of a wife who was ill-treated in her husband's house and who, at the instance of her father and his friend, got reluctant permission from her husband and parents-in-law and if Dr. Lulla's evidence were true, the appellant went back on his consent and was trying to prevent her from going with her father. In such a situation it is impossible to expect an unfortunate woman like the respondent to create more unpleasantness to herself by going to her husband's house before departure and to take the risk of spoiling her planned holiday. The fact that her husband's address was not given in the relevant travel papers could not be attributed to her, for they must have been prepared in usual course at the instance of the gentleman who was helping them in that regard. If once it was accepted that she deserted her husband permanently, these circumstances may have relevance, but once it was conceded that she was going with the permission of her husband, though unwillingly given, this conduct would fall in a piece with the respondent's case. I would, therefore, not give much value to such circumstances in the situation in which the respondent

was placed. The respondent left Bombay on July 7, 1954, for the Far East with her father. Much was made about her leaving India with her father. IF she had eloped with a stranger, no doubt that would be a different matter. But here a father was taking his daughter to give her a holiday so that she may improve her health. By taking her away for short time from the oppressive surroundings which affected her health,I do not see any justification for the comment that she had deserted her husband. It must also be remembered that the respondent's father was not living with his family in the Far East. His wife and children have all along been in India. He was taking the respondent only for a temporary sojourn; and what is wrong in a father taking his daughter for a holiday in those circumstances ? If he had taken the appellant's or his parents' consent, it was not suggested that there was anything wrong in her so going. If lie or his daughter did not take such a consent, it might be an improper or an inadvisable thing to do. But such a conduct in the case of a wife leaving with her father temporarily to a foreign country as an escape from an oppressive atmosphere cannot be described as reprehensible even by a Hindu society; much less can it be treated as a desertion. It was a natural reaction to an extraordinary situation. She might have known that her conduct would anger her husband, but she would not have thought that it would be a permanent obstacle in their relationship. Be it as it may, I have already found that she left with her father with the consent of the appellant and his father, and that even if the appellant subsequently retracted from his consent, her departure might be only improper, but could not conceivably amount to legal desertion.

Till now I was considering only the oral evidence. But hereafter we come across unimpeachable documentary evidence which shows the attitude of the couple to each other. I shall proceed to consider the documentary evidence on the assumption favourable to the appellant, namely, that he, along with Dr. Lulla, went to Poona in May 1954, retracted his permission given earlier, and persuaded her to come back to the matrimonial home, but she refused to do so and left with her father for foreign Countries.

I am definitely of the view that in -,he circumstances narrated above the exact words used by her could not be field to have been proved by the vague oral evidence of Dr. Lulla and that, even if she had expressed herself strongly in a buff, such expression could not in the circumstances be considered to be decisive of her determination to leave the matrimonial home for ever. She left for the Far East on July 7, 1954. Within a fortnight from that date, on July 20, 1954, the appellant gave a cable to the respondent to the following effect "Extremely surprised at your suddenly secretly leaving India without my knowledge and consent return immediately first plane."

On July 22/23, 1954, as soon as the respondent received the cable from the appellant, she gave a cable in reply thus "Returning within few months".

On July 24, 1954, the appellant gave another cable to the respondent to the following effect :

"You must return immediately."

Pausing here for a moment, let me recapitulate the position. If the respondent definitely told the appellant and Dr. Lulla that she bad given him up and that she would not return to the matrimonial home, why did the appellant send a cable telling her that he was surprised at her secretly leaving India and asking her to return immediately? And why did she reply that she would return in a few months?. The cable given by the appellant is more consistent with the fact that neither of them understood that she had left him for ever. Indeed, the cable reflected his anger on her departure along with her father, because, though permission was given earlier, he did not like her to go. Whatever ambiguity there may be, her immediate reply was inconsistent with her determination to leave him for ever, unless

we assume, as we are asked to do, that the cable 'was a link in the chain of the plan conceived by her and her father to resist an action that might be taken by the. husband in a court of law. In July 1954 what was the action which the appellant could have taken and what was the defence, if such an action was taken, that could be sustained on the basis of this cable? At that time the Act was not passed. The Act was passed in 1955 and came into force on May 18, 1955. Therefore, the only action which the husband could have taken 'Linder the law, as it then stood, was to file a suit for restitution of conjugal rights, and this cable could not possibly be a defence against such an action. If she wanted to join him again she could have submitted to the decree. The Bombay Hindu Divorce Act, 1947, may not have any extra-territorial operation. Even if it has, four years of desertion had to run out before she could be divorced; and there was no particular urgency for her to create any eviedence at that stage. To may this cable is destructive of tile case of the appellant that she left him for ever. His reply cable also is only consistent with the fact that there was no break between them.

Now, I come to a letter dated August 2, 1954, over which there is some controversy, the appellant alleging that it was a forged one and the respondent stating that it was ,a draft of the letter she sent to her husband. It reads " My dear husband, Darling I received your two telegrams, copies of which enclosed herewith.

I immediately cabled you that I shall be returning within few months, however I really feel surprised why you want me return to Bombay by first plane without any reason.

Dear I was particularly pained to read that I have suddenly and secretely left the place without your consent. What has prompted you to write this I really don't understand. Dear how came this change. You know I was not keeping good health and considerably gone down in spirit and weight for reasons which I (10 not like to discuss here since you are fully aware of it. It was you who suggested that I should go over and stay at my father's place and it was at your suggestion that I did so.

You were fully aware that I was accompanying my father to Singapore for a few months for a change and you gave consent As soon as I feel better I shall return to Bombay.

1 hope yourself, Ashok and all the other family members are 0. K. Give my loves to Ashok and Best regards to Mother and Father. Yours forever, Meena."

The respondent, in her examination-in-chief, says:-

"I had written a letter dated 2nd August 1954 to my husband, a copy whereof has been preserved by me, I produce the copy of the letter dated 2nd August 1954."

That was not objected to and the copy of the letter was put in and marked as Ex. No. 4. In the cross-examination there is some confusion, but she broadly stated that her father dictated to her the letter, that the said letter was typed, that she copied from that typed letter and that Ex. 4 is that typed letter. The father in his cross-examination, deposes that the respondent had written a letter dated August 2, 1954, to the appellant, that he had a draft of that letter and the same was written after consulting him. The appellant denied that he received that letter. The learned City Civil Judge found thus :-

"I am not prepared to hold that the copy letter Ex. 4 was fabricated subsequently, because there are references to the letter dated 2-8-1954 in subsequent letters addressed by the respondent to the petitioner."

But he held that the appellant did not receive such a letter. The trial Court held that the letter not being a copy of what was written the respondent to the appellant, it could not be regarded is a secondary

evidence of the contents of the letter. But the High Court pointed out that it was not the case of the respondent that it was a secondary evidence of the contents of the letter written by her, but her case was that the text of Ex. 4 and the letter written to the appellant was the same; and in support of her case she produced the letter from which she had copied out the letter she had addressed to the appellant. Both the Courts, therefore, held that Ex. 4 was the typed letter from which the respondent drafted her letter to her husband. Undoubtedly, Ex. 4 cannot be a secondary evidence of the letter written by the respondent to her husband, but it certainly corroborates her oral evidence that she wrote a letter with similar recitals contained in Ex. 4 to her hus-

band on the date Ex. 4 bears. As pointed out by the learned City Civil Judge as well as by the High Court, the subsequent letters written by her clearly demonstrate that Ex. 4 could not have been fabricated subsequently and a letter must have been written by her on August 2, 1954. In view of the concurrent findings of fact, I do not think it is necessary to consider the evidence over again. I accept the concurrent findings that a letter dated August 2, 1954, with contents similiar to those in Ex. 4 was written by the respondent to her husband.

It is contended that the said letter was written at the instance of the father and on his dictation to furnish evidence in an action that might be brought by the appellant against there spondent. Let me first take the comment,VI . Z., would a wife write a letter to her husband in consultation with her father? Ordinarily in the case of married couples it is true that a wife would not write letters to her husband after consulting her father. But the circumstances under which the respondent wrote letter were not ordinary ones. Here, there was trouble between the husband and wife. The husband, according to the respondent, gave his consent, though reluctantly, for her to leave with her father to the Far East, but soon there-after gave two cables asking her to return immediately. Naturally she would tell that fact to her father and seek his advice in the matter ofreplying to her husband. There is nothing wrong in her father helping her to send a suitable reply, so that the husband may not be offended. The second comment, namely, that this 'letter was intended to be a shield against a possible action by the appellant, is devoid of merits. At the time the letter was written the Act had not come into force and this letter could not have been an answer to a possible action the husband might take for restitution of conjugal rights. There was no particular urgency for her to create evidence on that date against a possible action under the Bombay Act, even if it applied to her. This letter demonstrates beyond any reasonable doubt that the wife did not desert her husband with the requisite animus, but, on the other hand, shows her willingness to go over to Bombay as soon as she regained her health. To this letter no reply was sent by the appellant and he says in his evidence that he did not receive the said letter. It is very difficult to believe Ms statement. He is obviously denying the receipt of this .letter a,,; it establishes that she had not the animus to desert him. On February 24, 1955, he again gave a cable in the following terms --

"Since your secret departure you not replying my telegrams letters myself shocked you wandering different countries leading reckless life spoiling my reputation your most disgraceful behaviour ruining my life."

This cable contains incorrect statements. Whether he received the letter dated August 2, 1954, or not, admittedly he had received the cable given by her. I have already held that he must have received the letter dated August 2, 1954. He imputes to her in this cable reckless life and disgraceful behaviour. Where did he get this information that she was leading a bad life? In his evidence he does not say that she was leading any disgraceful life. There is nothing on the record to show that the respondent was leading a bad life, and indeed the appellant admits that she was not even leading a fast one, she never

danced, played cards or drank, at any rate, according to the appellant, from the year 1947. This cable must have irritated any respectable woman. Yet on February 26, 1955, she gave the following cable :-.

"Your allegation,% in your cable dated twenty fourth not correct cannot understand your attitude stop I have departed with your knowledge with my father because of falling health due to reasons you are well aware stop keeping quiet life with my parents stop have not received your letter only telegrams which have been replied by cable and letter."

This reply is in subdued terms and it shows her respectable attitude towards the appellant inspite of his provocation. Therein she denies his wild accusations and restates that she went with her father with his consent and that she had replied to Ms cables by cables as well as by letter. On March 4, 1955, the appellant gave another cable to hercharging her with fabricating false stories. On March 3, 1955, before the respondent received the above cable, she wrote a letter to the appellant giving a detailed reply to his cables. Therein she denied that she was leading any reck-

26-2 S.C. India/64 less life and told him that she was either with her father or uncle and also that she did not receive any letters from him. Then she proceeded to state :-

You know darling I being away from the people who despise me, I have improved my health considerably, I wish you could come and meet me her outside that suspicious atmosphere and you will know the real pleasure. I am very lonely without you and my son Ashok who is always with me in my sleep. I long to see both of you and therefore I beg to come out here.. Please do come and do not disappoint me. You know in your heart that I love you so much. This trip outside India will make you good and we shall have a very happy life. You are working so hard for your parents and never think of me and your health which as I know is deteriorating and I also know that you are not happy. Darling, I assure you that this change for few months will improve your health considerably. You need good rest to think on all your problems of daily life which you can do only along and outside the influence of the people who are around you. I hope you will understand and at least come out here for a change-for a short period. I shall do what you want me to do, but please, darling, do come; Please give my Charanawandana to father and mother and love to Ashok."

This letter is criticized on the ground that it was another attempt to create evidence at the instance of her father and also on the ground that she asked her husband to come away from his parents. To me this letter appears to be an honest attempt on the part of the wife to reconcile with her husband. It mentions his troubles and requests him to come over the East not for any permanent stay but only as a temporary sojourn to recoup his health and to enjoy a holiday along with her. As I have already stated, by that time the Act was not passed and therefore this letter could not have been written to set up any defence against any possible action by the husband. I find it very difficult to see any sinister motive in this well meant reply to her husband, and particularly after his cable attributing to her reckless life. After dispatching this letter she received a cable dated March 4, 1955, wherein the appellant attributed to her the conduct of fabricating false stories. To that cable she sent a reply cable on March 10, 1955, denying the said allegation and telling him that somebody was wrecking their lives and asking him to come over to Hongkong. On April 2, 1955, the appellant wrote a long letter to the respondent in reply to her letter dated March 3, 1955. Therein he chastised her for making insinuations against his parents, who had done much for her welfare and happiness. Emphasizing upon the word "pleasure" in her letter dated March 3, 1955, he proceeded to state :-

"'Pleasure'! that, indeed, is the crux of the whole problem. It is your perverted funny notions of pleasure giving vent to your past and present associations, both in India and abroad, that are the root cause of all your evil and irrational deeds."

Pursuing the same idea, he observed:-

"Just remember my efforts all these years to improve you and make you a happy and contented wife. It is a wonder that you find pleasure in leaving home, leaving your husband, wandering from country to country, leading reckless life under the guise of being in the company of your relations and uncles whom you find readily available at every port. And you have gone so far in this direction, that you find yourself unable to break your past links and get out of the muddle created by you and seek pleasure and happiness in your own home by being a faithful and devoted wife."

He did not stop with that, but proceeded to state "....you have proceeded to Hongkong and other places, in defiance of my clear instruction to return And, in order to cloak all these evil things you are now inventing dirty excuses, evidently meant for the consumption of the outside world whom you want to fool, so that you may be able to justify your disgraceful conduct and continue to live your life of "pleasure" without let or hindrance."

What is more, he told her that in her letters she had fabricated false and malicious stories to cover up her outrageous conduct for misleading the outside world. He finally ended with the following words expressing his determination to ignore her further correspondence:-

"However, if you still choose to fling further filth in my face by writing to me such letters and telegrams, I shall have no choice but to ignore and make no reply to the same. Inspite of all my efforts, you have completely deserted me and chosen the path of pleasure and per-version at any cost. You are only looking for same cloak to cover your guilt and continue to live your life of degradation with impunity. I refuse to furnish you with that cloak and I refuse to be drawn in your game."

There is considerable argument on the import of this letter. On behalf of the appellant it is contented that the contents of this letter were nothing more than an emotional outburst of a deserted husband and that the words used therein should not be understood literally. It is argued on behalf of the respondent that this letter did not mince matters in attributing infidelity and unchastity to the respondent and it communicated a final determination on his part not to have anything to do with her. The former argument was accepted by the City Civil Court, but the latter contention had the approval of the High Court. Shah, J., after reading the relevant portions of the document, came to the following conclusion:-

Whatever may be the protestations made by the petitioner in his evidence before the Court, it is impossible to accede to the contention of Mr. Jethmalani that his letter was merely the outpouring of an anguished heart. The letter in no unmistakable terms charges the opponent with infidelity not occasional but a persistent and chosen life of infidelity-and also charges with inventing a scheme whereby she may be able to live that life of infidelity under an appearance of being respectfuly married. If after this letter the opponent was unwilling to carry out the petitioner's direction and to forthwith go and live with him, in our judgment, no fault can be found with her."

Deasi, J., in his separate judgment wholly agreed with Shah, J. Theappellant is a graduate and it cannot be said that he does not know English. The terms of the letter indicate that his standard of English is rather high and he has sufficient vocabulary at Ms command. It is not necessary to cover the ground overagain, as I entirely agree with the construction laced upon that letter by Shah and Deasi, JJ. The expressions "outrageous conduct" reckless life", "wild ventures", disgustful conduct", "life of pleasure",

"past links", "relations readily available at every port" and such others found in the letter leave no room to doubt that the said expressions were intended to impute an immoral and dissipated life to her. Whether he used those words really believeing that. she was such a bad woman or whether he used the wild language because he was angry that she went with her father need not be speculated upon. What matters is that he designedly couched his letter without leaving any room for doubt in clear and precise phraseology and told her that she was a bad woman and, therefore, he had nothing more to do with her. To such an outrageous letter, how did the respondent react? She must have been extremely offended as any self-respecting woman would be. But she controlled herself and replied to him by letter dated April 12, 1955 in a subdued and dignified manner. After repeating that the appellant and his parents gave her consent to leave with her father, she again repeated that she left with her father to improve her health. She told him that her health improved a little and that she would return to him and to her son after sometime. Adverting to his fulminations in his letter she said :

"I find it unnecessary to reply to the other unfounded accusations contained in your letter because I know and I am sure that the basis of the same are your hallucinations, of what I am not. I deny your charges all over again and you know that they are not true. I believe that the best way is to ignore them since they are not based on truth."

She ended her letter thus :

"Please do not indulge in misgivings. As soon as my health has completely improved, I shall of course, come back home to you and to our son. "

This letter shows that she was very much offended and she was also sorry. She told him in mild words that all his accusations were false and requested him not to indulge in such things. She promised to come as soon as her health improved. Here the arguments advanced by learned counsel for the appellant may be noticed.

Firstly, the usual argument, namely, that this letter was written to the dictation of her father as a shield against a possible action by the appellant, is repeated ; and secondly, this letter indicates that the false accusations made by her husband did not so operate on her mind as to induce her to give up her idea of coming back to him. The first argument calls for the same answer, which I have given in the context of other correspondence. There is nothing wrong in the respondent consulting her father, who any day was more affectionate to her than the appellant could possibly have been. There is no point in the second contention. This letter clearly shows that she was highly offended by the false accusations ; but she replied in a dignified manner asking him neither to make nor to believe such accusations. She should be unusual woman if she was not offended by this letter. This reply reflects more her selfcontrol than her indifference or insensitiveness. This letter, read along with the letter written by the appellant on April 2, 1955, demonstrates that she was always ready and willing to come back to him inspite of his accusations. Some comment is made on the basis of the answers she gave in her evidence in regard to the manner she got the contents explained to her. Those answers were given in the stress of cross-examination. Those could not possibly detract from the admitted facts that she received the said letter and gave her reply. The letter and her answers speak for themselves. The ingenuity of the cross-examining counsel could not add to or detract from either. So far as the letters go, they proved beyond reasonable doubt that however inadvisable it may be for the respondent to go to the Far East with her father, she had not the least intention of leaving her husband permanently. She was always ready and willing to go back to her husband.

On April 8, 1956, the respondent returned to India. The appellant's complaint is that she did not inform him that she was coming and that she did not come to his house. The contention on behalf of the respondent is that after she received the letter dated April 2, 1955, she was highly offended and that, therefore, she expected some step on the part of her husband to meet her or send somebody to take her to his home. In her evidence she says that after she arrived in India, her father spoke to two or three persons for rapprochement and one of them was Kishinchand of Messers. J. Kimatrai and Kundanmal and that her father told her that Kishinchand had a talk with the appellant, but the latter refused to take her back. She adds that after her return no efforts were made either by her husband or on his behalf or by his parents to call her back to his house and she thought that somebody would be sent by her husband to fetch her from Poona to Bombay according to the custom. The appellant admits in his evidence that sometime in the month of May or June 1955 he came to know that the Tespondent had returned to India. Assuming that he was speaking the truth, it is clear from the evidence that he knew of her return about a month after she returned, but presumably he was standing on his rights and prestige and did not move in the matter. It is suggested to her that instead of going to her husband's house, in April 1956 she went to Kashmir for a holiday. She admits that she went, but explains that her father's brother's children had holidays and as they proceeded to Kashmir, she also accompanied them. I do not see any bearing of this Kashmir trip on the question of desertion. If she was waiting for an invitation to go to her husband's place there is nothing wrong in her accompanying the children to Kashmir. The respondent's father says that about 2 months after their arrival in India, he waited for an invitation from the appellant, but as he did not move in the matter, he met one or two friends of his to bring about a rapprochement between the couple, but they could not do anything in the matter. There is nothing unnatural in the father making the said attempts to bring about reconciliation between the couple. There is no reason to reject his evidence in this regard. I shall assume that no mediators were sent by the respondent's father to, bring about a rapprochement between the couple. Even so, after the letter dated April 2, 1955 the husband, who knew that the respondent had come to India, should have taken some steps directly or indirectly to induce her to come to his house. If he stood on his prestige, the respondent could not be blamed, if after the rebuffs she received and the adment attitude of the appellant communicated to her in the said letter, she did not take the first step. In this context another circumstance may also be noticed. The respondent and also her father say that in November 1955, a sister of the appellant was married but no invitation was sent to the respondent. The respondent says that this fact also made her to apprehend that she would not be received if she straightaway went to the appellant's house. In the circumstances if she did not directly on landing in India go to her husband's house but waited for an invitation from him, I cannot say that her attitude was either unreasonable or that it should be attributed to her final determination to desert her husband. On this aspect of the case, Shah, J., observed in his judgment :

"The conduct of the opponent in not meeting her son after she returned to India may appear to be unnatural, but, if after receiving a highly offensive letter from the petitioner, she did not take an initiative to return to the matrimonial home and waited for some invitation from, or from some amends on the part of, the petitioner, that conduct may not be regarded as improbable or justifying an' inference that she was seeking to continue the state of desertion which had previously started."

I am in entire agreement with these observations. On the other hand the conduct of the appellant is telltale and reflects his determination to discard her. According to him he came to know that the respondent came to India in April or May 1956, but a few days thereafter instead of inviting her to come, he went to a lawyer for consultation and thereafter filed the petition for judicial separation in

September 1956. It is manifest that he was waiting for the statutory time to run out and soon thereafter he rushed to the Court. The respondent, who obviously did not know the passing of the Act, fell into his trap.

Pausing here, let me summarize the facts. The respondent belongs to a fairly rich family. She must have been brought up in comfort and with love and affection. She was not highly educated ; she has read, we are told, upto sixth standard. She was married to the appellant, who belongs to a well-to-do family. The appellant is an M.B.B.S. and has been carrying on the profession of a doctor in Bombay. After the marriage, the respondent came to live in the joint family house of the appellant in 1947. There were misunderstanding between the parents of the respondent and the appellant and the latter's sisters. The respondent was ill-treated, insulted and was not even allowed to look after her only child. The husband, for one reason or other, either because of his respect for his parents or because of his weakness or because of both, though at the beginning he was affectionate to his wife, was not able to stand up for her and later on he fell in line with his parents and sisters and began to ill-treat her. Though in the earlier years she was allowed to go to her parents' house now and then, later on the appellant and his parents refused her permission to go to her parents' house or allowed her to do so once in a while with great reluctance, when her father, on one of his infrequent visits, was in India. She was not even permitted to go when her uncle died. The appellant also contemplated a second marriage, but, for one reason or other, it did not come off. By the year 1954 she was in a nervous strain and necessarily that must have affected her health. Her father, who came to India at the end of 1953, heard her complaints and saw her physical and mental condition. He did what a loving father should do in the circumstances. Giving up the ideas of false prestige, he approached the parents of the appellant directly and through a friend and persuaded them to permit the respondent to go to his house and thereafter to the Far East with him for a short stay to recoup her health. The respondent also took the permission of her husband. After some time, the husband I am assuming that his version of the visit along with Dr. Lulla, to Poona was true-changed his mind and asked her to come back, but she refused to come back. From her standpoint she obviously did not like her husband going back on his word and disturbing her planned holiday, to which she was looking forward. From the standpoint of the husband, he was angry because as, a Hindu husband he expected his wife to obey him whether his demand was reasonable or not. The wife, perhaps' did not tell him the day when she would be leaving with her father to the Far East. She must have been afraid that he would prevent her somehow from going abroad. That explains her conduct in not seeing him or his parents at Bombay before she boarded the ship. The subsequent correspondence shows that the appellant was telling her from his commanding position that she should give up her holiday and come back to him immediately and she, on her part, was persuading him in a subdued tone to permit her to stay for a few months and promising to come back thereafter. The letter dated April 2, 1955, was an unexpected and unmerited blow to her. Therein she was charged with unchastity and leading a fast and reckless life. Even a Hindu wife would be enraged and insulted by such dastardly conduct on the part of her husband. Even so she sent a reply couched in a dignified and controlled language denying his allegations and stating that she would return in a few months. She was not even invited by the appellant when his sister was married in November 1955. She therefore, came back to India only in April 1956. In view of the serious allegations made by the appellant in his letter dated April 2, 1954, and in view of his determined attitude disclosed therein, she naturally and properly expected that the husband would invite her or send somebody to take her back to his home. Instead of doing so, though he knew that the respondent had come to India, he did not make any attempt to invite her or send a relation to bring her to his home as he used to do on previous occasions when she went to her father's house. By that time as the Act came into force, he

found his opportunity for which he was waiting and took advantage of the situation. As the statutory period of two years had expired from the date she left India, he rushed to the Court. On these facts, I have no doubt that the appellant failed to establish that the respondent deserted him without any reasonable cause. Even if she deserted him within the meaning of s. 10 of the Act, I would hold that by writing the letter dated April 2, 1955, she ceased to be in desertion from that date. A fair reading of that letter, read in the context of her offer to return within a few months, shows beyond any doubt that he closed the door for her return long before the statutory period had expired. When the respondent wrote to the appellant telling him that she would come in a few months, he wrote to her saying that she was leading an immoral life and that he would no longer be "drawn into her game." Even after that letter, she wrote back denying his charges and promising to come as soon as her health improved. I have no doubt that, at any rate from April 2, 1955, the desertion, if any, on the part of the respondent, came to an end and from that date the appellant was guilty of desertion.

For the aforesaid reasons, I agree with the conclusion arrived at by the High Court. The appeal deserves to be dismissed and I accordingly dismiss it with costs.

ORDER OF COURT In accordance with the majority opinion, the appeal is allowed with costs here and in the High Court.

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BIPIN CHANDER JAISINGHBHAI SHAH VS PRABHAWATI

Bench: Hon'ble Mr. Justice Bhuvneshwar P. Sinha, Hon'ble Mr. Justice B. Jagannadhadas & Hon'ble Mr. Justice T.L. Venkatarama Aiyyar

Bipin Chander Jaisinghbhai Shah
Vs.
Prabhawati.

Equivalent Citations: 1956 Scr 838
Date of Judgment: 19/10/1956

1957 AIR 176

HMA-section 13- divorce- ground of desertion - For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely

(1) the factum of separation, and

(2) the intention to bring cohabitation permanently to an end (animus deserendi).

Similarly two elements are essential so far as the deserted spouse is concerned:

(1) the absence of consent, and

(2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively....

Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co-exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus deserendi coincide in point of time.

JUDGMENT

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 247 of 1953. Appeal by special leave from the judgment and decree dated August 22, 1952 of the Bombay High Court in Appeal No. 66 of 1952 arising out of the decree dated March 7, 1952 of Bombay High Court in its Ordinary Original Civil Jurisdiction in Suit No. 1177 of 1951.

M. C. Setalvad, Attorney-General for India, Purshottam Tricumdas, T. Godiwala, J. B. Dadachanji, Rameshwar Nath and S. N. Andley, for the appellant.

C. K. Daphtary, Solicitor-General of India and Sardar Bahadur, for the respondent.

1956, October 19. The Judgment of the Court was delivered by

Hon'ble Mr. Justice Bhuvneshwar P. Sinha :—

This is an appeal by special leave against the judgment and decree of the High Court of Judicature at Bombay dated August 22,1952, reversing those of a single Judge of that Court on the Original Side, dated March 7,1952, by which he had granted a decree for dissolution of marriage between the appellant and the respondent.

The facts and circumstances of this case may be stated as follows: The appellant, who was the plaintiff, and the respondent were married at Patan on April 20, 1942, according to Hindu rites of the Jain Community. The families of both the parties belong to Patan, which is a town in Gujarat, about a night's rail journey from Bombay. They lived in Bombay in a two-room flat which was in occupation of the appellant's family consisting of his parents and his two sisters, who occupied the larger room called the hall, and the plaintiff and the defendant who occupied the smaller room called the kitchen. The appellant's mother who is a patient of asthma lived mostly at Patan. There is an issue of the marriage, a son named Kirit, born on September 10, 1945. The defendant's parents lived mostly at Jaigaon in the East Khandesh district in Bombay. The parties appear to have lived happily in Bombay until a third party named Mahendra, a friend of the family came upon the scene and began to live with the family in their Bombay flat some time in 1946, after his discharge from the army. On January 8, 1947, the appellant left for England on business. It was the plaintiff's case that during his absence from Bombay the defendant became intimate with the said Mahendra and when she went to Patan after the plaintiff's departure for England she carried on "amorous correspondence" with Mahendra who continued to stay with the plaintiff's family in Bombay. One of the letters written by the defendant to Mahendra while staying at the plaintiff's flat in Bombay, is Ex. E as officially translated in English, the original being in Gujerati except a few words written in faulty English. This letter is dated April,1947, written from the plaintiff's house at Patan, where the defendant bad been staying with her mother-in-law. This letter had been annexed to the plaint with the official translation. It was denied by the defendant in her written statement. But at the trial her counsel admitted it to have been written by her to Mahendra. As this letter started all the trouble between the parties to this litigation, it will have to be set out in extenso hereinafter. Continuing the plaintiff's narrative of the events as alleged in the plaint and in his evidence, the plaintiff returned to Bombay from abroadon May 20, 1947. To receive him back from his foreign journey the whole family' including the defendant was there in Bombay. According to the plaintiff, he found that on the first night after his return his bed had been made in the hall occupied by his father and that night he slept away from his wife. As this incident is said to have some significance in the narrative of events leading up to the separation between the husband and the wife and about the reason for which the parties differ, it will have to be examined in detail later. Next morning, that is to say, on May 21, 1947, the plaintiff's father handed over the letter aforesaid to the plaintiff, who recognised it as being in the familiar handwriting of his wife. He decided to tackle his wife with reference to the letter. He handed it to a photographer to have photo copies made of the same. That very day in the evening he asked his wife as to why she had addressed the letter to Mahendra. She at first denied having written any letter and asked to see the letter upon which the plaintiff informed her that it was with the photographer with a view to photo copies being made. After receiving the letter and the photo copies from the photographer on May 23, the plaintiff showed the defendant the photo copy of the letter in controversy between them at that stage and then the defendant is alleged to have admitted having written the letter to Mahendra and to have further told the plaintiff that Mahendra was a better man than him and that Mahendra loved her and she loved him. The next important event

in the narrative is what happened on May 24, 1947. On the morning of that day, while the plaintiff was getting ready to go to his business office his wife is alleged to have told him that she had packed her luggage and was ready to go to Jalgaon on the ostensible ground that there was a marriage in her father's family. The plaintiff told her that if she had made up her mind to go, he would send the car to take her to the station and offered to pay her Rs. 100 for her expenses. But she refused the offer. She left Bombay apparently in the plaintiff's absence for Jalgaon by the afternoon train. when the plaintiff came back home from his office, he "discovered that she had taken away everything with her and had left nothing behind". It may be added here that the plaintiff's mother had left for Patan with his son some days previously. Plaintiff 's case further is that the defendant never came back to Bombay to live with him, nor did she write any letters from Jalgaon, where she stayed most of the time. It appears further that the plaintiff took a very hasty, 'if not also a foolish, step of having a letter addressed to the defendant by his solicitor on July 15, 1947, charging her with intimacy between herself and Mahendra and asking her to send back the little boy. ,The parties violently differ on the intent and effect of this letter which will have to be set out in extenso at the appropriate place. No answer to this letter was received by the plaintiff. In November, 1947, the plaintiff's mother came from Patan to Bombay and informed the plaintiff that the defendant might be expected in Bombay a few days later. Thereupon the plaintiff sent a telegram to his father-in-law at Patan. The telegram is worded as follows:-

"Must not send Prabha. Letter posted.

Wishing happy new year".

The telegram stated that a letter bad been posted. The defendant denied that any such letter bad been received by her or by her father. Hence the original, if any, is not on the record. But the plaintiff produced what he alleged to be a carbon copy of that letter which purports to have been written on November 13, 1947, the date on which the telegram was despatched. An English translation of that letter is Ex. C and is to the following effect:-

Bombay 13-11-47 To Rajmanya Rajeshri Seth Popatlal & others. There is no letter from you recently. You must have received the telegram sent by me today.

Further, this is to inform you that I have received information from my Mami (mother) thatPrabha is going to come to Bombay in 3 or 4 days. I am surprised to hear this news; Ever since she has gone to Jalgaon, there has been not a single letter from her to this day. Not only that, but, although you know everything, neither you nor any one on your behalf has come to see me in this connection. What has made Prabha thus inclined to come all of a sudden! After her behaviour while going to Jalgaon for: the marriage, (and after), her letter to Mahendra and her words. 'He is better than you-Has feeling for' me and I love him' and all this, I was afraid that she would not set up a house with me. Hence when my mother gave me the news of her return, I was surprised.

I have not the slightest objection to the return of Prabha, but if she gives such shameless replies to me and shows such improper behaviour, I shall not be able to tolerate the same. If she now really realises her mistake and if she is really repenting and wants sincerely to come, please make her write a reply to this letter. On getting a letter from her, I shall personally come to Patan to fetch her. Kirit is young. For his sake also, it is necessary to persuade Prabha.

Further, I have to state that I have so far kept peace. I have made efforts to call back Prabha. Please understand this to her my final effort. If even now Prabha does not give up her obstinacy, I am not responsible and (then) do not blame me.

Well, that is all for the present. Kirit must be bale and hearty. My new year's greetings to you all. Please do assign to me such work-as I can manage.

Written by Bipinchandra"

The plaintiff stated that be received no answer either to the telegram or to the letter. Two days later, on, November 15, the plaintiff's father addressed a letter to the defendant's father, which is Ex. D. This letter makes reference. to the defendant's mother having, talked to the plaintiffs mother about sending the defendant I to Bombay and to the fact that the plaintiff bad sent a telegram on November 13, and ends with the expression of opinion by the plaintiff's father that it was "absolutely necessary" that the plaintiff's consent should be obtained before sending the defendant to Bombay. This letter also remained unanswered. According to the plaintiff, nothing happened until May, 1948, when he went to Patan and there met the defendant and told her "that if she repented for her relations with Mahendra in the interests of the child as well as our own interests she could come back and live with me". To that the defendant is said to have replied that in November, 1947, as a result of pressure from her father and the community, she had-been thinking of coming to live with the plaintiff) but that she had then decided not to do so. The defendant has given quite a different version of this interview. The second interview between the plaintiff and the defendant again took place at Patan some time later in 1948 when the plaintiff went there to see her on coming to know that she had been suffering from typhoid,. At that time also she evinced no desire to come back to the plaintiff. The third and the last interview between the plaintiff and the defendant took place at Jalgaon in April-May, 1949. At that interview also the defendant turned down the plaintiff's request that at least in the interests of the child she should come back to him. According to the plaintiff, since May 24, 1947, when the defendant left his home in Bombay of her own accord, she bad not come back to her marital home. The suit was commenced by the plaintiff by filing the plaint dated July 4, 1951, substantially on the ground that the defendant bad been in desertion ever since May 24, 1947, without reasonable cause and without his consent and against his will for a period of over four years. He therefore prayed for a decree for a dissolution of his marriage with the defendant and for the custody of the minor child.

The suit was contested by the defendant by a written statement filed on February 4, 1952, substantially on the ground that it was the plaintiff who by his treatment of her after his return from England had made her life unbearable and compelled her to leave her marital home against her wishes on or about May 24, 1.947. She denied any intimacy between herself and Mahendra or that she was confronted by the plaintiff with a photostat copy of the letter., Ex. E, or that she had confessed any such intimacy to the plaintiff. She admitted having received the Attorney's letter, Ex. A, and also that she did not reply to that letter. She adduced her father's advice as the reason for not sending any answer to that letter. She added that her paternal uncle Bhogilal (since deceased) and his son Babubhai saw the plaintiff in Bombay at the instance of the defendant and her father and that the plaintiff turned down their request for taking her back. She also made reference to the negotiations between the defendant's mother and the plaintiff's mother to take the defendant back to Bombay and that the defendant could not go to Bombay as a result of the telegram of November 13, 1947, and the plaintiff's father's letter of November 15, 1947, aforesaid. She also stated that the defendant and her son, Kirit, both lived with,the plaintiff's family at Patan for over four months and off and on on several occasions. The defendant's definite case is that she had always been ready and willing to go back to the plaintiff and that it was the plaintiff who all along had been wailfully refusing to keep her and to cohabit with her. On those allegations she resisted the plaintiff's claim for a decree for a dissolution of the marriage. On those pleadings a single issue was joined between the parties, namely,-

"Whether the defendant deserted the plaintiff for a continuous period of over four years prior to the filing of the suit".

At the trial held by Tendolkar, J. of the Bombay High Court on the Original Side, the plaintiff examined only himself in support of his case. The defendant examined herself, her father, Popatlal, and her cousin, Bhogilal, in support of her case that she had been all along ready and willing to go back to her marital home and that in spite of repeated efforts on her part through her relations the plaintiff had been persistently refusing to take her back.

The learned trial Judge answered the only issue in the case in the affirmative and granted a decree for divorce in favour of the plaintiff, but made DO order as to the costs of the suit. He held that the letter, Ex. E "reads like a love letter written by a girl to her paramour. The reference to both of them having been anxious about something and there being now no need to be anxious any more can only be to a possible fear that she might miss her monthly periods and her having got her monthly period thereafter, because, if it were not so and the reference was to anything innocent, there was nothing that she should have repented later on in her mind as she says she did, nor should there have been occasion for saying 'after all love is such an affair'." With reference to that letter he further held that it was capable of the interpretation that she had misbehaved with Mahendra and that she was conscious of her guilt. With reference to the incident of May 24, the learned Judge observed that having regard to the demeanour of the plaintiff and of the defendant in the witness box, he was inclined to prefer the husband's testimony to that of the wife in all matters in which there was a conflict. He held therefore that there was desertion with the necessary animus deserendi and that the defendant had failed to prove that she entertained a bonafide intention to come back to the marital home, that is to say, there was no animus revertendi. With reference to the contention that the solicitor's letter of July 15,1947, had terminated the desertion, if any, he held that it was not well founded inasmuch as the defendant had at no time a genuine desire to return to her husband. He made no reference to the prayer in the plaint that the custody of the child should be given to the father, perhaps because that prayer was not pressed. The defendant preferred an appeal under the Letters Patent which was heard by a. Division Bench consisting of Chagla C.J. and Bhagwati J. The Appellate Bench, allowed the appeal, set aside the decision of the trial Judge and dismissed the suit with costs. It held that the defendant was not guilty of desertion, that the letter of July 15, 1947, clearly established that it was the 'plaintiff who had deserted the defendant. Alternatively, the Appellate Court held that even assuming that the defendant was in desertion as a result of what had happened on May 24, and subsequently, the letter aforesaid bad the effect of putting an end to that desertion. In its judgment the letter, Ex. E, did not justify the plaintiff having any reasonable suspicions about his wife's guilt and that the oral evidence of the defendant and her relations proved the wife's anxiety to return back to her husband and of the obduracy of the husband in refusing to take the wife back. The plaintiff made an application to the High Court for leave to appeal to this Court. The leave asked for was refused by another Division Bench consisting of the Chief Justice and Dixit J. Thereafter the plaintiff moved this Court and obtained special leave to appeal from the judgment of the Appellate Bench of the High Court.

In this appeal the learned Attorney-General appearing on behalf of the appellant and the learned Solicitor-General appearing on behalf of the respondent have placed all relevant considerations of fact and law before us, and we are beholden to them for the great assistance they rendered to us in deciding this difficult case. The difficulty is enhanced by the fact that the two courts below have taken diametrically opposite views of the facts of the case which depend mostly upon oral testimony of the plaintiff-husband and the defendant-wife and not corroborated in many respects on either

side. It is a case of the husband's testimony alone on his side and the wife's testimony aided by that of her father and her cousin. As already indicated, the learned trial Judge was strongly in favour of preferring the husband's testimony to that of the wife whenever there was any conflict. But he made no reference to the testimony of the defendant's father and cousin which, if believed, would give an entirely different colour to the case. Before we deal with the points in controversy, it is convenient here to make certain general of observations on the history of the law on the subject and the well established general principles on which such cases are determined. The suit giving rise to this appeal is based on section 3(1) (d) of the Bombay Hindu Divorce Act', XXII of 1947, (which hereinafter will be referred to as "The Act") which came into force on May 12, 1947, the date the Governor's assent was published in the Bombay Government Gazette. This Act, so far as the Bombay Province, as it then was, was concerned, was the first step in revolutionizing the law of matrimonial relationship, and, as the Preamble shows, was meant "to provide for a right of divorce among all communities of Hindus in certain circumstances". Before the enactment, dissolution of a Hindu marriage particularly amongst what were called the regenerate classes was unknown to general Hindu law and was wholly inconsistent with the basic conception of a Hindu marriage as a sacrament, that is to say, a holy alliance for the performance of religious duties. According to the Shastras, marriage amongst the Hindus was the last of the ten sacraments enjoined by the Hindu religion for purification. Hence according to strict Hindu law as given by the Samhitas and as developed by the commentators, a Hindu marriage could not be dissolved on any-ground whatsoever, even on account of degradation in the hierarchy of castes or apostacy. But custom', particularly amongst the tribal and what used to be called the lower castes recognised divorce on rather easy terms. Such customs of divorce on easy terms have been in some instances held by the courts to be against public policy. The Act in section 3 sets out the grounds of divorce. It is noticeable that the Act does not recognise adultery simpliciter as one of the grounds of divorce, though cl. (f) renders the fact that a husband "has any other woman as a concubine" and that a wife "is a concubine of any other man or leads the life of a prostitute" a ground of divorce. In the present case we are immediately concerned with the provisions of s. 3(1)(d), which are in these terms:-

3. (1) A husband or wife may sue for divorce on any of the following grounds, namely:-

.....

(d) that the defendant has deserted the plaintiff for a continuous period of four years".

"Desertion" has been defined in section 2(b) in these terms:-

'Desert' means to desert without reasonable cause and without the consent or against the will of the spouse". It will be seen that the definition is tautological and not very helpful and leads us to the Common Law of England where in spite of repeated legislation on the subject of matrimonial law, no attempt has been made to define "desertion". Hence a large body of case law has developed round the legal significance of "desertion". "Marriage" under the Act means "a marriage between Hindus whether contracted before or after the coming into operation of this Act". "Husband" means a Hindu husband and "wife" means a Hindu wife.

In England until 1858 the only remedy for desertion was a suit for restitution of conjugal rights. But by the Matrimonial Causes Act of 1857, desertion without cause for two years and upwards was made a ground for a suit for judicial separation. It was not till 1937 that by the Matrimonial Causes Act, 1937, desertion without cause for a period of three years immediately preceding the institution of proceedings was made a ground for divorce. The law has now been consolidated in the Matrimonial Causes Act, 1950 (14 Geo. VI, c. 25). It would thus appear that desertion as affording a cause of action

for a suit for dissolution of marriage is a recent growth even in England. What is desertion? "Rayden on Divorce" which is a standard Work on the subject at p. 128 (6th Edn.) has summarised the case-law on the subject in these terms:-

"Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to on end without reasonable cause and without the consent of the other spouse; but the physical act of departure by one spouse does not necessarily make that spouse the deserting party".

The legal position has been admirably summarised in paras. 453 and 454 at pp. 241 to 243 of Halsbury's Laws of England (3rd Edn.) Vol. 12, in the following words:- "In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases.

Desertion is not the withdrawal from a place but from a state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, 'the home'. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated.

The person who actually withdraws from cohabitation is not necessarily the deserting party. , The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.

The offence of desertion is a course of conduct which exists independently of its duration, but as a ground for divorce it must exist for a period of at least three years immediately preceding the presentation of the petition or, where the offence appears as a cross-charge, of the answer. Desertion as a ground of divorce differs from the statutory grounds of adultery and cruelty in that the offence founding the cause of action of desertion is not complete, but is inchoate, until the suit is constituted. Desertion is a continuing offence".

Thus the quality of permanence is one of the essential elements which differentiates desertion from wilful separation. If a spouse abandon the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion.' For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there., namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. Here a difference between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce; under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case. Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed

as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co-exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or-implied, of bringing cohabitation permanently to a close. The law in England has prescribed a three year period and the Bombay Act prescribes a period of four years as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the locus poenitentiae thus provided by law and decides to come back to the deserted spouse by a bonafide offer of resuming the matrimonial some with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced,, desertion comes to an end and if the deserted spouse unreasonably refuses the offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period that there has been a desertion the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce' the plaintiff must prove the offence of desertion, like any other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law, the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court. In this connection the following observations of Lord Goddard, C.J. in the case of Lawson v. Lawson[45] may be referred to:-

"These cases are not cases in which corroboration is required as a matter of law. It is required as a matter of precaution.....

With these preliminary observations we now proceed to examine the evidence led on behalf of the parties to find out whether desertion has been proved in this case and, if so, whether there was a bona fide offer by the wife to return to her matrimonial home with a view to discharging marital duties and, if so, whether there was an unreasonable refusal on the part of the husband to take her back.

In this connection the plaintiff in the witness box deposed to the incident of the night of May 20, 1947. He stated that at night he found that his bed had been made in the hall in which his father used to sleep, and on being questioned by him, the defendant told him that it was so done with a view to giving him the opportunity after a long absence in England to talk to his father. The plaintiff expressed his wish to the defendant that they should sleep in the same room as they used to before his departure for England, to which the wife replied that as the bed had already been made, "it would look indecent if they were removed". The plaintiff therefore slept in the hall that night. This incident was relied upon by the plaintiff with a view to showing that the wife had already made up her mind to stop cohabitation. This incident has not been admitted by the defendant in her cross-examination. On the other hand she would make it out that it was at the instance of the plaintiff that the bed had been made in the hall occu- pied by his father and that it was the plaintiff and not she who was responsible for their sleeping apart that night. As the learned trial Judge has preferred the plaintiff's testimony to that of the defendant on all matters on which there was simply oath against oath, we would not go behind that finding. This incident by itself is capable of an innocent explanation and therefore has to be viewed along with the other incidents deposed to by the plaintiff in order to prove his case of desertion by

45 [1955] 1 All E.R. 341, 342.

the defendant. There was no reason why the husband should have thought of sleeping apart from the wife because there was no suggestion in the record that the husband was aware till then of the alleged relationship between the defendant and Mahendra. But the wife may have been apprehensive that the plaintiff had known of her relations with Mahendra. That apprehension may have induced her to keep out of the plaintiff's way. The most important event which led to the ultimate rupture between the parties took place on May 21, 1947, when in the morning the plaintiff's father placed Mahendra's letter aforesaid in the plaintiff's hands. The letter which has rightly been pointed out in the courts below as the root case of the trouble is in its relevant parts in these terms:-

"Mahendrababu, Your letter has been received. I have read the same and have noted the contents. In the same way, I hope, you will take the trouble of writing me a letter now and then. I am writing, this letter with fear in my mind, because if this reaches anybody's hands, that cannot be said to be decent. What the mind feels has got to be constrained in the mind only. On the pretext of lulling (my) son to sleep, I have been sitting here in this attic, writing this letter to you. All others are chitchatting below. I am thinking now and then that I shall write this and shall write that. Just now my brain cannot go in any way. I do not feel like writing on the main point. The matters on which we were to remain anxious and you particularly were anxious, well we need not now be. I very much repented later on in my mind. But after all love is such an affair. (Love begets love).

..... "While yet busy doing services to my mother-in-law, the clock strikes twelve. At this time, I think of you and you only, and your portrait shoots up before my eyes. I am reminded of you every time. You write of coming, but just now there is nothing like a necessity, why unnecessarily waste money? And again nobody gets salvation at my bands and really nobody will. You know the natures of all. Many a time I get tired and keep on being uneasy in my mind, and in the end I weep and pray God and say, 0 Lord, kindly take me away soon: I am not obsessed by any kind of anxiety and so relieve me from this mundane existence. I do not know how many times I must be thinking of you every day....."

This letter is not signed by the defendant and in place of the signature the word "namaste" findsplace. The contents of the letter were put to the defendant in cross-examination. At that time it was no more a contested document, the defendant's counsel having admitted it during the cross-examination" of the plaintiff. She stated that she had feelings for Mahendra as a brother and not as a lover' When the mysterious parts of the letter beginning with the words "The matters on which" and ending with the words "such an affair" were put to her, she could not give any explanation as to what she meant. She denied the suggestion made on behalf of the plaintiff in these words:-

"It is not true that the reference here is to our having had sexual intercourse and being afraid that I might remain pregnant".

The sentence "I very much repented later on in my mind" was also put to her specifically and her answer was "I do not know what I repented for. I wrote some thing foolishly". Pressed further about the meaning of the next sentence after that, her answer was "I cannot now understand how I came to write such a letter. I admit that this reads like a letter written by a girl to her lover. Besides the fact that my brain was not working properly I bad no explanation to give as to how I wrote such a letter". She also admitted that she took good care to see that the. other members of the family, meaning the mother-in-law and the sisters-in-law, did not see her writing that letter and that she wanted that the letter should remain a secret to them. Being further pressed to explain the sentence "We need not be anxious now", her answer was " I did not intend to convey that I had got my monthly period about

which we were anxious. I cannot say what the normal natural meaning of this letter would be". She bad admitted having received at least one letter from Mahendra. Though it would appear from the trend of her cross-examination that she received more letters than one, she stated that she did not preserve any of his letters. She has further admitted in cross-examination "I have not signed this letter. It must have remained to be signed by mistake. I admit that under the letter where the signature should be I have put the word 'Namaste' only. It is not true that I did not sign this letter because I was afraid, that if it got into the hands of any one, it might compromise me and Mahendra. Mahendra would have known from my handwriting that this was my letter. I had previously written one letter to him. That letter also I had not signed. I had only said 'Namaste'". The tenor of the letter and the defendant's explanation or want of explanation in the witness box of those portions of the letter which very much need explanation would leave no manner of doubt in any person who read that letter that there was something between her and Mahendra which she was interested to keep a secret from everybody. Even when given the opportunity to explain, if she could, those portions of the letter, she was not able to put any innocent meaning to her words except saying in a bland way that it was a letter from a sister to a brother. The trial court rightly discredited her testimony relating to her answers with respect to the contents of the letter. The letter shows a correspondence between her and Mahendra which was clearly unworthy of a faithful wife and her pose of innocence by characterising it as between a sister and a brother is manifestly disingenuous. Her explanation, if any, is wholly unacceptable. The plaintiff naturally got suspicious of his wife and naturally taxed her with reference to the contents of the letter. That she had a guilty mind in respect of the letter is shown by the fact that she at first denied having written any such letter to Mahendra, a denial in which she persisted even in her answer to the plaint. The plaintiff's evidence that he showed her a photostatic copy of that letter on May 23, 1947, and that she then admitted having written that letter and that she bad tender feelings for Mahendra can easily be believed. The learned trial Judge was therefore justified in coming to the conclusion that the letter betrayed on the part of the writer "a consciousness of guilt". But it is questionable how far the learned Judge was justified in observing further that' the contents of the letter "are only capable of the interpretation that she had misbehaved with Mahendra during the absence of the plaintiff". If he meant by the word "misbehaved" that the defendant had sexual intercourse with Mahendra, he may be said to have jumped to the conclusion which did not necessarily follow as the only conclusion from them. The very fact that a married girl was writing amorous letters to a man other than her husband was reprehensible and easily capable of furnishing good grounds to the husband for suspecting the wife's fidelity. So far there can be no difficulty in assuming that the husband was fully justified in losing temper with his wife and in insisting upon her repentance and assurance of good conduct in future. But we are not prepared to say that the contents of the letter are capable of only that interpretation and no other. On the other hand, the learned Judges of the Appeal Court were inclined to view this letter as an evidence merely of what is sometimes characterised as "platonic love" between two persons who by reasons of bond of matrimony are compelled to restrain themselves and not to go further than merely showing love and devotion for each other. We are not prepared to take such a lenient, almost indulgent, view of the wife's conduct as betrayed in the letter in question. We cannot but sympathise with the husband in taking a very serious view of the lapse on the wife's part. The learned Judges of the Appeal Court have castigated the counsel for the plaintiff for putting those questions to the defendant in cross-examination. They observe in their judgment (speaking through the Chief Justice) that there was no justification for the counsel for the plaintiff to put to the defendant those questions in cross-examination suggesting that she had intercourse with Mahendra as a result of which they were apprehending future trouble in the shape of pregnancy and illegitimate child birth. It is true that it was

not in terms the plaintiff's case that there had been an adulterous intercourse between the defendant and Mahendra. That need not have been so, because the Act does not recognise adultery as one of the grounds for divorce. But we do not agree with the appellate Court that those questions to the defendant in cross-examination were not justified. The plaintiff proposed to prove that the discovery of the incriminating letter containing those mysterious sentences was the occasion for the defendant to make up her mind to desert,the plaintiff. We do not therefore agree with the observations of the appellate Court in all that they have said in respect of the letter in question.

There can be no doubt that the letter in question made the plaintiff strongly suspicious of his wife's conduct (to put it rather mildly), and naturally he taxed his wife to know from her as to what she bad to say about her relations with Mahendra. She is said to have confessed to him that Mahendra was a better man than the plaintiff and that he loved her and she loved him. When matters had come to such a head, the natural reaction of the parties would be that the husband would get not only depressed, as the plaintiff admitted in the witness box, but would in the first blush think of getting rid of such an unloving, if not a faithless, wife. The natural reaction of the defendant would be not to face the husband in that frame of mind. She would naturally wish to be out of the sight of her husband at least for some time, to gain time for trying, if she was so minded, to reestablish herself in her husband's estimation and affection, if not love. The event of the afternoon of May 24, 1947, must therefore be viewed in that light. There was going to be performed the marriage of the defendant's cousin at her father's place of business in Jalgaon, though it was about five to six weeks from then. The plaintiff would make it out in his evidence that she left rather in a recalcitrant mood in the afternoon during his absence in office with all her belongings and that she had refused his offer of being sent in his car to station and Rs. 100 for' expenses. This conduct on the part of the wife can easily be explained as that of a person who had found that her love letter had been discovered by the husband. She would-naturally try to flee away from the husband for the time being at least because she had not the moral courage to face him. The question is whether her leaving her marital home on the afternoon of May 24, 1947, is only consistent with her having deserted, her husband, in the sense that she had deliberately' decided permanently to forsake all relationship with her husband with the intention of not returning to consortium, without the consent of the husband and against his wishes. That is the plaintiff's case. May that conduct be not consistent with the defendant's case that she had not any such intention, i.e., being in desertion? The following observations of Pollock, M. R. in Thomas v. Thomas[46] may usefully be quoted in this connection:-

"Desertion is not a single act complete in itself and revocable by a single act of repentance.

The act of departure from the other spouse draws its significance from the purpose with which it is done, as revealed by conduct or other expressions of intention: see Charter v. Charter[47]. A mere temporary parting is equivocal, unless and until its purpose and object is made plain.

I agree with the observations of Day J. in Wilkinson v. Wilkinson[48] that desertion is not a specific act, but a course of conduct. As Corell Barnes J. said in Sickert v. Sickert[49]: 'The party who intends bringing the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion'. That conduct is not necessarily wiped out by a letter of invitation to the wife to return".

46 [1924] P. 194.

47 84 L T. 272.

48 58 J. P. 415.

49 [1899] P. 278, 282

The defendant's further case that she bad been turned out of the house by the husband under duress cannot be accepted because it is not corroborated either by circumstances or by direct testimony. Neither her father nor her cousin say a word about her speaking to them on her arrival at Jalgaon that she had been turned out of her husband's home. If her case that she bad been forcibly turned out of her marital home by the husband had been made out, certainly the husband would have been guilty of "constructive desertion", because the test is riot who left the matrimonial home first. (See Lang v. Lang[50]). If one spouse by his words and conduct compel the other spouse to leave the marital home. the former would be guilty of desertion, though it is the latter who has physically separated from the other and has been made to leave the marital home. It should be noted that the wife did not cross-petition for divorce or for any other relief. Hence it is no more necessary for us to go into that question. It is enough to point out that we are not prepared to rely upon the uncorroborated testimony 'of the defendant Chat she had been compelled to leave her marital home by the threats of the plaintiff.

The happenings of May 24, 1947, as pointed out above, are consistent with the plaintiff's case of desertion by the wife. But they are also consistent not with the defendant's case as actually Pleaded in her written statement, but with the fact; and circumstances disclosed in the evidence, namely, that the defendant having been discovered in her clandestine amorous correspondence with her supposed paramour Mahendra, she could not face her husband or her husband's people living in the same flat in Bombay and therefore shamefacedly withdrew herself and went to her parent's place of business in Jalgaon on the pretext of the marriage of her cousin which was yet far off. That she was not expected at Jalgaon on that day in connection with the marriage is proved by her own admission in the witness box that "when I went to Jalgaon everyone was surprised". As pointed out above, the burden is on the plaintiff to prove desertion without cause for the statutory period of four years, that is. to say, that the deserting spouse must be in desertion throughout the whole period. In this connection the following observations of Lord Macmillan in his speech in the House of Lords in the case of Pratt v. Pratt[51] are apposite:-

"In my opinion what is required of a petitioner for divorce on the ground of desertion is proof that throughout the whole course of the three years the respondent has without cause been in desertion. The 861, deserting spouse must be shown to have persisted in the intention to desert throughout the whole period. In fulfilling its duty of determining whether on the evidence a case of desertion without cause has been proved the court ought not, in my opinion, to leave out of account the attitude of mind of the petitioner. If on the facts it appears that a petitioning husband has made it plain to his deserting wife that he will not receive her back, or if he has repelled all the advances which she may have made towards a resumption of married life, he cannot complain that she has persisted without cause in her desertion". It is true that the defendant did not plead that she had left her husband's home in Bombay in the circumstances indicated above. She, on the other hand, pleaded constructive desertion by the husband. That case, as already observed, she has failed to substantiate by reliable evidence. But the fact that the defendant has so failed does not necessarily lead to the conclusion that the plaintiff has succeeded in proving his case. The plaintiff must satisfy the court that the defendant had been in desertion for the continuous period of four years as required by the Act. If we come to the conclusion that the happenings of May 24, 1947, are consistent with both the conflicting theories, it is plain that the plaintiff has not succeeded in bringing the offence of desertion home to the defendant beyond all reasonable doubt. We must therefore examine what other evidence there is in support of the plaintiff's case and in corroboration of his evidence in court.

50 [1955] A.C. 402. 417.

51 [1939] A C. 417, 420.

The next event of importance in this narrative is the plaintiff's solicitor's letter of July 15, 1947, addressed to the defendant, care of her father at Jalgaon. The defendant's cousin's marriage was performed towards the end of June and she could have come back to her husband's place, soon thereafter' Her evidence is that after the marriage had been performed she was making preparations to go back to Bombay but her father detained her and asked her to await a letter from the plaintiff. The defendant instead of getting an invitation from the plaintiff to come back to the marital home received the solicitor's letter aforesaid, which, to say the least, was not calculated to bring the parties nearer. The letter is in these terms:-

"Madam, Under instructions from our client Bipin Chandra J. Shah we have to address you as under:-

That you were married to our client in or about April 1942 at Patan. Since the marriage you and our client lived together mostly in Bombay and son by name Kirit was born on or about the 10th day of September 1944.

Our client. states that he left for Europe in January last and returned by the end of May last. After our client's return, our client learnt that during our client's absence from India you developed intimacy with one Mahendra and you failed to give any satisfactory reply when questioned about the same and left for your parents under the pretext of attending to the marriage ceremony of your cousin. You have also taken the minor with you and since then you are residing with your father to evade any satisfactory explanation.

Our client states that under the events that have happened, our client has become entitled to obtain a divorce and our client does not desire to keep you any longer under his care and protection. Our client desires the minor to be kept by him and we are instructed to request you to send back the minor to our client or if necessary our client will send his agent to bring the minor to him. Our client further states that in any event it will be in the interest of the minor that he should stay with our client. Our client has made this inquiry about the minor to avoid any unpleasantness when our client's agent comes to receive the minor". The letter is remarkable in some respects,apart from antedating the birth of the son Kirit by a year. The letter does not in terms allege that the defendant was in desertion, apart from mentioning the fact that she had left against the plaintiff's wishes or that she had done so with the intention of permanently abandoning her marital duties. On the other hand, it alleges that "You are residing with your father to avoid any satisfactory explanation". The most important part of the letter is to the effect that the plaintiff had "become entitled to obtain a divorce" and that he "does not desire to keep you any longer under his care and protection". Thus if the solicitor's letter is any indication of the working of the mind of the plaintiff, it makes it clear that at that time the plaintiff did not believe that the defendant had been in desertion and that the plaintiff had positively come to the determination that he was no longer prepared to affirm the marriage relationship. As already indicated, one of the essential conditions for success in a suit for divorce grounded upon desertion is that the deserted spouse should have been willing to fulfill his or her part of the marital duties. The statement of the law in para 457 at p. 244 of Halsbury's Laws of England (3rd Edn. Vol 12) may be usefully quoted:

"The burden is on the petitioner to show that desertion without cause subsisted, throughout the statutory period. The deserting spouse must be shown to have persisted in the intention to desert throughout the whole of the three year period. It has been said that a petitioner should be able honestly to say that he or she was all along willing to fulfill the duties of the marriage, and that the desertion was against his or her will, and continued throughout the statutory period without his or her consent; but in practice it is accepted that once desertion has been started by the fault of the deserting spouse, it is

no longer necessary for the deserted spouse to show that during the three years preceding the petition be or she actually wanted the other spouse to come back, for the intention to desert is presumed to continue. That presumption may, however, be rebutted". Applying those observations to the facts of the present case, can the plaintiff honestly say that be was all along willing to fulfill the duties of the marriage and that the defendant's desertion, if any, continued throughout the statutory period without his consent. The letter, Ex. A) is an emphatic no. In the first place, even the plaintiff in that letter did not allege any desertion and, secondly, he was not prepared to receive her back to the matrimonial home. Realising his difficulty when cross-examined as to the contents of that letter, he wished the court to believe that at the time the letter was written in his presence he was "in a confused state of mind" and did not remember exactly whether he noticed the sentence -that he did not desire to keep his wife any longer. Pressed fur- ther in cross-examination, he was very emphatic in his answer and stated:-

"It is not true that by the date of this letter I had made up my mind not to take her back. It was my hope that the letter might induce her parents to find out what had happened, and they would persuade her to come back. I am still in the confused state of mind that despite my repeated attempts my wife puts me off".

In our opinion, the contents of the letter could not thus be explained away by the plaintiff in the witness box. On the other hand, it shows that about seven weeks after the wife's departure for her father's place the plaintiff had at least for the time being convinced himself that the defendant was no more a suitable person to live with. That, as found by us, be was justified in this attitude by the reprehensible conduct of his wife during his absence is beside the point. This letter has an importance of its own only in so far as it does not corroborate the plaintiff's version that the defendant was in desertion and that the plaintiff was all along anxious to induce her to come back to him. This letter is more consistent with the supposition that the husband was very angry with her on account of her conduct as betrayed by the letter, Ex. E and that the wife left her husband's place in shame not having the courage to face him after that discovery. But that will not render her in the eye of the law a deserter, as observed by Pollock, M. R. in Bowron v. Bowron[52] partly quoting from Lord Gorell as follows:-

"In most cases of desertion the guilty party

actually leaves the other, but it is not always or necessarily the guilty party who leaves the matrimonial home. In my opinion, the party who intends bringing the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion: See also Graves v. Graves[53]; Pulford v. Pulford[54]; Jackson v. Jackson[55]; where Sir Henry Duke P. explains the same doctrine. You must look at the conduct of the spouses and ascertain their real intention".

It is true that once it is found that one of the spouses has been in desertion, the presumption is that the desertion has continued and that it is not necessary for the deserted spouse actually to take steps to bring the deserting spouse back to the matrimonial home. So far we do not find any convincing evidence in proof of the alleged desertion by the wife and naturally therefore the presumption of continued desertion cannot arise.

52 [1925] P. 187, 192.

53 3 Sw. & Tr. 350.

54 [1923] P. 18.

55 [1924] P. 19.

But it is not necessary that at the time the wife left her husband's home, she should have at the same time the animus deserendi. Let us therefore examine the question whether the defendant in this case, even if she had no such intention at the time she left Bombay, subsequently decided to put an end to the matrimonial tie. This is in consonance with the latest pronouncement of the Judicial Committee of the Privy Council in the case of Lang v. Lang[56] in an appeal from the decision of the High Court of Australia, to the following effect:-

"Both in England and in Australia, to establish desertion two things must be proved: first, certain outward and visible conduct the 'factum' of desertion; secondly, the 'animus deserendi' the intention underlying this conduct to bring the matrimonial union to an end.

In ordinary desertion the factum is simple: it is the act of the absconding party in leaving the matrimonial home. The contest in such a case will be almost entirely as to the 'animus'. Was the intention of the party leaving the home to break it up for good, or something short of, or different from that?" In this connection the episode of November, 1947, when the plaintiff's mother came from Patan to Bombay is relevant. It appears to be common ground now that the defendant had agreed to come back to Bombay along with the plaintiff's mother or after a few days. But on this information being given to the plaintiff he countermanded any such steps on the wife's part by sending the telegram, Ex. B,aforesaid and the plaintiff's father's letter dated November 15, 1947. 'We are keeping out of consideration for the present the letter, Ex. C, dated November 13, 1947, which is not admitted to have been received either by the defendant or her father. The telegram is in peremptory terms: "Must not send Prabha". The letter of November 15, 1947, by the plaintiff's father to the defendant's father is equally peremptory. It says "It is absolutely necessary that you should obtain the consent of Chi. Bipinchandra before sending Chi. Prabhavati". The telegram and the letter which is a supplement to the telegram, as found by the courts below, completely negative the plaintiff's statement in court that he was all along ready and willing to receive the defendant back to his home. The letter of November 13, 1947, Ex. C, which the plaintiff claims to have written to his father-in-law in explanation of the telegram and is a prelude to it is altogether out of tune with the tenor of the letter and the telegram referred to above. The receipt of this letter has been denied by the defendant and her father. In court this letter has been described as a fake in the sense that it was an afterthought and was written with a. view to the legal position and particularly with a view to getting rid of the effect of the solicitor's letter of July 15, which the plaintiff found it hard to explain away in the witness box. Neither the trial court, which was entirely in favour of the plaintiff and which had accepted the letter as genuine, nor the appellate Court, which was entirely in favour of the defendant has placed implicit faith in the bona fides of this letter. The lower appellate Court is rather ironical about it, observing "This letter as it were stands in isolated glory. There is no other letter. There is no other conduct of the plaintiff which is consistent with this letter". Without going into the controversy as to the genuineness or bona flde‍s of this letter, it can be said that the plaintiff's attitude, as disclosed therein, was that he was prepared to take her back into the matrimonial home provided she wrote a letter to him expressing real repentance and confession of mistake. This attitude of the plaintiff cannot be said to be unreasonable in the circumstances of the case. He was more sinned against than sinning at the beginning of the controversy between the husband and the wife.

This brings us to a consideration of the three attempts alleged by the plaintiff to have been made by him to induce his wife to return to the matrimonial home when he made two journeys to Patan in 1948 and the third journey in April- May, 1949, to Jalgaon. These three visits are not denied by the defendant. The only difference between the parties is as to the purpose of the visit and the substance

56 [1955] A.G. 402, 417.

of the talk between them. That the plaintiff's attachment for the defendant had not completely dried up is proved by the fact that when he came to know that she had been suffering from typhoid he went to Patan to see her. On this occasion which was the second visit the plaintiff does not say that he proposed to her to come back and that she refused to do so. He only says that she did not express any desire to come back. That may be explained as being due to diffidence on her part. But in respect of the first and the third visits the plaintiff states that on both those occasions he wanted her to come back but she refused. On the other hand, the defendant's version is that the purpose of his visit was only to take away the child and not to take her back to his home. It is also the plaintiff's complaint that the defendant never wrote any letter to him offering to come back. The wife's answer is that she did write a few letters before the solicitor's letter was received by the father and that thereafter under her father's advice she did not writeany more to the plaintiff. In this connection it becomes necessary to examine the evidence of her cousin Babulal and her father Popatlal. Her cousin, Babulal, who was a member of her father's joint family, deposes that on receipt of the letter, Ex. A, a fortnight later he and his father, since deceased, came to Bombay and saw the plaintiff. They expostulated with him and pleaded the defendant's cause and asked the plaintiff to forgive and forget and to take her back. The plaintiff's answer was that he did not wish to keep his wife. The defendant's father's evidence is to the effect that after receipt of the letter, Ex. A, he came to Bombay and saw the plaintiff's father at his residence and protested to him that "a false notice had been given to us". The plaintiff's father is said to have replied that they "would settle the matters amicably" He also deposes as to his brother and his brother's son having gone to the plaintiff. He further states that he with his wife and the defendant went to Patan and saw the plaintiff's mother and in consultation with her made arrangements to send her back to 'Bombay. But before that could be done the telegram, Ex. B, and the letter, Ex. D, were received and consequently he gave up the idea of sending the defendant to Bombay without straightening matters. Both these witnesses on behalf of the defendant further deposed to the defendant having done several times and stayed with the plaintiff's family, particularly his mother at Patan along with the boy. The evidence of these two witnesses on behalf of the defendant is ample corroboration of the defendant's ,case and the evidence in court that she has all along been ready and willing to go back to the matrimonial home. The learned trial Judge has not noticed this evidence and we have not the advantage of his comment on this corroborative evidence. This body of evidence is in consonance with the natural course of events. The plaintiff himself stated in the witness box that he had sent the solicitor's' letter by way of a shock treatment to the defendant's family so that they might persuade his wife to come back to his matrimonial home. The subsequent telegram and letters (assuming that both the letters of the 13th and 15th November had been posted in the usual course and received by the addressees) would give a shock to the family. Naturally thereafter the members of the family would be up and doing to see that a reconciliation is brought about between the husband and the wife. Hence the visits of the defendant's uncle and the father would be a natural conduct after they had been apprised of the rupture between them. We therefore do not see any sufficient reasons for brushing aside all that oral evidence which has been believed by the Lower Appellate Court and had not in terms been disbelieved by the trial court. This part of the case on behalf of the defendant and her evidence is corroborated by the evidence of the defendant's relatives aforesaid. It cannot be seriously argued that evidence should be disbelieved, because the witnesses happened to be the defendant's relatives. They were naturally the parties most interested in bringing about a reconciliation They were anxious not only for the welfare of the defendant but were also interested in the good name of the family and the community as is only natural in families like these which have not been so urbanised as to completely ignore the feelings of the community. They would therefore be the persons most

anxious in the interests of all the parties concerned to make efforts to bring the husband and the wife together and to put an end to a controversy which they con- sidered to be derogatory to the good name and, prestige of the families concerned. The plaintiff's evidence, on the other hand, on this part of the case is uncorroborated. Indeed his evidence stands uncorroborated in many parts of his case and the letters already discussed run counter to the tenor of his evidence in court. We therefore feel inclined to accept the defendant's case that after her leaving her husband's home and after the performance of her cousin's marriage she was ready and willing to go back to her husband. It, follows from what we have said so far that the wife was not in desertion though she left her husband's home without any fault on the part of the plaintiff which could justify her action in leaving him, and that after the lapse of a few months' stay at her father's place she was willing to go back to her matrimonial home. This conclusion is further supported by the fact that between 1948 and 1951 the defendant stayed with her mother- in-law at Patan whenever she was there, sometimes for months, at other times for weeks. This conduct is wholly inconsistent with the plaintiff's case that the defendant was in desertion during the four years that she was out of her matrimonial home. It is more consistent with the defen- dant's attempts to. get herself re-established in her husband's home after the rupture in May 1947 as aforesaid. It is also in evidence that at the suggestion of her mother- in-law the defendant sent her three year old son to Bombay so that be might induce his' ,father to send for the mother, The boy stayed in Bombay for about twenty days and then was brought. back to Patan by his father as he (the boy) was unwilling to stay there without the mother., This was in August_September 1948 when the defendant deposes to having questioned her husband why she bad not been called back and the husband's answer was evasive. Whether or not this statement of the defendant is true, there can be no doubt that the defendant would not have allowed her little boy of about three years of age to be sent alone to Bombay except in the hope that he might be instrumental in bringing about a reconciliation between the father and the mother. The defendant has deposed to the several efforts made by her mother-in-law and her father-in-law to intercede on her behalf with the plaintiff but without any result. There is no explanation why the plaintiff could not examine his father and mother in corroboration of his case of continuous desertion for the statutory period by the defendant. Their evidence would have been as valuable, if not more, as that of the defendant's father and cousin as discussed above. Thus it is not a case where evidence was not available in corroboration of the plaintiff's case. As the plaintiff's evidence on many important aspects of the case has remained uncorroborated by evidence which could be available to him, we must hold that the evidence given by the plaintiff falls short of proving his case of desertion by his wife. Though we do not find that the essential ingredients of desertion have been proved by the plaintiff, there cannot be the least doubt that it was the defendant who had by her objectionable conduct brought about a rupture in the matrimonial home and caused the plaintiff to become so cold to her after she left him.

In view of our finding that the plaintiff has failed to prove his case of desertion by the defendant, it is not necessary to go into the question of animus revertendi on which considerable argument with reference to case-law was addressed to us on both sides. For the aforesaid reasons we agree with the Appellate Bench of the High Court in the conclusion at which they had arrived, though not exactly for the same reasons. The appeal is accordingly dismissed. But as the trouble started on account of the defendant's con- duct, though she is successful in this Court, we direct that each party must bear its own costs throughout. Appeal dismissed.

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U.SREE VS U.SRINIVAS

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Bench: Hon'ble Mr. Justice K.S. Radhakrishnan & Hon'ble Mr. Justice Dipak Misra

U. Sree ... Appellant
Versus
U. Srinivas ... Respondent

CIVIL APPEAL NOS. 8927-8928 OF 2012

[Arising out of S.L.P. (Civil) Nos. 37449-37450 of 2012 (CC.5877-5878 of 2012)]

Decided on 11 December, 2012

The 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 the other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

….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 straitjacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances.

….In matrimonial relationship, cruelty would obviously mean absence of mutual respect and understanding between the spouses which embitters the relationship and often leads to various outbursts of behaviour which can be termed as cruelty. Sometime cruelty in a matrimonial relationship may take the form of violence, sometime it may take a different form. At times, it may be just an attitude or an approach. Silence in some situations may amount to cruelty.

JUDGMENT

Hon'ble Mr. Justice Dipak Misra :—

Leave granted.

2. The appellant-wife instituted F.C.O.P. No. 568 of 1997 under Section 9 of the Hindu Marriage Act, 1955 (for brevity the Act) in the Principal Family Court, Chennai for restitution of conjugal rights. The respondent-husband filed F.C.O.P. No. 805 of 1998 under Sections 13(1)(i-a), 26 and 27 of the Act read with Section 7 of the Family Courts Act, 1984 praying for dissolution of marriage, custody of the child and return of jewellery and other items. The learned Family Judge jointly tried both the cases and, on the basis of the evidence brought on record, dismissed the

application for restitution of conjugal rights preferred by the wife and allowed the petition of the husband for dissolution of marriage and held that the child would remain in the custody of the mother on the principle that welfare of the child is paramount, and further the husband was not entitled to return of jewels or any other item from the wife in the absence of any cogent evidence in that regard. The learned Family Judge, while passing the decree for dissolution of marriage, directed to pay permanent alimony of Rs. 5 lacs each to the wife and her minor son within a month.

3. Being dissatisfied by the common order, the appellant-wife preferred C.M.A. No. 1656 of 2010 and C.M.A. No. 1657 of 2010 in the High Court of Judicature at Madras and the Division Bench concurred with the conclusion as regards the decree of dissolution of marriage as a consequence of which both the appeals had to meet the fate of dismissal. However, the Bench, apart from concurring with the grant of permanent alimony, directed the respondent-husband to pay a sum of maintenance amounting to Rs.12,500/- to the appellant-wife and her son from the date of order passed by the Chief Metropolitan Magistrate at Hyderabad till the date of the order passed by the High Court. Hence, the present two appeals have been preferred by special leave assailing the common judgment passed by the High Court in both the appeals.

4. The facts requisite to be stated for adjudication of the appeals are that the marriage between the appellant and the respondent was solemnized on 19.11.1994 at Tirupathi according to Hindu rites and customs. After entering into wedlock, they lived together at Vadapalani, Chennai. As tradition would warrant, she went to her parental home for delivery where a male child was born on 30th of May, 1995. The respondent celebrated the childs birth in his in-laws house and thereafter, the wife stayed with her parents for sometime. She returned to Chennai on 4.10.1995 and there she lived with her husband till 3.1.1996. The case of the wife in her application for restitution of marriage is that on 3.1.1996, her father-in-law, without her consent, took her to her parental home and, thereafter, the husband without any justifiable reason withdrew from her society. All efforts made by her as well as by her parents to discuss with her husband and his family members to find out a solution went in vain. In this backdrop, a prayer was made for restitution of conjugal rights.

5. The husband resisted the aforesaid stand contending, inter alia, that there was total incompatibility in the marital relationship inasmuch as she found fault with his life style, his daily routine, his likes and dislikes and picked up quarrels on trivial issues. She threw tantrums only with the exclusive purpose that she should dominate the relationship and have her own way. At the time of practising and learning music in the presence of his father, who was also his Guru, she hurled abuses and screamed which invariably followed with arguments and quarrels. Though she was expected, as per the customs, to show respect towards elders and to the senior artists, yet, throwing all traditional values to the wind, she would walk away by creating a scene to his utter embarrassment. His public image was totally ruined and reputation was mutilated. It was also alleged that she called her parents and threatened to initiate proceedings under the Indian Penal Code, 1860 with the help of her father, who was an I.A.S. officer in the Vigilance Department in the Government of Andhra Pradesh. With the efflux of time, the discord aggravated and the wife became more aggressive and did not allow her husband to go near her or the child. On 3.1.1996, when the wife expressed her desire to go to her parental home, he could not dare to object and she went with costly gifts received by him in India and abroad in recognition of his performance in music. Regard being had to the physical safety of the wife and the child, he requested his

father to escort them to Hyderabad. While she was at Hyderabad, she spread rumours among the relatives and friends pertaining to his fidelity, character and habits. It was further asserted by the husband that she had filed the petition only to harass him and, in fact, the manner in which he had been treated clearly exhibited mental cruelty and, therefore, the said relief should not be granted. It was averred that in view of the treatment meted out to the husband, dissolution of marriage was the only solution and not restitution of conjugal rights.

6. The respondent, in his petition for divorce, pleaded that after abandoning formal education, he pursued his career in music treating it as a concept of bhakti or devotion. He had to continue his sadhana as a daily routine under the guidance of his father as it was necessary to understand the nuances and the subtleties of music which could only be gathered by experience and acquisition of knowledge at the feet of a guru and also to keep alive the Guru- Sishya Parampara. The aforesaid aspect of his life was not liked by his wife and she always interrupted hurling abuses at him. Despite his best efforts to make his wife understand the family tradition and show reverence to the seniors in the sphere of music, she remained obstinate in her attitude and chose to walk away causing him not only embarrassment in public but also humiliation which affected his reputation and self respect. That apart, whenever the husband visited her at the parental home, he was deprived of conjugal rights and physically prevented from playing with the child. In spite of his sacrifice and efforts to adjust with her mental attitude, she remained adamant and her behavioural pattern remained painfully consistent. Gradually, her behaviour became very cruel and, eventually, he was compelled to file a case for judicial separation to which, as a counterblast, she filed a case for restitution of conjugal rights. She had communicated with her friends that she would like to see her husband behind bars on the ground of dowry harassment. She had also threatened that if he took part in any musical concert at Hyderabad, his life shall be endangered. Put in such a situation, left with no other alternative, he was compelled to file a petition for dissolution of marriage.

7. As the factual narration would unfurl, the wife in the written statement asserted that she was aware of the importance of music, its traditional values and clearly understood the devotion and dedication as she herself was a `Veena player and because of her sacrifice, her husband had gained reputation and popularity which also enhanced his financial status, but, with the rise, he failed to perform his duties as a husband. She denied the interruption in the practice sessions and controverted the factum of maltreatment. It was averred that as the husband had gained reputation, his parents and other relatives thought of a second marriage so that he could get enormous dowry. She denied the scandalous allegations and stated that she was proud of her husbands accomplishments. She justified her filing of petition before the Chief Metropolitan Magistrate for grant of maintenance as he was absolutely careless and negligent to look after her and the child. It was further pleaded that the grounds mentioned in the petition were vexatious and frivolous and, therefore, there was no justification for grant of a decree of divorce.

8. The learned Family Judge framed seven issues and, considering the oral and documentary evidence brought on record, came to hold that the wife had treated the husband with cruelty; that she had not taken any steps for re-union and had deserted him for thirteen years without any valid reason and, hence, the husband was entitled for a decree of divorce and she was not entitled to have a decree for restitution of conjugal rights. The learned Family Judge directed that the custody of the child should remain with the mother and the husband had miserably failed

to make out a case for return of jewels and other items. He granted permanent alimony as stated earlier.

9. Being grieved by the aforesaid decision of the learned Family Judge, the wife preferred two appeals. On behalf of the appellant-wife, it was urged before the High court that the judgment and decree passed by the Family Court regarding grant of divorce was passed on assumptions and presumptions; that she had suffered immense humiliation and hardship at the hands of the family members of the husband but the Family Court did not appreciate the said facet in proper perspective; that the finding relating to desertion by the wife was contrary to the evidence on record and, in fact, it was the case that the husband had left the wife in the lurch at her parental home and did not think for a moment to bring her back; that the allegation with regard to the interruption in the music learning sessions and her dislike of her husband had been deliberately stated to make out a case of mental cruelty; that certain documents had been placed reliance upon by the learned Family Judge though they were not admissible in evidence and further the documents produced by the wife had not been properly appreciated and dealt with; and that the court below would have been well advised, in the obtaining factual matrix, to direct restitution of conjugal rights. It is worth noting that alternatively it was urged that the trial Court had committed an error in granting permanent alimony of Rs. 10 lacs in toto, regard being had to the income of the husband.

10. In appeal, the High Court, after noting the respective contentions advanced by the learned counsel for the parties, proceeded to appreciate the essential ingredients which are necessary to be established to sustain a petition under Section 9 of the Act. After referring to certain decisions in the field and the concept of mental cruelty as stated in Halsburys Laws of England, 4th Edn., Vol. 13, para 623 and American Jurisprudence and the dictum laid down in N.G. Dastane v. S. Dastane[1], Rajani v. Subramaniam[2], Parveen Mehta v. Inderjit Mehta[3], Gananath Pattnaik v. State of Orissa[4], Shobha Rani v. Madhukar Reddi[5], Manisha Tyagi v. Deepak Kumar[6], Sujata Uday Patil v. Uday Madhukar Patil[7], Chanderkala Trivedi v. Dr. S.P. Trivedi[8] and Pranay Majumdar v. Bina Majumdar[9], the High Court came to hold that the material brought on record showed that the wife had gone to the parental home on 3.1.1996 and made no efforts to get reunited with the husband and, as per the evidence on record, she had admitted in the testimony recorded in O.P. No. 568 of 1995 that the relations between her and her husband were cordial till she left the matrimonial home. The High Court found that her depositions were contradictory inasmuch as on one hand she had stated that she had been ill-treated and on the other that there was cordial relationship. As is noticeable, the High Court referred to the xerox copy of the letter Exhibit R-8 dated 18.10.1995 written in her handwriting to her parents and observed that when the said letter was summoned from her father she stated that there was no such letter and on that ground the admissibility was called in question. The High Court opined that when the efforts were made to get the primary evidence and it could not be obtained, the secondary evidence could be adduced and that would be admissible under Section 65 of the Evidence Act. Be it noted, the English translation of the said letter was marked as Exhibit R-9 which indicated that the wife had clearly stated that she had spoken ill of her mother-in-law and others and had expressed her desire to seek divorce as she could not stay any longer in the matrimonial home. It was observed by the Bench that the conduct of the wife clearly established desertion and her behaviourial pattern exhibited mental cruelty meted out to the husband. The High Court also took note of the fact that a stage had reached where it had become well nigh

impossible for the couple to live together. Regard being had to the totality of the circumstances, the High Court gave the stamp of approval to the common judgment and decree passed by the learned Family Court.

11. We have heard Mrs. K. Sarada Devi, learned counsel for the appellant, and Mr. K. Ramamoorthy, learned senior counsel for the respondent. It is contended by Mrs. Sarada Devi that the learned Family Judge as well as the High Court had failed to appreciate that neither mental cruelty nor desertion had been established as per the law. It is contended by her that Exh. R-8 and R-9 were not admissible in evidence inasmuch as they could not be treated as secondary evidence as envisaged under Section 65 of the Evidence Act. It is further urged that the whole decision for granting divorce and denying restitution of conjugal rights has been based regard being had to the total break down of marriage but the said ground is not a legally permissible one to grant divorce.

12. Mr. K. Ramamoorthy, learned senior counsel appearing for the respondent, per contra, would submit that the said observation is one of the facets, but the High Court has, after due deliberations, returned findings relating to cruelty and desertion and the same being founded on proper appreciation of the material on record, this Court should not interfere in exercise of appeal entertained by grant of leave under Section 136 of the Constitution of India.

13. At this juncture, we may note with profit that as a matter of fact, the High Court has observed that it has become well nigh impossible for the husband and the wife to live together and the emotional bond between the parties is dead for all purposes. We have noted this aspect for completeness, but we will not address the said facet and will restrict our delineation only towards the justifiability of the conclusions pertaining to mental cruelty and desertion.

14. Before we dwell upon the tenability of the conclusions of desertion and mental cruelty, we think it condign to deal with the submission whether the photostat copy of the letter alleged to have been written by the wife to her father could have been admitted as secondary evidence. As the evidence on record would show, the said letter was summoned from the father who had disputed its existence.

The learned Family Court Judge as well as the High Court has opined that when the person is in possession of the document but has not produced the same, it can be regarded as a proper foundation to lead secondary evidence. In this context, we may usefully refer to the decision in Ashok Dulichand v. Madahavlal Dube[10] wherein it has been held that according to clause (a) of Section 65 of the Indian Evidence Act, secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the court, or of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produce it. Thereafter, the Court addressed to the facts of the case and opined thus: -

In order to bring his case within the purview of clause (a) of Section 65, the appellant filed applications on July 4, 1973, before Respondent 1 was examined as a witness, praying that the said respondent be ordered to produce the original manuscript of which, according to the appellant, he had filed photostat copy. Prayer was also made by the appellant that in case Respondent 1 denied that the said manuscript had been written by him, the photostat copy might be got examined from a handwriting expert. The appellant also filed affidavit in support

of his applications. It was, however, nowhere stated in the affidavit that the original document of which the photostat copy had been filed by the appellant was in the possession of Respondent 1. There was also no other material on the record to indicate that the original document was in the possession of Respondent 1. The appellant further failed to explain as to what were the circumstances under which the photostat copy was prepared and who was in possession of the original document at the time its photograph was taken. Respondent 1 in his affidavit denied being in possession of or having anything to do with such a document. Be it noted, in this backdrop, the High Court had recorded a conclusion that no foundation had been laid by the appellant for leading secondary evidence in the shape of the photostat copy and this Court did not perceive any error in the said analysis.

15. In J. Yashoda v. K. Shobha Rani[11], after analyzing the language employed in Sections 63 and 65 (a), a two-Judge Bench held as follows:-

Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non- production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the section.

16. In M. Chandra v. M. Thangamuthu and Other[12], It has been held as follows:-

It is true that a party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduced in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasised that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original through no fault of that party.

17. Recently, in H. Siddiqui (Dead) by Lrs. v. A. Ramalingam[13], while dealing with Section 65 of the Evidence Act, this Court opined though the said provision permits the parties to adduce secondary evidence, yet such a course is subject to a large number of limitations. In a case where the original documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence.

Thus, secondary evidence relating to the contents of a document is inadmissible, until the non-production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It has been further held that mere admission of a document in evidence does not amount to its proof. Therefore, it is the obligation of the Court to decide the question of admissibility of a document in secondary evidence before making endorsement thereon.

18. In the case at hand, the learned Family Judge has really not discussed anything relating to foundational evidence. The High Court has only mentioned that when the letter was summoned

and there was a denial, the secondary evidence is admissible. In our considered opinion, such a view is neither legally sound nor in consonance with the pronouncements of this Court and, accordingly, we have no hesitation in dislodging the finding on that score.

19. The next facet which is to be dwelled upon is whether the appellant had treated her husband with mental cruelty. The legal sustainability of the said conclusion has to be tested keeping the photostat copy of the letter out of consideration. At the very outset, we may state that there is no cavil over the proposition as to what cruelty includes. Regard being had to the same, we shall refer to certain authorities.

20. In Samar Ghosh v. Jaya Ghosh[14], a three-Judge Bench, after dealing with the concept of mental cruelty, has observed thus:-

99. The 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 the other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious 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 straitjacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances.

21. In Ravi Kumar v. Julmidevi[15], this Court has expressed thus: -

In matrimonial relationship, cruelty would obviously mean absence of mutual respect and understanding between the spouses which embitters the relationship and often leads to various outbursts of behaviour which can be termed as cruelty. Sometime cruelty in a matrimonial relationship may take the form of violence, sometime it may take a different form. At times, it may be just an attitude or an approach. Silence in some situations may amount to cruelty.

20. Therefore, cruelty in matrimonial behaviour defies any definition and its categories can never be closed. Whether the husband is cruel to his wife or the wife is cruel to her husband has to be ascertained and judged by taking into account the entire facts and circumstances of the given case and not by any predetermined rigid formula. Cruelty in matrimonial cases can be of infinite varietyit may be subtle or even brutal and may be by gestures and words.

22. Recently, this Court, in Vishwanath Agrawal, s/o Sitaram Agrawal v. Sarla Vishwanath Agrawal[16], while dealing with the conception of cruelty, has stated that it has inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperament and emotions that have been conditioned by the social status. The two-Judge Bench referred to the decisions in Sirajmohmedkhan Janmohamadkhan v. Hafizunnisa Yasikhan[17], Shobha Rani (supra), Sheldon v. Sheldon[18], V. Bhagat v. D. Bhagat[19], Parveen Mehta (supra), Vijaykumar Ramchandra Bhate v. Neela Vijaykumar Bhate[20], A. Jayachandra v. Aneel Kaur[21], Vinita Saxena v. Pankaj Pandit[22], Samar Ghosh (supra) and Suman Kapur v. Sudhir Kapur[23],

and opined that when the evidence brought on record clearly establish a sustained attitude of causing humiliation and calculated torture on the part of the wife to make the life of the husband miserable, it would amount to mental cruelty. Emphasis was laid on the behavioral pattern of the wife whereby a dent is created in the reputation of the husband, regard being had to the fact that reputation is the salt of life.

23. In the case at hand, the husband has clearly deposed about the constant and consistent ill-treatment meted out to him by the wife inasmuch as she had shown her immense dislike to his sadhna in music and had exhibited total indifference and, in a way, contempt to the tradition of teacher and disciple. It has graphically been demonstrated that she had not shown the slightest concern for the public image of her husband on many an occasion by putting him in a situation of embarrassment leading to humiliation. She has made wild allegations about the conspiracy in the family of her husband to get him re-married for the greed of dowry and there is no iota of evidence on record to substantiate the same. This, in fact, is an aspersion not only on the character of the husband but also a maladroit effort to malign the reputation of the family. The learned Family Judge as well as the High Court has clearly analysed the evidence and recorded a finding that the wife had treated the husband with mental cruelty. True it is, there is some reference in that regard to the photostat copy of the letter which we have not accepted as admissible in evidence but the other evidence brought on record clearly support the findings recorded by the learned Family Judge and the High Court and the said finding remains in the realm of fact.

24. This Court, in State of U. P. v. Babul Nath[24], while considering the scope of Article 136 as to when this Court is entitled to upset a finding of fact, has observed thus: -

5. At the very outset we may mention that in an appeal under Article 136 of the Constitution this Court does not normally reappraise the evidence by itself and go into the question of credibility of the witnesses and the assessment of the evidence by the High Court is accepted by the Supreme Court as final unless, of course, the appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and misreading of the evidence, or where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record.

25. In Bharat Coking Coal Ltd. v. Karam Chand Thapar & Bros. Pvt. Ltd.[25], this Court opined that the jurisprudence under Article 136 stands out to be extremely wide but that does not, however, warrant intervention in a situation having concurrent set of facts and an appeal therefrom on the factual issue. The article has been engrafted by the founding fathers of the Constitution for the purposes of avoiding mischief and injustice on the wrong assumption of law. The justice delivery system of the country prompts this Court to interfere under Article 136 of the Constitution when the need of the society stands established and the judgment, if left outstanding, would not only create prejudice but would also have an otherwise adverse effect on the society. Further elaborating, the Bench ruled thus:-

The jurisdiction under Article 136 stands out to be extremely wide but that does not, however, warrant intervention having concurrent set of facts and an appeal therefrom on the factual issue. The article has been engrafted by the founding fathers of the Constitution for the purposes of avoiding mischief of injustice on the wrong assumption of law. The justice delivery system of the country prompts this Court to interfere under Article 136 of the Constitution when the need of the society stands established and the judgment, if left outstanding, would not only create

prejudice but would have an otherwise adverse effect on to the society it is this solemn objective of administration of justice with which the Constitution-makers thought it prudent to confer such a power on to the Apex Court of the country. It is the final arbiter but only when the dispute needs to be settled by the Apex Court so as to avoid injustice and infraction of law.

26. In Ganga Kumar Srivastava v. State of Bihar[26], after referring to the earlier authorities, this Court culled out certain principles which would invite exercise of power of this Court under Article 136 of the Constitution:-

(i) The powers of this Court under Article 136 of the Constitution are very wide but in criminal appeals this Court does not interfere with the concurrent findings of fact save in exceptional circumstances.

(ii) It is open to this Court to interfere with the findings of fact given by the High Court, if the High Court has acted perversely or otherwise improperly.

(iii) It is open to this Court to invoke the power under Article 136 only in very exceptional circumstances as and when a question of law of general public importance arises or a decision shocks the conscience of the Court.

(iv) hen the evidence adduced by the prosecution fell short of the test of reliability and acceptability and as such it is highly unsafe to act upon it.

(v) Where the appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and misreading of the evidence, or where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record.

27. In Dubaria v. Har Prasad and Another[27], it has been held that when there is infirmity in the decision because of excluding, ignoring and overlooking the abundant materials and the evidence, if considered in proper perspective, would have led to conclusion contrary to the one taken by both the High Court as well as the fora below, it would be open to this Court to interfere with the concurrent findings of fact.

28. Tested on the touchstone of the aforesaid principles, we have no trace of doubt that the finding returned by the Family Judge which has been given the stamp of approval by the High Court relating to mental cruelty cannot be said to be in ignorance of material evidence or exclusion of pertaining materials or based on perverse reasoning. In our view, the conclusion on that score clearly rests on proper appreciation of facts and, hence, we concur with the same.

29. Presently, we shall advert to the finding recorded by the learned Family Judge and the High Court relating to desertion by the wife. As the factual matrix would reveal, both the Courts have proceeded on the base that the wife had not endeavored to reunite herself with the husband and there had long lapse of time since they had lived together as husband and wife. On the aforesaid foundation, the conclusion has been drawn that there is an animus descerendi on the part of the wife. To test the tenability of the said conclusion, we have perused the petition for divorce from which it is evident that there is no pleading with regard to desertion. It needs no special emphasis to state that a specific case for desertion has to be pleaded. It is also interesting to note that the petition was not filed seeking divorce on the ground of desertion but singularly on cruelty. In the absence of a prayer in that regard, we are constrained to hold that the conclusion

arrived at as regards desertion by the learned Family Judge which has been concurred with by the High Court is absolutely erroneous and, accordingly, we overturn the same.

30. From the foregoing analysis, it is established that the husband has proved his case of mental cruelty which was the foundation for seeking divorce. Therefore, despite dislodging the finding of desertion, we conclude and hold that the respondent husband has rightly been granted a decree of divorce.

31. The next issue that emerges for consideration pertains to the grant of permanent alimony. It is noticeable that the wife had filed a case for grant of maintenance and residence under the Hindu Adoptions and Maintenance Act, 1956 at Hyderabad. The High Court has granted Rs. 12,500/- per month from the date of filing of the petition for maintenance and Rs.5 Lacs each to the wife and son towards permanent alimony. Whether the High Court should have granted Rs.12500/- as maintenance need not be addressed by us inasmuch as we are inclined to deal with this issue of grant of permanent alimony in a different backdrop. As is evincible from the orders of this Court when the matters were listed on 9.4.2012, the Court had taken note of the fact that the wife and son have been living separately at Hyderabad for about 16 years and, in that context, the following order was passed :-

Looking to the financial and social status of the parties, we request the learned senior counsel appearing for the respondent to ask his client to arrange for one flat for the petitioner and their so that they can live in the said flat comfortably. On this suggestion, being given by the Court, learned senior counsel appearing for the respondent prayed for time to seek instructions.

32. On 30.4.2012, the following order came to be passed:-

As per the Order passed by this Court on 09.04.2012, learned senior counsel appearing for the respondent-husband informed that respondent is ready and willing to buy a flat for the petitioner in Hyderabad, so that she will have a roof over her head for all the times to come.

However, the details of the same are required to be worked out.

It is, therefore, desirable that both the parties should remain present in this Court on 10.07.2012.

Without prejudice, a sum of Rs. 10 lakhs by way of Demand Draft is being paid by the respondent-husband to petitioner- wife. Other Rs. 10 lakhs is in deposit with the Family Court at Chennai. Petitioner will be at liberty to withdraw this amount.

33. We have reproduced the aforesaid orders to highlight that the husband had agreed to buy a flat at Hyderabad. However, when the matter was listed thereafter, there was disagreement with regard to the locality of the flat arranged by the husband and, therefore, the matter was heard on merits.

We have already opined that the husband has made out a case for divorce by proving mental cruelty.

As a decree is passed, the wife is entitled to permanent alimony for her sustenance. Be it stated, while granting permanent alimony, no arithmetic formula can be adopted as there cannot be mathematical exactitude. It shall depend upon the status of the parties, their respective social needs, the financial capacity of the husband and other obligations. In Vinny Parmvir Parmar v. Parmvir Parmar[28], while dealing with the concept of permanent alimony, this Court has observed that 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. At the same time, the amount so fixed cannot be excessive or affect the living condition of the other party.

34. Keeping in mind the aforesaid broad principles, we may proceed to address the issue. The respondent himself has asserted that he has earned name and fame in the world of music and has been performing concerts in various parts of India and abroad. He had agreed to buy a flat in Hyderabad though it did not materialise because of the demand of the wife to have a flat in a different locality where the price of the flat is extremely high. Be that as it may, it is the duty of the Court to see that the wife lives with dignity and comfort and not in penury. The living need not be luxurious but simultaneously she should not be left to live in discomfort. The Court has to act with pragmatic sensibility to such an issue so that the wife does not meet any kind of man-made misfortune. Regard being had to the status of the husband, the social strata to which the parties belong and further taking note of the orders of this Court on earlier occasions, we think it appropriate to fix the permanent alimony at Rs 50 lacs which shall be deposited before the learned Family Judge within a period of four months out of which Rs.20 lacs shall be kept in a fixed deposit in the name of the son in a nationalized bank which would be utilised for his benefit. The deposit shall be made in such a manner so that the respondent wife would be in a position to draw maximum quarterly interest. We may want to clarify that any amount deposited earlier shall stand excluded.

35. On the basis of the forgoing discussion, the decree for dissolution of marriage is affirmed only on the ground of mental cruelty which eventually leads to dismissal of the appeals. The parties shall bear their respective costs.

K. S. Radhakrishnan

Dipak Misra

New Delhi; December 11, 2012

[1] (1975) 2 SCC 326
[2] AIR 1990 Kerala 1
[3] (2002) 5 SCC 706
[4] (2002) 2 SCC 619
[5] (1988) 1 SCC 105
[6] (2010) 4 SCC 339
[7] (2006) 13 SCC 272
[8] (1993) 4 SCC 232
[9] (2007) 9 SCC 217
[10] (1975) 4 SCC 664
[11] (2007) 5 SCC 730
[12] (2010) 9 SCC 712
[13] (2011) 4 SCC 240
[14] (2007) 4 SCC 511
[15] (2010) 4 SCC 476
[16] (2012) 7 SCC 288
[17] (1981) 4 SCC 250
[18] (1966) 2 WLR 993
[19] (1994) 1 SCC 337
[20] (2003) 6 SCC 334
[21] (2005) 2 SCC 22
[22] (2009) 1 SCC 422
[23] (2009) 1 SCC 422
[24] (1994) 6 SCC 29
[25] (2003) 1 SCC 6
[26] (2005) 6 SCC 211
[27] (2009) 9 SCC 346
[28] (2011) 13 SCC 112

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VISHWANAT VS SAU. SARLA VISHWANATH AGRAWAL

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Bench: Hon'ble Mr. Justice Deepak Verma & Hon'ble Mr. Justice Dipak Misra

Vishwanath S/o Sitaram Agrawal .....Appellant
Versus
Sau. Sarla Vishwanath Agrawal Respondent

CIVIL APPEAL NO. 4905 OF 2012

(Arising out of S.L.P. (Civil) No. 16528 of 2007)

Decided on 4 July, 2012

J U D G M E N T

Regard being had to the aforesaid, we have to evaluate the instances. In our considered opinion, a normal reasonable man is bound to feel the sting and the pungency. The conduct and circumstances make it graphically clear that the respondent-wife had really humiliated him and caused mental cruelty. Her conduct clearly exposits that it has resulted in causing agony and anguish in the mind of the husband. She had publicised in the newspapers that he was a womaniser and a drunkard. She had made wild allegations about his character. She had made an effort to prosecute him in criminal litigations which she had failed to prove. The feeling of deep anguish, disappointment, agony and frustration of the husband is obvious. It can be stated with certitude that the cumulative effect of the evidence brought on record clearly establish a sustained attitude of causing humiliation and calculated torture on the part of the wife to make the life of the husband miserable. The husband felt humiliated both in private and public life. Indubitably, it created a dent in his reputation which is not only the salt of life, but also the purest treasure and the most precious perfume of life. It is extremely delicate and a cherished value this side of the grave. It is a revenue generator for the present as well as for the posterity. Thus analysed, it would not be out of place to state that his brain and the bones must have felt the chill of humiliation. The dreams sweetly grafted with sanguine fondness with the passage of time reached the Everstine disaster, possibly, with a vow not to melt. The cathartic effect looked like a distant mirage. The cruel behaviour of the wife has frozen the emotions and snuffed out the bright candle of feeling of the husband because he has been treated as an unperson. Thus, analysed, it is abundantly clear that with this mental pain, agony and suffering, the husband cannot be asked to put up with the conduct of the wife and to continue to live with her. Therefore, he is entitled to a decree for divorce.

Hon'ble Mr. Justice Dipak Misra :—

Leave granted.

2. The marriage between the appellant and the respondent was solemnized on the 30th of April, 1979 as per the Hindu rites at Akola. In the wedlock, two sons, namely, Vishal and Rahul, were born on 23.9.1982 and 1.11.1984 respectively. As the appellant-husband felt that there was total

discord in their marital life and compatibility looked like a mirage, he filed a petition for divorce under Section 13(1) (ia) of The Hindu Marriage Act, 1955 (for brevity the Act).

3. It was the case of the appellant before the court of first instance that the respondent-wife did not know how to conduct herself as a wife and daughter-in-law and despite persuasion, her behavioural pattern remained unchanged. The birth of the children had no impact on her conduct and everything worsened with the efflux of time. The behaviour of the respondent with the relatives and guests who used to come to their house was far from being desirable and, in fact, it exhibited arrogance and lack of culture and, in a way, endangered the social reputation of the family. That apart, she did not have the slightest respect for her mother-in-law. Despite the old lady being a patient of diabetes and hyper tension, it could not invoke any sympathy from the respondent and hence, there was total absence of care or concern.

4. As pleaded, in the month of March, 1990, there was a dacoity in the house where the appellant was staying and, therefore, they shifted to the ginning factory and eventually, on 17.3.1991, shifted to their own three storeyed building situate in Gandhi Chowk. Even with the passage of time, instead of bringing maturity in the attitude of the respondent, it brought a sense of established selfishness and non-concern for the children. Whim and irrationality reigned in her day-to-day behaviour and frequent quarrels became a daily affair. As misfortune would have it, on 23.1.1994, the mother of the appellant died and the freer atmosphere at home gave immense independence to the respondent to make the life of the appellant more troublesome. The appellant and his father were compelled to do their personal work as the entire attention of the servants was diverted in a compulsive manner towards her. Her immature perception of life reached its zenith when on certain occasions she used to hide the keys of the motorcycle and close the gate so that the appellant could not go to the office of the factory to look after the business. Frequent phone calls were made to the factory solely for the purpose of abusing and causing mental agony to the appellant. As asserted, the appellant and his sons used to sleep on the second floor whereas the respondent used to sleep in the bedroom on the third floor and their relationship slowly but constantly got estranged. As the cruelty became intolerable, the appellant visited his in-laws and disclosed the same but it had no effect on her behaviour. Eventually, on 1.5.1995, the respondent was left at the house of her parents at Akola and the appellant stayed in his house with the two sons. As the factual matrix would unveil, on 24.7.1995, a notice issued by her advocate was published in the daily Lokmat stating, inter alia, that the appellant is a womaniser and addicted to liquor. On 11.10.1995, at 4.00 p.m., the respondent came to the house of the appellant at Gandhi Chowk and abused the father, the children and the appellant. She, in fact, created a violent atmosphere in the house as well as in the office by damaging the property and causing mental torture to the appellant and also to the family members which compelled the appellant to lodge a complaint at the Police Station, Chopda. It was alleged that she had brought gundas and certain women to cause that incident. The said untoward incident brought the A.S.P., Jalgaon, to the spot. The publication in the newspaper and the later incident both occurred during the pendency of the divorce petition and they were incorporated by way of amendment. On the aforesaid basis, it was contended that the respondent had treated the appellant with cruelty and hence, he was entitled to a decree for divorce.

5. The asseverations made in the petition were controverted by the respondent stating that she was always respectful and cordial to her in- laws, relatives and the guests as was expected from a cultured daughter-in- law. They led a happy married life for 16 years and at no point of time she

showed any arrogance or any behaviour which could remotely suggest any kind of cruelty. She attended to her mother-in-law all the time with a sense of committed service and at no point of time there was any dissatisfaction on her part. She disputed the allegation that she had hidden the keys of the motorcycle or closed the gate or repeatedly called the appellant on phone at the office to abuse him or to disturb him in his work. It is her stand that the appellant owns an oil mill, ginning factory and a petrol pump at Chopda and had sold certain non-agricultural land by demarcating it into small plots. The appellant, as alleged, joined the computer classes which were run by one Neeta Gujarathi in the name and style of Om Computer Services and gradually the appellant started spending much of his time at the computer centre instead of attending to his own business in the factory. When the respondent became aware of the intimacy, she took serious objection to the same and therefrom their relationship became bitter.

6. It was alleged by the respondent that she was disturbed after knowing about the involvement of the appellant with another lady despite having an established family life and two adolescent sons and, therefore, she was compelled to make phone calls to make enquiries about his whereabouts. As the interference by the respondent was not appreciated by the appellant, he took the respondent on 1.5.1995 to Akola and left her at her parental house and never cared to bring her back to her matrimonial home. Her willingness to come back and stay with the husband and children could not get fructified because of the totally indifferent attitude shown by the appellant. Her attempts to see the children in the school became an exercise in futility, as the husband, who is a trustee of the school, managed to ensure that the boys did not meet her. It was further alleged that the said Neeta lived with him as his mistress and when the respondent came to know about it, she went to Chopda to ascertain the same and coming to know that Neeta was in the house of the appellant, she made an effort to enter into the house but she was assaulted. This resulted in gathering of people of the locality and the appellant-husband, as a counter-blast, lodged a complaint at the police station. The Deputy Superintendent of Police arrived at the scene and found that Neeta was inside the house and thereafter she was taken back to her house by the police. Because of the involvement of the appellant with the said Neeta, he had concocted the story of cruelty and filed the petition for divorce.

7. The learned trial Judge framed as many as four issues. The two vital issues were whether the appellant had been able to prove the alleged cruelty and whether he was entitled to take disadvantage of his own wrong. The appellant, in order to prove the allegation of cruelty, examined ten witnesses and on behalf of the respondent, eight witnesses were examined. The learned trial Judge, analysing the evidence on record, came to hold that there was conjugal relationship till 1.5.1995; that there was no substantial material on record to demonstrate that the respondent had behaved with immaturity immediately after marriage; that in the absence of cogent evidence, it was difficult to hold that the respondent had troubled the husband and his parents; that the evidence of PW-3, Ramesh, was not worthy of acceptance as he is close and an interested witness; that the allegation that whenever she used to go to her parental home, she was granting leave to the servants was not acceptable; that the appellant should have examined some of the servants including the maid servant but for some reason or other had withheld the best evidence; that the plea that the respondent was not looking after her mother-in-law who was suffering from paralysis from 1984 has not been proven; that the allegation that the respondent was hiding the uniforms of the children and not treating them well had not been proven because the version of Vishal could not be accepted as he was staying with the father and, therefore, it was

natural for him to speak in favour of the father; that the stand that the respondent was hiding the keys of the motorcycle and crumpling the ironed clothes of the appellant did not constitute mental cruelty as the said acts, being childish, were enjoyed by the appellant-husband; that the factum of abuse by the respondent on telephone had not been established by adducing reliable evidence; that the respondent and the appellant were sleeping on the third floor of the house and hence, she was sleeping with him in the bedroom and the allegation that he was deprived of sexual satisfaction from 1991 was unacceptable; that from the witnesses cited on behalf of the respondent, it was demonstrable that her behaviour towards her sons and in-laws was extremely good; that even if the allegations made by the appellant were accepted to have been established to some extent, it could only be considered as normal wear and tear of the marital life; that the plea of mental cruelty had not been proven as none of the allegations had been established by adducing acceptable, consistent and cogent evidence; that the notice published in the daily Lokmat on 28.7.1995 and the later incident dated 11.10.1995 being incidents subsequent to the filing of the petition for divorce, the same were not to be taken into consideration.

8. The learned trial Judge further returned the finding that the appellant was going to learn computer and taking instructions from Neeta Gujarathi and the plea that she was engaged as a Computer Operator in his office was not believable as no appointment letter was produced; that the stand that she was paid Rs.1200/- per month was not worthy of any credence as she was operating a computer centre; that from the evidence of the witnesses of the respondent, namely, RW-3 to RW-5, it was clear that Neeta Gujarathi was living with the appellant in his house and he had developed intimacy with her and, therefore, the subsequent events, even if analysed, were to be so done on the said backdrop; that the allegation that there was a gathering and they were violent and broke the windows was really not proven by adducing credible evidence; that the testimony of the witnesses of the respondent clearly reveal that Neeta was inside the house of the appellant and effort was made to bring her out from the house and no damage was caused to the property; that on that day, the police had come in the mid night hours and taken out Neeta from the house of the appellant and left her at her house; that the notice which was published in Lokmat was to protect the interest of the sons in the property and basically pertained to the appellants alienating the property; that the public notice was not unfounded or baseless and the question of defaming him and thereby causing any mental cruelty did not arise; that the allegations made in the application for grant of interim alimony that the appellant is a womaniser and is addicted to liquor cannot be considered for the purpose of arriving at the conclusion that the husband was meted with cruelty; that the allegations made in the written statement having been found to be truthful, the same could not be said to have caused any mental cruelty; that the cumulative effect of the evidence brought on record was that no mental cruelty was ever caused by the respondent; and that the husband could not take advantage of his own wrong. Being of this view, the learned trial Judge dismissed the application with costs and also dismissed the application of the respondent-wife for grant of permanent alimony.

9. Grieved by the aforesaid decision, the appellant-husband preferred Civil Appeal No. 23 of 1999. The first appellate court appreciated the evidence, dealt with the findings returned by the trial court and eventually came to hold that the cumulative effect of the evidence and the material brought on record would go a long way to show that the appellant had failed to make out a case of mental cruelty to entitle him to obtain a decree for divorce. The aforesaid conclusion by the appellate court entailed dismissal of the appeal.

10. Being dissatisfied with the judgment and decree passed by the learned appellate Judge, the husband preferred Second Appeal No. 683 of 2006 before the High Court. The learned single Judge of the High Court came to hold that there were concurrent findings of fact and no substantial question of law was involved. However, the learned single Judge observed that the sons of the parties had grown up and have been married; that the parties had no intention to patch up the matrimonial discord; and that the marriage had been irretrievably broken but that could not be considered by the High Court but only by the Apex Court under Article 142 of the Constitution. Expressing the aforesaid view, he did not admit the appeal and dismissed the same.

11. We have heard Mr. Arvind V. Sawant, learned senior counsel for the appellant-husband, and Mr. Vivek C. Solshe, learned counsel for the respondent-wife.

12. At the very outset, we would like to make it clear that though the learned single Judge of the High Court has expressed the view that the parties are at logger heads and have shown no inclination to patch the matrimonial rupture and the sons have grown up and got married and with the efflux of time, the relationship has been further shattered and hence, the marriage is irretrievably broken and only this Court can grant divorce in exercise of power under Article 142 of the Constitution, yet we are not going to take recourse to the same and only address ourselves whether a case for divorce has really been made out.

13. At this juncture, we may note with profit that the learned senior counsel for the appellant exclusively rested his case on the foundation of mental cruelty. It is his submission that if the evidence of the husband and other witnesses are scrutinized in an apposite manner along with the stand and stance taken in the written statement, it will clearly reveal a case of mental cruelty regard being had to the social status of the appellant. It is urged by him that the trial court as well as the appellate court have not given any credence to the evidence of some of the witnesses on the ground that they are interested witnesses though they are the most natural witnesses who had witnessed the cruel behaviour meted to the appellant.

14. It is the submission of the learned senior counsel for the appellant that the court of first instance as well as the appellate court have failed to take into consideration certain material aspects of the evidence and the appreciation of evidence being absolutely perverse, the High Court would have been well advised to scan and scrutinize the same but it declined to admit the appeal on the ground that there are concurrent findings of fact. It is canvassed by him that this Court, in exercise of power under Article 136 of the Constitution, can dislodge such concurrent findings of facts which are perverse, baseless, unreasonable and contrary to the material on record.

15. The learned counsel for the respondent, resisting the aforesaid submissions, contended that the view expressed by the High Court cannot be found fault with as the courts below have, at great length, discussed the evidence and appreciated the same with utmost prudence and objectivity and there is nothing on record to show that any material part of the evidence has been ignored or something extraneous to the record has been taken into consideration. It is highlighted by him that the stand put forth by the wife in her written statement having been established, the same cannot be construed to have constituted mental cruelty. Lastly, it is put forth that the appellant has created a dent in the institution of marriage and made a maladroit effort to take advantage of his own wrong which should not be allowed.

16. First, we shall advert to what actually constitutes mental cruelty and whether in the case at hand, the plea of mental cruelty has been established and thereafter proceed to address whether the courts below have adopted an approach which is perverse, unreasonable and unsupported by the evidence on record and totally unacceptable to invite the discretion of this Court in exercise of power under Article 136 of the Constitution to dislodge the same.

17. The expression cruelty has an inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status. In Sirajmohamedkhan Janmohamadkhan v. Hafizunnisa Yasinkhan and another[1], a two-Judge Bench approved the concept of legal cruelty as expounded in Sm. Pancho v. Ram Prasad[2] wherein it was stated thus: -

Conception of legal cruelty undergoes changes according to the changes and advancement of social concept and standards of living. With the advancement of our social conceptions, this feature has obtained legislative recognition that a second marriage is a sufficient ground for separate residence and separate maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used.

Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is unchaste are all factors which may undermine the health of a wife. It is apt to note here that the said observations were made while dealing with the Hindu Married Womens Right to Separate Residence and Maintenance Act (19 of 1946). This Court, after reproducing the passage, has observed that the learned Judge has put his finger on the correct aspect and object of mental cruelty.

18. In Shobha Rani v. Madhukar Reddi[3], while dealing with cruelty under Section 13(1)(ia) of the Act, this Court observed that the said provision does not define cruelty and the same could not be defined. 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. Thereafter, the Bench proceeded to state as follows: -

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 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.

19. After so stating, this Court observed about the marked change in life in modern times and the sea change in matrimonial duties and responsibilities. It has been observed that when a spouse makes a complaint about treatment of cruelty by the partner in life or relations, the court should not search for standard in life. A set of facts stigmatized 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. Their Lordships referred to the observations

made in Sheldon v. Sheldon[4] wherein Lord Denning stated, the categories of cruelty are not closed. Thereafter, the Bench proceeded to state thus: -

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.

These preliminary observations are intended to emphasise that the court in matrimonial cases is not concerned with ideals in family life. The court has only to understand the spouses concerned as nature made them, and consider their particular grievance. As Lord Ried observed in Gollins v. Gollins[5] :

In matrimonial affairs we are not dealing with objective standards, it is not a matrimonial offence to fall below the standard of the reasonable man (or the reasonable woman). We are dealing with this man or this woman.

20. In V. Bhagat v. D. Bhagat (Mrs.)[6], a two-Judge Bench referred to the amendment that had taken place in Sections 10 and 13(1)(ia) after the Hindu Marriage Laws (Amendment) Act, 1976 and proceeded to hold that the earlier requirement that such cruelty has caused a reasonable apprehension in the mind of a spouse that it would be harmful or injurious for him/her to live with the other one is no longer the requirement. Thereafter, this Court proceeded to deal with what constitutes mental cruelty as contemplated in Section 13(1)(ia) and observed that mental cruelty in the said provision 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. 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 was further observed, while arriving at such conclusion, that 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. What is cruelty in one case may not amount to cruelty in another case and it has to be determined in each case keeping in view the facts and circumstances of that case. That apart, the accusations and allegations have to be scrutinized in the context in which they are made. Be it noted, in the said case, this Court quoted extensively from the allegations made in the written statement and the evidence brought on record and came to hold that the said allegations and counter allegations were not in the realm of ordinary plea of defence and did amount to mental cruelty.

21. In Praveen Mehta v. Inderjit Mehta[7], it has been held that mental cruelty is a state of mind and feeling with one of the spouses due to behaviour or behavioural pattern by the other. Mental cruelty cannot be established by direct evidence and 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 facts and circumstances are to be assessed emerging from the evidence

on record and thereafter, a fair inference has to be drawn whether the petitioner in the divorce petition has been subjected to mental cruelty due to the conduct of the other.

22. In Vijaykumar Ramchandra Bhate v. Neela Vijaykumar Bhate[8], it has been opined that a conscious and deliberate statement levelled with pungency and that too placed on record, through the written statement, cannot be so lightly ignored or brushed aside.

23. In A. Jayachandra v. Aneel Kaur[9], it has been ruled that 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 and environment in which they live. If from the conduct of the spouse, it is established and/or an inference can legitimately be 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 the same would amount to cruelty. While dealing with the concept of mental cruelty, enquiry must begin as to the nature of cruel treatment and the impact of such treatment in the mind of the spouse. It has to be seen whether the conduct is such that no reasonable person would tolerate it.

24. In Vinita Saxena v. Pankaj Pandit[10], it has been ruled that as to what constitutes mental cruelty for the purposes of Section 13(1)(ia) will not depend upon the numerical count of such incident or only on the continuous course of such conduct but one has to 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.

25. In Samar Ghosh v. Jaya Ghosh[11], this Court, after surveying the previous decisions and referring to the concept of cruelty, which includes mental cruelty, in English, American, Canadian and Australian cases, has observed that the 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 the other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious belief, human values and their value system. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system, etc. etc. What may be mental cruelty now may not remain mental cruelty after a passage of time or vice versa. There can never be any straitjacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances.

26. In Suman Kapur v. Sudhir Kapur[12], after referring to various decisions in the field, this Court took note of the fact that the wife had neglected to carry out the matrimonial obligations and further, during the pendency of the mediation proceeding, had sent a notice to the husband through her advocate alleging that he had another wife in USA whose identity was concealed. The said allegation was based on the fact that in his income-tax return, the husband mentioned the Social Security Number of his wife which did not belong to the wife, but to an American lady. The husband offered an explanation that it was merely a typographical error and nothing else. The High Court had observed that taking undue advantage of the error in the Social Security Number, the wife had gone to the extent of making serious allegation that the husband had married an American woman whose Social Security Number was wrongly typed in the income-

tax return of the husband. This fact also weighed with this Court and was treated that the entire conduct of the wife did tantamount to mental cruelty.

27. Keeping in view the aforesaid enunciation of law pertaining to mental cruelty, it is to be scrutinized whether in the case at hand, there has been real mental cruelty or not, but, a significant one, the said scrutiny can only be done if the findings are perverse, unreasonable, against the material record or based on non-consideration of relevant materials. We may note here that the High Court has, in a singular line, declined to interfere with the judgment and decree of the courts below stating that they are based on concurrent findings of fact. The plea of perversity of approach though raised was not adverted to.

28. It is worth noting that this Court, in Kulwant Kaur v. Gurdial Singh Mann (dead) by L.Rs. and others[13], has held that while it is true that in a second appeal, a finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court will be within its jurisdiction to deal with the issue. An issue pertaining to perversity comes within the ambit of substantial question of law. Similar view has been stated in Govindaraju v. Mariamman[14].

29. In Major Singh v. Rattan Singh (Dead) by LRs and others[15], it has been observed that when the courts below had rejected and disbelieved the evidence on unacceptable grounds, it is the duty of the High Court to consider whether the reasons given by the courts below are sustainable in law while hearing an appeal under Section 100 of the Code of Civil Procedure.

30. In Vidhyadhar v. Manikrao and another[16], it has been ruled that the High Court in a second appeal should not disturb the concurrent findings of fact unless it is shown that the findings recorded by the courts below are perverse being based on no evidence or that on the evidence on record, no reasonable person could have come to that conclusion. We may note here that solely because another view is possible on the basis of the evidence, the High Court would not be entitled to exercise the jurisdiction under Section 100 of the Code of Civil Procedure. This view of ours has been fortified by the decision of this Court in Abdul Raheem v. Karnataka Electricity Board & Ors. [17].

31. Having stated the law relating to mental cruelty and the dictum of this Court in respect of the jurisdiction of the High Court where concurrent findings of fact are assailed, as advised at present, we will scan the evidence whether the High Court has failed to exercise the jurisdiction conferred on it despite the plea of perversity being raised. Any finding which is not supported by evidence or inferences is drawn in a stretched and unacceptable manner can be said to be perverse. This Court in exercise of power under Article 136 of the Constitution can interfere with concurrent findings of fact, if the conclusions recorded by the High Court are manifestly perverse and unsupported by the evidence on record. It has been so held in Alamelu and another v. State, Represented by Inspector of Police[18] and Heinz India Pvt. Ltd. & Anr. v. State of U.P. & Ors.[19]

32. Presently, to the core issue, viz, whether the appellant-husband had made out a case for mental cruelty to entitle him to get a decree for divorce. At this juncture, we may unhesitantly state that the trial court as well as the first appellate court have disbelieved the evidence of most of the witnesses cited on behalf of the husband on the ground that they are interested witnesses. In a matrimonial dispute, it would be inappropriate to expect outsiders to come and depose.

The family members and sometimes the relatives, friends and neighbours are the most natural witnesses. The veracity of the testimony is to be tested on objective parameters and not to be thrown overboard on the ground that the witnesses are related to either of the spouse. Exception has been taken by the courts below that the servants of the house should have been examined and that amounts to suppression of the best possible evidence. That apart, the allegations made in the written statement, the dismissal of the case instituted by the wife under Section 494 of the Indian Penal Code, the non-judging of the material regard being had to the social status, the mental make-up, the milieu and the rejection of subsequent events on the count that they are subsequent to the filing of the petition for divorce and also giving flimsy reasons not to place reliance on the same, we are disposed to think, deserve to be tested on the anvil of perversity of approach. Quite apart from the above, a significant question that emerges is whether the reasons ascribed by the courts below that the allegations made in the written statement alleging extra marital affair of the appellant-husband with Neeta Gujarathi has been established and, therefore, it would not constitute mental cruelty are perverse and unacceptable or justified on the basis of the evidence brought on record. These are the aspects which need to be scrutinized and appositely delved into.

33. The appellant-husband, examining himself as PW-1, has categorically stated that the wife used to hide the pressed clothes while he was getting ready to go to the factory. Sometimes she used to crumple the ironed clothes and hide the keys of the motorcycle or close the main gate. In the cross-examination, it is clearly stated that the wife was crumpling the ironed clothes, hiding the keys of the motorcycle and locking the gate to trouble him and the said incidents were taking place for a long time. This being the evidence on record, we are at a loss to find that the courts below could record a finding that the appellant used to enjoy the childish and fanciful behaviour of the wife pertaining to the aforesaid aspect. This finding is definitely based on no evidence. Such a conclusion cannot be reached even by inference. If we allow ourselves to say so, even surmises and conjectures would not permit such a finding to be recorded. It is apt to note here that it does not require Solomons wisdom to understand the embarrassment and harassment that might have been felt by the husband. The level of disappointment on his part can be well visualised like a moon in a cloudless sky.

34. Now we shall advert to the allegation made in the written statement. The respondent-wife had made the allegation that the husband had an illicit relationship with Neeta Gujarathi. The learned trial Judge has opined that the said allegation having been proved cannot be treated to have caused mental cruelty. He has referred to various authorities of many High Courts. The heart of the matter is whether such an allegation has actually been proven by adducing acceptable evidence. It is worth noting that the respondent had filed a complaint, RCC No. 91/95, under Section 494 of the Indian Penal Code against the husband. He was discharged in the said case. The said order has gone unassailed. The learned trial Judge has expressed the view that Neeta Gujarathi was having a relationship with the husband on the basis that though the husband had admitted that she was working in his office yet he had not produced any appointment letter to show that she was appointed as a computer operator. The trial Judge has relied on the evidence of the wife. The wife in her evidence has stated in an extremely bald manner that whenever she had telephoned to the office in the factory, the husband was not there and further that the presence of Neeta Gujarathi was not liked by her in-laws and the elder son Vishal. On a careful reading of the judgment of the trial court, it is demonstrable that it has been persuaded to return such

a finding on the basis of the incident that took place on 11.10.1995. It is worth noting that the wife, who examined herself as RW-1, stated in her evidence that Vishal was deposing against her as the appellant had given him a scooter. The learned trial Judge has given immense credence to the version of the social worker who, on the date of the incident, had come to the house of the appellant where a large crowd had gathered and has deposed that she had seen Neeta going and coming out of the house. The evidence of the wife, when studiedly scrutinized, would show that there was more of suspicion than any kind of truth in it. As has been stated earlier, the respondent had made an allegation that her son was influenced by the appellant-husband. The learned trial Judge as well as the appellate court have accepted the same. It is germane to note that Vishal, the elder son, was approximately 16 years of age at the time of examination in court. There is remotely no suggestion to the said witness that when Neeta Gujarati used to go to the house, his grandfather expressed any kind of disapproval. Thus, the whole thing seems to have rested on the incident of 11.10.1995. On that day, as the material on record would show, at 4.00 p.m., the wife arrived at the house of the husband. She has admitted that she wanted to see her father- in-law who was not keeping well. After she went in, her father-in-law got up from the chair and went upstairs. She was not permitted to go upstairs. It is testified by her that her father-in-law came down and slapped her. She has deposed about the gathering of people and publication in the newspapers about the incident. Vishal, PW-5, has stated that the mother had pushed the grandfather from the chair. The truthfulness of the said aspect need not be dwelled upon. The fact remains that the testimony of the wife that the father-in-law did not like the visit of Neeta does not appear to be true. Had it been so, he would not have behaved in the manner as deposed by the wife. That apart, common sense does not give consent to the theory that both, the father of the husband and his son, Vishal, abandoned normal perception of life and acceded to the illicit intimacy with Neeta. It is interesting to note that she has deposed that it was published in the papers that the daughter-in-law was slapped by the father- in-law and Neeta Gujarathi was recovered from the house but eventually the police lodged a case against the husband, the father-in-law and other relatives under Section 498A of the Indian Penal Code. We really fail to fathom how from this incident and some cryptic evidence on record, it can be concluded that the respondent-wife had established that the husband had an extra marital relationship with Neeta Gujarathi. That apart, in the application for grant of interim maintenance, she had pleaded that the husband was a womaniser and drunkard. This pleading was wholly unwarranted and, in fact, amounts to a deliberate assault on the character. Thus, we have no scintilla of doubt that the uncalled for allegations are bound to create mental agony and anguish in the mind of the husband.

35. Another aspect needs to be taken note of. She had made allegation about the demand of dowry. RCC No. 133/95 was instituted under Section 498A of the Indian Penal Code against the husband, father-in-law and other relatives. They have been acquitted in that case. The said decision of acquittal has not been assailed before the higher forum. Hence, the allegation on this count was incorrect and untruthful and it can unhesitatingly be stated that such an act creates mental trauma in the mind of the husband as no one would like to face a criminal proceeding of this nature on baseless and untruthful allegations.

36. Presently to the subsequent events. The courts below have opined that the publication of notice in the daily Lokmat and the occurrence that took place on 11.10.1995 could not be considered as the said events occurred after filing of the petition for divorce. Thereafter, the courts below

have proceeded to deal with the effect of the said events on the assumption that they can be taken into consideration. As far as the first incident is concerned, a view has been expressed that the notice was published by the wife to safeguard the interests of the children, and the second one was a reaction on the part of the wife relating to the relationship of the husband with Neeta Gujrathi. We have already referred to the second incident and expressed the view that the said incident does not establish that there was an extra marital relationship between Neeta and the appellant. We have referred to the said incident as we are of the considered opinion that the subsequent events can be taken into consideration. In this context, we may profitably refer to the observations made by a three-Judge Bench in the case of A. Jayachandra (supra) :-

The matter can be looked at from another angle. If acts subsequent to the filing of the divorce petition can be looked into to infer condonation of the aberrations, acts subsequent to the filing of the petition can be taken note of to show a pattern in the behaviour and conduct.

37. We may also usefully refer to the observations made in Suman Kapur (supra) wherein the wife had made a maladroit effort to take advantage of a typographical error in the written statement and issued a notice to the husband alleging that he had another wife in USA. Thus, this Court has expressed the opinion that the subsequent events can be considered.

38. Keeping in view the aforesaid pronouncement of law, we shall first appreciate the impact of the notice published in the Lokmat. The relevant part of the said notice, as published in the newspaper, reads as follows: -

Shri Vishwanath Sitaram Agrawal is having vices of womanizing, drinking liquor and other bad habits. He is having monthly income of Rs.10 lacs, but due to several vices, he is short of fund. Therefore, he has started selling the property. He has sold some properties. My client has tried to make him understand which is of no use and on the contrary, he has beaten my client very badly and has driven her away and dropped her to Akola at her parents house.

In the property of Shri Vishwanath Sitaram Agrawal my client and her two sons are having shares in the capacity of members of joint family and Shri Vishwanath Sitaram Agrawal has no right to dispose of the property on any ground. Immense emphasis has been given on the fact that after publication of the notice, the husband had filed a caveat in the court. The factual matrix would reveal that the husband comes from a respectable family engaged in business. At the time of publication of the notice, the sons were quite grown up. The respondent-wife did not bother to think what impact it would have on the reputation of the husband and what mental discomfort it would cause. It is manifest from the material on record that the children were staying with the father. They were studying in the school and the father was taking care of everything. Such a publication in the newspaper having good circulation can cause trauma, agony and anguish in the mind of any reasonable man. The explanation given by the wife to the effect that she wanted to protect the interests of the children, as we perceive, is absolutely incredible and implausible. The filing of a caveat is wholly inconsequential. In fact, it can decidedly be said that it was mala fide and the motive was to demolish the reputation of the husband in the society by naming him as a womaniser, drunkard and a man of bad habits.

39. At this stage, we may fruitfully reminisce a poignant passage from N.G. Dastane v. S. Dastane[20] wherein Chandrachud, J. (as his Lordship then was) observed thus: -

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 to a matrimonial court for, even if they may not be able to drown their differences, their ideal attitudes may help them overlook or gloss over mutual faults and failures.

40. Regard being had to the aforesaid, we have to evaluate the instances. In our considered opinion, a normal reasonable man is bound to feel the sting and the pungency. The conduct and circumstances make it graphically clear that the respondent-wife had really humiliated him and caused mental cruelty. Her conduct clearly exposits that it has resulted in causing agony and anguish in the mind of the husband. She had publicised in the newspapers that he was a womaniser and a drunkard. She had made wild allegations about his character. She had made an effort to prosecute him in criminal litigations which she had failed to prove. The feeling of deep anguish, disappointment, agony and frustration of the husband is obvious. It can be stated with certitude that the cumulative effect of the evidence brought on record clearly establish a sustained attitude of causing humiliation and calculated torture on the part of the wife to make the life of the husband miserable. The husband felt humiliated both in private and public life. Indubitably, it created a dent in his reputation which is not only the salt of life, but also the purest treasure and the most precious perfume of life. It is extremely delicate and a cherished value this side of the grave. It is a revenue generator for the present as well as for the posterity. Thus analysed, it would not be out of place to state that his brain and the bones must have felt the chill of humiliation. The dreams sweetly grafted with sanguine fondness with the passage of time reached the Everstine disaster, possibly, with a vow not to melt. The cathartic effect looked like a distant mirage. The cruel behaviour of the wife has frozen the emotions and snuffed out the bright candle of feeling of the husband because he has been treated as an unperson. Thus, analysed, it is abundantly clear that with this mental pain, agony and suffering, the husband cannot be asked to put up with the conduct of the wife and to continue to live with her. Therefore, he is entitled to a decree for divorce.

41. Presently, we shall deal with the aspect pertaining to the grant of permanent alimony. The court of first instance has rejected the application filed by the respondent-wife as no decree for divorce was granted and there was no severance of marital status. We refrain from commenting on the said view as we have opined that the husband is entitled to a decree for divorce. 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. During the course of hearing of the matter, we have heard the learned counsel for the parties on this aspect. After taking instructions from the respective parties, they have addressed us. The learned senior counsel for the appellant has submitted that till 21.2.2012, an amount of Rs.17,60,000/- has been paid towards maintenance to the wife as directed by the courts below and hence, that should be deducted from the amount to be fixed. He has further submitted that the permanent alimony should be fixed at Rs.25 lacs. The learned counsel for the respondent, while insisting for affirmance of the decisions of the High Court as well as by the courts below, has submitted that the amount that has already been paid should not be taken into consideration as the same has been paid within a span of number of years and the deduction would affect the future sustenance. He has emphasised on the income of the husband, the progress in the business, the inflation in the cost of living and the way of life the respondent is expected to lead. He has also canvassed that the age factor and the medical

aid and assistance that are likely to be needed should be considered and the permanent alimony should be fixed at Rs.75 lacs.

42. In our considered opinion, the amount that has already been paid to the respondent-wife towards alimony is to be ignored as the same had been paid by virtue of the interim orders passed by the courts. It is not expected that the respondent-wife has sustained herself without spending the said money. Keeping in view the totality of the circumstances and the social strata from which the parties come from and regard being had to the business prospects of the appellant, permanent alimony of Rs.50 lacs (rupees fifty lacs only) should be fixed and, accordingly, we so do. The said amount of Rs.50 lacs (rupees fifty lacs only) shall be deposited by way of bank draft before the trial court within a period of four months and the same shall be handed over to the respondent-wife on proper identification.

43. Consequently, the appeal is allowed, the judgments and decrees of the courts below are set aside and a decree for divorce in favour of the appellant is granted. Further, the husband shall pay Rs.50 lacs (rupees fifty lacs only) towards permanent alimony to the wife in the manner as directed hereinabove. The parties shall bear their respective costs.

[Deepak Verma]

[Dipak Misra]

New Delhi; July 04, 2012

[1] (1981) 4 SCC 250

[2] AIR 1956 All 41

[3] (1988) 1 SCC 105

[4] (1966) 2 All ER 257

[5] (1963) 2 All ER 966

[6] (1994) 1 SCC 337

[7] AIR 2002 SC 2582

[8] AIR 2003 SC 2462

[9] (2005) 2 SCC 22

[10] (2006) 3 SCC 778

[11] (2007) 4 SCC 511

[12] AIR 2009 SC 589

[13] AIR 2001 SC 1273

[14] (2005) 2 SCC 500

[15] AIR 1997 SC 1906

[16] (1999) 3 SCC 573

[17] AIR 2008 SC 956

[18] AIR 2011 SC 715

[19] (2012) 3 SCALE 607 = (2012) 2 KLT (SN) 64

[20] (1975) 3 SCR 967

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AMARDEEP SINGH VERSUS HARVEEN KAUR

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Bench: Hon'ble Mr. Justice Adarsh Kumar Goel & Hon'ble Mr. Justice Uday Umesh Lalit

Amardeep Singh …Appellant
Versus
Harveen Kaur …Respondent

CIVIL APPEAL NO. 11158 OF 2017

(Arising out of Special Leave Petition (Civil)No. 20184 of 2017)

The question which arises for consideration in this appeal is whether the minimum period of six months stipulated under Section 13B(2) of the Hindu Marriage Act, 1955 (the Act) for a motion for passing decree of divorce on the basis of mutual consent is mandatory or can be relaxed in any exceptional situations.

In determining the question whether provision is mandatory or directory, language alone is not always decisive. The Court has to have the regard to the context, the subject matter and the object of the provision. This principle, as formulated in Justice G.P. Singh's "Principles of Statutory Interpretation" (9th Edn., 2004), has been cited with approval in Kailash versus Nanhku and ors.as follows:15 (2005) 4 SCC 480 "The study of numerous cases on this topic does not lead to formulation of any universal rule except this that language alone most often is not decisive, and regard must be had to the context, subject-matter and object of the statutory provision in question,in determining whether the same is mandatory or directory. In an oft-quoted passage Lord Campbell said: 'No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered.' " 'For ascertaining the real intention of the legislature', points out Subbarao, J. 'the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances,namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered'. If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory."

- **Applying the above to the present situation, we are of the view that where the Court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13B(2),it can do so after considering the following :**

i) the statutory period of six months specified in Section 13B(2), in addition to the statutory period of one year under Section 13B(1) of separation of parties is already over before the first motion itself;

ii) all efforts for mediation/conciliation including efforts in terms of Order XXXIIA Rule 3 CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

iv) the waiting period will only prolong their agony. The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver. If the above conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the concerned Court. Since we are of the view that the period mentioned in Section 13B(2) is not mandatory but directory, it will be open to the Court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation.

JUDGMENT

Hon'ble Mr. Justice Adarsh Kumar Goel :—

1. The question which arises for consideration in this appeal is whether the minimum period of six months stipulated under Section 13B(2) of the Hindu Marriage Act, 1955 (the Act) for a motion for passing decree of divorce on the basis of mutual consent is mandatory or can be relaxed in any exceptional situations.

   Signature Not Verified Digitally signed by SWETA DHYANI Date: 2017.09.12 16:23:52 IST Reason:

2. Factual matrix giving rise to this appeal is that marriage between the parties took place on 16 th January, 1994 at Delhi. Two children were born in 1995 and 2003 respectively. Since 2008 the parties are living separately. Disputes between the parties gave rise to civil and criminal proceedings. Finally, on 28 th April, 2017 a settlement was arrived at to resolve all the disputes and seeks divorce by mutual consent. The respondent wife is to be given permanent alimony of Rs.2.75 crores. Accordingly, HMA No. 1059 of 2017 was filed before the Family Court (West), Tis Hazari Court, New Delhi and on 8 th May, 2017 statements of the parties were recorded. The appellant husband has also handed over two cheques of Rs.50,00,000/-, which have been duly honoured, towards part payment of permanent alimony. Custody of the children is to be with the appellant. They have sought waiver of the period of six months for the second motion on the ground that they have been living separately for the last more than eight years and there is no possibility of their re union. Any delay will affect the chances of their resettlement. The parties have moved this Court on the ground that only this Court can relax the six months period as per decisions of this Court.

3. Reliance has been placed inter alia on decision of this Court in Nikhil Kumar vs. Rupali Kumar 1 wherein the statutory period of six months was waived by this Court under Article 142 of the Constitution and the marriage was dissolved.

   The text of Section 13B is as follows:

"13-B. Divorce by mutual consent.— (1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree."

4. There is conflict of decisions of this Court on the question whether exercise of power under Article 142 to waive the statutory period under Section 13B of the Act was appropriate. In 1 (2016) 13 SCC 383 Manish Goel versus Rohini Goel2, a Bench of two-Judges of this Court held that jurisdiction of this Court under Article 142 could not be used to waive the statutory period of six months for filing the second motion under Section 13B, as doing so will be passing an order in contravention of a statutory provision. It was observed :

"14. Generally, no court has competence to issue a direction contrary to law nor can the court direct an authority to act in contravention of the statutory provisions. The courts are meant to enforce the rule of law and not to pass the orders or directions which are contrary to what has been injected by law. (Vide State of Punjab v. Renuka Singla[(1994) 1 SCC 175], State of U.P. v. Harish Chandra [(1996) 9 SCC 309], Union of India v. Kirloskar Pneumatic Co. Ltd. [(1996) 4 SCC 453], University of Allahabad v. Dr. Anand Prakash Mishra [(1997) 10 SCC 264] and Karnataka SRTC v. Ashrafulla Khan [(2002) 2 SC 560]

15. A Constitution Bench of this Court in Prem Chand Garg v. Excise Commr.[AIR 1963 SCC 996] held as under: (AIR p. 1002, para 12) "12. … An order which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws." (emphasis supplied) The Constitution Benches of this Court in Supreme Court Bar Assn. v. Union of India [(1998) 4 SCC 409] and E.S.P. Rajaram v. Union of India [(2001) 2 SCC 186] held that under Article 142 of the Constitution, this Court cannot altogether ignore the substantive provisions of a statute and pass orders concerning an issue which can be settled only 2 (2010) 4 SCC 393 through a mechanism prescribed in another statute. It is not to be exercised in a case where there is no basis in law which can form an edifice for building up a superstructure."

5. This Court noted that power under Article 142 had been exercised in cases where the Court found the marriage to be totally unworkable, emotionally dead, beyond salvage and broken down irretrievably. This power was also exercised to put quietus to all litigations and to save the parties from further agony 3. This view was reiterated in Poonam versus Sumit Tanwar4.

6. In Neeti Malviya versus Rakesh Malviya5, this Court observed that there was conflict of decisions in Manish Goel (supra) and Anjana Kishore versus Puneet Kishore6. The matter was referred

to bench of three-Judges. However, since the matter became infructuous on account of grant of divorce in the meanwhile7.

3 Para 11 ibid, noting earlier decisions in Romesh Chander v. Savitri (1995) 2 SCC 7; Kanchan Devi v. Promod Kumar Mittal (1996) 8 SCC 90; Anita Sabharwal v. Anil Sabharwal (1997) 11 SCC 490; Ashok Hurra v. Rupa Bipin Zaveri (1997) 4 SCC 226; Kiran v. Sharad Dutt (2000)10 SCC 243; Swati Verma v. Rajan Verma (2004) 1 SCC 123; Harpit Singh Anand v. State of W.B. (2004) 10 SCC 505; Jimmy Sudarshan Purohit v. Sudarshan Sharad Purohit (2005) 13 SCC 410; Durga Prasanna Tripathy v. Arundhati Tripathy (2005) 7 SCC 353; Naveen Kohli v. Neelu Kohli (2006) 4 SCC 558; Sanghamitra Ghosh v. Kajal Kumar Ghosh (2007) 2 SCC 220; Rishikesh Sharma v. Saroj Sharma (2007) 2 SCC 263; Samar Ghosh v. Jaya Ghosh (2007) 4 SCC 511 and Satish Sitole v. Ganga (2008) 7 SCC 734 4 (2010) 4 SCC 460 5 (2010) 6 SCC 413 6 (2002) 10 SCC 194 7 Order dated 23rd August, 2011 in Transfer Petition (Civil)No. 899 of 2007

7. Without any reference to the judgment in Manish Goel (supra), power under Article 142 of the Constitution has been exercised by this Court in number of cases 8 even after the said judgment.

8. We find that in Anjana Kishore (supra), this Court was dealing with a transfer petition and the parties reached a settlement. This Court waived the six months period under Article 142 in the facts and circumstances of the case. In Anil Kumar Jain versus Maya Jain9, one of the parties withdrew the consent. This Court held that marriage had irretrievably broken down and though the civil courts and the High Court could not exercise power contrary to the statutory provisions, this Court under Article 142 could exercise such power in the interests of justice. Accordingly the decree for divorce was granted. 8 Priyanka Singh v. Jayant Singh(2010) 15 SCC 390; Sarita Singh v. Rajeshwar Singh (2010) 15 SCC 374; Harpreet Singh Popli v. Manmeet Kaur Pople (2010) 15 SCC 316; Hitesh Bhatnagar v. Deepa Bhatnagar (2011) 5 SCC 234; Veena v. State (Govt of NCT of Delhi) (2011) 14 SCC 614; Priyanka Khanna v. Amit Khanna (2011) 15 SCC 612; Devinder Singh Narula v. Meenakshi Nangia (2012) 8 SCC 580; Vimi Vinod Chopra v. Vinod Gulshan Chpra (2013) 15 SCC 547; Priyanka Chawla v. Amit Chawla (2016) 3 SCC 126; Nikhil Kumar v. Rupali Kumar (2016) 13 SCC 383 9 (2009) 10 SCC 415

9. After considering the above decisions, we are of the view that since Manish Goel (supra) holds the field, in absence of contrary decisions by a larger Bench, power under Article 142 of the Constitution cannot be exercised contrary to the statutory provisions, especially when no proceedings are pending before this Court and this Court is approached only for the purpose of waiver of the statute.

10. However, we find that the question whether Section 13B(2) is to be read as mandatory or discretionary needs to be gone into. In Manish Goel (supra), this question was not gone into as it was not raised. This Court observed :

"23. The learned counsel for the petitioner is not able to advance arguments on the issue as to whether, statutory period prescribed under Section 13-B(1) of the Act is mandatory or directory and if directory, whether could be dispensed with even by the High Court in exercise of its writ/ appellate jurisdiction."

11. Accordingly, vide order dated 18th August, 2017, we passed the following order :

"List the matter on 23rd August, 2017 to consider the question whether provision of Section 13B of the Hindu Marriage, Act, 1955 laying down cooling off period of six months is a mandatory

requirement or it is open to the Family Court to waive the same having regard to the interest of justice in an individual case.

Mr. K.V. Vishwanathan, senior counsel is appointed as Amicus to assist the Court. Registry to furnish copy of necessary papers to learned Amicus".

12. Accordingly, learned amicus curiae has assisted the Court. We record our gratitude for the valuable assistance rendered by learned amicus who has been ably assisted by S/Shri Abhishek Kaushik, Vrinda Bhandari and Mukunda Rao Angara, Advocates.

13. Learned amicus submitted that waiting period enshrined under Section 13(B)2 of the Act is directory and can be waived by the court where proceedings are pending, in exceptional situations. This view is supported by judgments of the Andhra Pradesh High Court in K. Omprakash vs. K. Nalini 10, Karnataka High Court in Roopa Reddy vs. Prabhakar Reddy11, Delhi High Court in Dhanjit Vadra vs. Smt. Beena Vadra12 and Madhya Pradesh High Court in Dinesh Kumar Shukla vs. Smt. Neeta13. Contrary view has been taken by Kerala High Court in M. Krishna Preetha vs. Dr. Jayan 10 AIR 1986 AP 167 (DB) 11 AIR 1994 Kar 12 (DB) 12 AIR 1990 Del 146 13 AIR 2005 MP 106 (DB) Moorkkanatt14. It was submitted that Section 13B(1) relates to jurisdiction of the Court and the petition is maintainable only if the parties are living separately for a period of one year or more and if they have not been able to live together and have agreed that the marriage be dissolved. Section 13B(2) is procedural. He submitted that the discretion to waive the period is a guided discretion by consideration of interest of justice where there is no chance of reconciliation and parties were already separated for a longer period or contesting proceedings for a period longer than the period mentioned in Section 13B(2). Thus, the Court should consider the questions:

    i) How long parties have been married?

    ii) How long litigation is pending?

    iii) How long they have been staying apart?

    iv) Are there any other proceedings between the parties?

    v) Have the parties attended mediation/conciliation?

    vi) Have the parties arrived at genuine settlement which takes care of alimony, custody of child or any other pending issues between the parties?

14. AIR 2010 Ker 157 14. The Court must be satisfied that the parties were living separately for more than the statutory period and all efforts at mediation and reconciliation have been tried and have failed and there is no chance of reconciliation and further waiting period will only prolong their agony.

15. We have given due consideration to the issue involved. Under the traditional Hindu Law, as it stood prior to the statutory law on the point, marriage is a sacrament and cannot be dissolved by consent. The Act enabled the court to dissolve marriage on statutory grounds. By way of amendment in the year 1976, the concept of divorce by mutual consent was introduced. However, Section 13B(2) contains a bar to divorce being granted before six months of time elapsing after filing of the divorce petition by mutual consent. The said period was laid down to enable the parties to have a rethink so that the court grants divorce by mutual consent only if there is no chance for reconciliation.

16. The object of the provision is to enable the parties to dissolve a marriage by consent if the marriage has irretrievably broken down and to enable them to rehabilitate them as per available options. The amendment was inspired by the thought that forcible perpetuation of status of matrimony between unwilling partners did not serve any purpose. The object of the cooling off the period was to safeguard against a hurried decision if there was otherwise possibility of differences being reconciled. The object was not to perpetuate a purposeless marriage or to prolong the agony of the parties when there was no chance of reconciliation. Though every effort has to be made to save a marriage, if there are no chances of reunion and there are chances of fresh rehabilitation, the Court should not be powerless in enabling the parties to have a better option.

17. In determining the question whether provision is mandatory or directory, language alone is not always decisive. The Court has to have the regard to the context, the subject matter and the object of the provision. This principle, as formulated in Justice G.P. Singh's "Principles of Statutory Interpretation" (9th Edn., 2004), has been cited with approval in Kailash versus Nanhku and ors.15as follows:

    15 (2005) 4 SCC 480 "The study of numerous cases on this topic does not lead to formulation of any universal rule except this that language alone most often is not decisive, and regard must be had to the context, subject-matter and object of the statutory provision in question, in determining whether the same is mandatory or directory. In an oft-quoted passage Lord Campbell said: 'No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered.' " 'For ascertaining the real intention of the legislature', points out Subbarao, J. 'the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered'. If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory."

18. Applying the above to the present situation, we are of the view that where the Court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13B(2), it can do so after considering the following :

    i) the statutory period of six months specified in Section 13B(2), in addition to the statutory period of one year under Section 13B(1) of separation of parties is already over before the first motion itself;

    ii) all efforts for mediation/conciliation including efforts in terms of Order XXXIIA Rule 3 CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

iv) the waiting period will only prolong their agony.

19. The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver.

20. If the above conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the concerned Court.

21. Since we are of the view that the period mentioned in Section 13B(2) is not mandatory but directory, it will be open to the Court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation.

22. Needless to say that in conducting such proceedings the Court can also use the medium of video conferencing and also permit genuine representation of the parties through close relations such as parents or siblings where the parties are unable to appear in person for any just and valid reason as may satisfy the Court, to advance the interest of justice. 23. The parties are now at liberty to move the concerned court for fresh consideration in the light of this order.

The appeal is disposed of accordingly.

……..J.
(ADARSH KUMAR GOEL)

……..J.
(UDAY UMESH LALIT)

NEW DELHI;

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LANDMARK JUDGMENTS ON

STRIDHAN

L. GOWRAMMA (D) BY LR. VERSUS SUNANDA (D) BY LRS. & ANR.

SUPREME COURT OF INDIA

Bench : Hon'ble Mr. Justice Kurian Joseph & Hon'ble Mr. Justice R.F. Nariman

L. Gowramma (D) by Lr. – Appellant
Versus
Sunanda (D) by Lrs. & Anr. – Respondents

CIVIL APPEAL NOS. 174-175 OF 2016

(Arising out of S.L.P. (Civil) Nos.24809-24810 of 2008)

Decided On : 12-01-2016

Hindu Law Women's Rights Act, 1933 (Mysore Act No. X of 1933) – Sections 8(1)(d) and 10(1)(g) – Order of succession – Section 8(1)(d) can have no application to a case where joint family property passes to a single coparcener not by survivorship but by partition – Succession to a Hindu male dying intestate will vest only in widow under Section 4(1)(ii) to exclusion of daughters who are mentioned in subsequent Clause (iii) – Under Section 10(1)(g) it is only property taken by inheritance by a female from her husband that is included in Stridhan – This would not include unmarried daughters as property taken by inheritance by a female from her father is not included. (Paras 17, 19 and 20)

(1997) 10 SCC 684 ; [1968] 1 SCR 124 – Relied. ILR 2014 Karnataka 1335 – Approved.

Facts of Case:

Instant appeals raise question on true construction of some of provisions of Hindu Law Women's Rights Act, 1933 (Mysore Act No. X of 1933). Widow has executed a will on 9.5.1990 bequeathing her share in joint family property in favour of only one of three daughters namely the third defendant. 4th defendant has been joined in suit inasmuch as first defendant widow had sold one of scheduled items of suit property namely item No.3 to the said 4th defendant during the pendency of suit.

Findings of Court:

There is also another way of looking at the issue raised in present appeals. A partition of joint family property among brothers is expressly mentioned in Section 8(1)(b). Therefore, upon partition of joint family property between Thimmappa and his older brother, it is only their mother, their unmarried sisters and widows and unmarried daughters of their pre-deceased undivided brothers who have left no male issue who get a share under the Section. Unlike sub-section (a), unmarried daughters of Thimmappa do not get any share at the partition between Thimmappa and his brother.

Result : Appeals allowed. Judgments passed by Courts below set aside.

Cases referred :

Byamma Vs. Ramdev reported in I.L.R. 1991 KAR 3245 – Referred.

Sathyaprema Manjunatha Gowda (Smt) Vs. Controller of Estate Duty, Karnataka, (1997) 10 SCC 684 – Relied.

Nagendra Prasad Vs. Kempananjamma, [1968] 1 SCR 124 – Relied.

Smt. Ramakka and others Vs. Smt. Thanamma since deceased by LR, P. Srinivas and Others, ILR 2014 Karnataka 1335 – Approved.

HINDU LAW WOMENS RIGHTS ACT : S.10(1)(g), S.4(1)(ii), S.8(1)(d)

IMPORTANT POINT

Property taken by inheritance by a female from her father is not included in Stridhan.

JUDGMENT

Hon'ble Mr. Justice R.F. Nariman :—

1. Delay condoned in filing the special leave petitions.

2. Leave granted.

3. These appeals raise an interesting question on the true construction of some of the provisions of the Hindu Law Women's Rights Act, 1933 (Mysore Act No.X of 1933). One Venkatsubbaiah had two sons Mahabalaiah and Thimmappa. After the death of Venkatsubbaiah the two sons and the wife of Mahabalaiah constituted a joint Hindu family. Mahabalaiah being the elder brother was the Karta of the said family. In the year 1940-1941, Mahabalaiah and Thimmappa partitioned and divided their joint family properties and got possession of their respective shares. Thimmappa died on 9.10.1952, leaving behind him his widow one Gowramma and three daughters. The widow has executed a will on 9.5.1990 bequeathing her share in the joint family property in favour of only one of the three daughters namely the third defendant. The 4th defendant has been joined in the suit inasmuch as the first defendant widow had sold one of the scheduled items of the suit property namely item No.3 to the said 4th defendant during the pendency of the suit.

4. One of the said daughters namely Sunanda filed a suit against defendant No.1 – her mother, defendant Nos. 2 and 3 – her sisters, and defendant No.4 – the purchaser, being O.S. No.46 of 1994. After setting out the relevant facts, the Civil Judge, Senior Division by judgment dated 28.3.2005 framed as many as 12 issues and ultimately decided on application of Section 10(2)(g) of the 1933 Act that the plaintiff would be entitled to a 1/4th share in the scheduled properties and the suit was decreed accordingly.

5. In a first appeal filed by defendant No.1, the first Appellate Court agreed with the conclusions both on facts as well as law with the trial court. Accordingly, the first appeal was dismissed on 5.8.2005.

6. Thereafter, a review petition was filed and by the judgment dated 24.11.2007, the review was dismissed but this time adverting to Section 8(1)(d) of the 1933 Act and decreeing the suit with reference to the said Section. The review also was accordingly dismissed.

7. Shri R.S. Hegde, learned counsel appearing on behalf of the appellant has urged before us that the applicable Section of the 1933 Act is Section 4, and not Sections 8 and 10, and accordingly the succession of a Hindu male dying intestate vests property only in the widow to the exclusion of the daughters and hence the plaintiff's suit should have been dismissed on this ground.

8. On the other hand, Shri S.N. Bhat, learned counsel, invited our attention to Section 8(1)(d) of the Act and according to him since joint family property passed to Thimmappa who was a single coparcener by survivorship, on partition in 19401941, all the classes of females mentioned in Section 8 would be entitled to a share in the said property which would include not only his widow but also his unmarried daughters.

9. For a proper appreciation of the controversy at hand, we set out the relevant Sections of the Hindu Law Women's Rights Act, 1933 (Mysore Act No.X of 1933).

"Part I

INHERITANCE

4. Order of succession:-

(1) The succession to a Hindu male dying intestate shall, in the first place, vest in the members of the family of the propositus mentioned below, and in the following order:-

i) the male issue to the third generation ;

ii) the widow ;

iii) daughters ;

iv) daughter's sons

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8. Certain females entitled to shares at partition-

(1) (a) At a partition of joint family property between a person and his son or sons, his mother, his unmarried daughters and the widows and unmarried daughters of his predeceased undivided sons and brothers who have left no male issue shall be entitled to share with them.

(b) At a partition of joint family property among brothers, their mother, their unmarried sisters and the widows and unmarried daughters of their predeceased undivided brothers who have left no male issue shall be entitled to share with them.

(c) Sub-sections (a) and (b) shall also apply mutatis mutandis to a partition among other coparceners in a joint family.

(d) Where joint family property passes to a single co-parcener by survivorship, it shall so pass subject to the right to shares of the classes of females enumerated in the above sub-sections.

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10. What is "stridhana" –

(1) "Stridhana" means property of every description belonging to a Hindu female, other than property in which she has, by law or under the terms of an instrument, only a limited estate.

(2) "Stridhana" includes :

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(g) property taken by inheritance by a female from another female and property taken by inheritance by a female from her husband or son, or from a male relative connected by blood except when there is a daughter or daughter's son of the propositus alive at the time the property is so inherited.

(3) All gifts and payments other than or in addition to, or in excess of, the customary presents of vessels, apparel and other articles of personal use made to a bride or bridegroom in connection with their marriage or to their parents or guardians or other person on their behalf, by the bridegroom, bride or their relatives or friends, shall be the stridhana of the bride."

10. A cursory reading of Section 8 would reveal that various females mentioned in the Section would be entitled to a share of joint family property in the circumstances mentioned therein. Under Sections 8(1)(a) to 8(1)(c) there has necessarily first to be a partition in the circumstances mentioned in each of the said sub-sections whereas under sub-section (d) what is required is that joint family properties should pass to a single coparcener by survivorship. If this condition of subclause (d) is met, then all the women mentioned in sub-clauses (a) to (c) would be entitled to a share therein.

11. Shri Bhat relied upon a judgment delivered by B.P. Singh,J. in Byamma v. Ramdev reported in I.L.R. 1991 KAR 3245. After setting out Section 8 of the 1933 Act, it was held:-

"It is well settled that devolution of joint family property, which come to the hands of a son from his father or grand-father or great-grand-father as unobstructed heritage is governed by the Rule of Survivorship. A male coparcener acquires right to such property by birth. This is different from property that may come to the hands of a coparcener in which he has no right by birth. This is what is known as obstructed heritage, and such property devolve by succession and not by survivorship. Such a distinction is well known in Hindu Law. Therefore, when Section 8(1)(d) of the Mysore Act refers to the properties passing on to a single coparcener by survivorship, it has reference to the ancestral properties which come to his hands upon partition or otherwise. It is also well settled that if a coparcener dies, his interest devolves upon other coparceners by survivorship. As long as the joint family is in existence, all the coparceners jointly own all the properties. Each coparcener is a full owner of each property owned by the joint family. The effect of partition is severance of status and, as a consequence, each coparcener becomes entitled to separate possession and enjoyment of his share in the joint family properties. Partition by itself does not create a right because the right of a coparcener existed even before partition. It only brings about demarcation of his interest with a right to separate possession and enjoyment. It is therefore, not correct to state that when a coparcener, upon partition, gets his share in the joint family properties, it does not come to him by survivorship. The right which accrues to the coparcener is by operation of the Rule of Survivorship and the partition only demarcates his share in the joint family properties. As observed earlier, unobstructed heritage always devolves by operation of the Rule of Survivorship and there is no exception to this Rule. It has therefore been held that where a father disposes of by a Will, his interest in the joint family properties in favour of his son, the properties in the hands of the son still retain the character of coparcenary property, and not self-acquired property.

I, therefore, hold that the properties to which Chowdappa became entitled, upon partition passed on to him by survivorship. I find no substance in the contention raised on behalf of the respondents that it passed on to him by reason of partition and not by survivorship.

In view of Section 8(1) of the Act, there can be no doubt that a single coparcener such as Chowdappa took the ancestral property, subject to the right to shares of female members of the joint family enumerated in Clauses (a), (b) or (c) of Section 8(1) of the Mysore Act. The plaintiff, being a widow of a pre-deceased son, was entitled to a share equal to one half of the share to which her husband would have been entitled if he were alive [vide Section 8(1) (a) of the Mysore Act]. I therefore hold that the plaintiff is entitled to claim one half of the share which her husband could have claimed if he was alive. In the instant case her husband would have got half share in the properties in a partition between his father and himself in the year 1946 when Chowdappa became a single coparcener. Consequently, she is entitled to 1/4th share in the suit schedule properties." (at para nos.10, 11, 12 and 17)

12. Unfortunately for Shri Bhat, this Court in Sathyaprema Manjunatha Gowda (Smt) v. Controller of Estate Duty, Karnataka, (1997) 10 SCC 684, has taken a view which is directly contrary to the view of the single Judge of the Karnataka High Court.

13. In Sathyaprema's case (supra), the question posed was whether in the facts and circumstances of the case the Tribunal was correct in holding that neither the unmarried daughter nor the wife of the deceased had any interest in the joint family property of the deceased while he was alive. This Court stated that the only question for consideration is whether the estate left by the husband and father of the widow and unmarried daughter respectively on partition was obtained by survivorship applying Section 8(1)(d) of the Act.

14. This Court exhaustively discussed the meaning of the expressions "survivor" and "survivorship" and ultimately held:-

"Here, we are concerned with Manjunatha Gowda who had obtained property at a partition with coparceners. Survivorship, therefore, is the living of one of two or more persons after the death of the others having interest to succeed in the property by succession. The shares in the coparcenery property changes with death or birth of other coparceners. However, in the case of survivorship it is not of the same incidence. He received the property at the partition without there being any other coparcener. It is an individual property and, therefore, he did not receive it by survivorship but by virtue of his status being a coparcener of the Hindu Joint Family along with his father and brothers.

Under these circumstances, the conclusion reached by the High Court that since it is by partition, not by survivorship, clause (d) of sub-section (1) of Section 8 does not get attracted, is not (sic) correct. No doubt, the learned counsel relied upon the judgment of this Court in Nagendra Prasad v. Kempananjamma [AIR 1968 SC 209] which was also considered by the High Court in the impugned judgment. This Court therein has explained that the object of Section 8(1)(d) is to give a right to claim a share in the joint family property to all females referred to in clauses (a) to (c) thereof. Merely because partition by one of the coparceners under clauses (a) to (c) is a condition for a class of family members entitled to a share in the property, it does not apply to a case where class of family members entitled under clause 8(1)(d) since it stands altogether on a different footing and, therefore, partition is not a condition precedent for claiming a share by a class of family members enumerated in Section 8(1)(a) of the Act. But that principle has

no bearing to the facts in this case for the reason that the property held was not received by survivorship. Under these circumstances, family members enumerated under Section 8(1)(d) are notentitled to a share in the estate left by the deceased. Thus we do not find any illegality in the view taken by the High Court warranting interference." (at paragraph nos.13-15)

15. In fact, this follows from a reading of Section 8. Whereas Sections 8(1)(a)(b) and (c) refers to a partition among coparceners in a joint family, sub-section (d) refers to property passing to a single coparcener only by survivorship. In this behalf, in Nagendra Prasad v. Kempananjamma, [1968] 1 SCR 124, this Court by a majority judgment held:-

"This intention can only be given effect to on the basis that clause (d) does not restrict itself to finding out females on the basis of an assumed partition between the last two male coparceners. It is significant that clause (d) gives a right independently of a partition and we do not see why its scope should be restricted by assuming a partition." (at page No.128).

16. In fact, even the dissenting Judge held:-

"Clause (d) applies to a case when the family property passes by survivorship to a sole surviving coparcener. In such a case there can be no partition, as is the case under clause (a) or (b) or (c). Indeed, the property becomes incapable of partition and but for clause (d) no female relative would have any right to a share. To save such a result clause (d) provides that the rights of the female relatives should not be lost only by reason of the property passing to the sole surviving coparcener. Sub-section 5, furthermore, gives such female relatives as fall under subsection 1 a right to have their shares separated and thus makes them co-sharers subject to whose rights the sole surviving coparcener takes the property. Therefore, whereas under clauses (a), (b) and (c) the rights fluctuate according to the position of the female relatives in the family when the partition takes place there is no such uncertainty in the case falling under clause (d) as the sole surviving coparcener takes the property subject to the right to shares of female relatives falling under the provisions of clause (a) or (b) or (c). Such is the scheme of Section 8(1)."

17. The dissenting Judge basically dissented on the point that under sub-clause (d), a partition has to be assumed because it is only on such assumption that females on whom a right to share is conferred can be ascertained. It is clear, therefore, that Section 8(1)(d) can have no application to a case where joint family property passes to a single coparcener not by survivorship but by partition.

A recent view of Section 8(1)(d) in Smt. Ramakka and others v. Smt. Thanamma since deceased by LR, P. Srinivas and Others, ILR 2014 Karnataka 1335, has been taken by a Division Bench of the Karnataka High Court. While construing Section 8(1)(d), the Division Bench has held:-

"When the coparcenary property passes to a sole surviving coparcener, provision has been made in clause (d) of Section 8(1). This clause, in protecting the rights of females, had necessarily to give females the right to share in the coparcenary property even if there be no partition at all, because, on passing of property to a sole surviving coparcener, there could not possibly be any partition sought by the male members of the coparcenary body. The right conferred by clause (d) is, therefore, an independent right and not connected with the rights granted to the females under clauses (a), (b) and (c). The females who are to get benefit are all those to whom a right to a share in the joint family property would have accrued if there had been a partition either under clause (a), or clause (b) or clause (c). The language of clause (d) has to be interpreted as

laying down that right to shares will vest in all females of the joint Hindu family who would have possibly received the right to a share if at any earlier time there had been partition in the family in any of the three manners laid down in clauses (a), (b) and (c). It is significant that clause (d) gives a right independent of a partition and its scope should not be restricted by assuming a partition."

This is the correct view of the law on Section 8(1)(d), and we endorse it.

18. There is also another way of looking at the issue raised in the present appeals. A partition of joint family property among brothers is expressly mentioned in Section 8(1)(b). Therefore, upon partition of joint family property between Thimmappa and his older brother, it is only their mother, their unmarried sisters and widows and unmarried daughters of their pre-deceased undivided brothers who have left no male issue who get a share under the Section. Unlike sub-section (a), unmarried daughters of Thimmappa do not get any share at the partition between Thimmappa and his brother.

19. The ground on which the judgments below rested, namely Section 10(1)(g), was not even sought to be supported by Shri Bhat. And for a very good reason. In order that Section 10(1)(g) apply, first and foremost the property referred to is "stridhana" which is defined as property of every description belonging to a Hindu female other than property in which she has by law or under the terms of an instrument only a limited estate. Under Section 10(1)(g) it is only property taken by inheritance by a female from her husband that is included in stridhana. This would not include the unmarried daughters as property taken by inheritance by a female from her father is not included.

20. In this view of the matter, Shri Hegde is right in saying that the succession to a Hindu male dying intestate will vest only in the widow under Section 4(1)(ii) to the exclusion of the daughters who are mentioned in a subsequent clause i.e. clause (iii) by virtue of the expression "in the following order". This being the case, it is clear that the appeals will have to be allowed and the judgments of the courts below set aside. The suit will stand dismissed as a consequence.

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KRISHNA BHATACHARJEE VS. SARATHI CHOUDHURY

SUPREME COURT OF INDIA

Bench : Hon'ble Mr. Justice Dipak Misra and Hon'ble Mr. Justice Prafulla C. Pant

Krishna Bhatacharjee ... Appellant
Versus
Sarathi Choudhury and Anr. ... Respondents

Criminal Appeal No. 1545 of 2015 (@ SLP(Crl) No. 10223 OF 2014)

Decided on November 20, 2015

... Stridhana property is the exclusive property of the wife on proof that she entrusted the property or dominion over the stridhana property to her husband or any other member of the family, there is no need to establish any further special agreement to establish that the property was given to the husband or other member of the family.

.... It is always a question of fact in each case as to how the property came to be entrusted to the husband or any other member of the family by the wife when she left the matrimonial home or was driven out therefrom.

The Judgment of the Court was delivered by

Hon'ble Mr. Justice Dipak Misra :—

Leave granted.

2. The appellant having lost the battle for getting her Stridhan back from her husband, the first respondent herein, before the learned Magistrate on the ground that the claim preferred under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (for short, 'the 2005 Act') was not entertainable as she had ceased to be an "aggrieved person" under Section 2(a) of the 2005 Act and further that the claim as put forth was barred by limitation; preferred an appeal before the learned Additional Sessions Judge who concurred with the view expressed by the learned Magistrate, and being determined to get her lawful claim, she, despite the repeated non-success, approached the High Court of Tripura, Agartala in Criminal Revision No. 19 of 2014 with the hope that she will be victorious in the war to get her own property, but the High Court, as is perceivable, without much analysis, declined to interfere by passing an order with Spartan austerity possibly thinking lack of reasoning is equivalent to a magnificent virtue and that had led the agonised and perturbed wife to prefer the present appeal, by special leave.

3. Prior to the narration of facts which are essential for adjudication of this appeal, we may state that the 2005 Act has been legislated, as its Preamble would reflect, to provide for more effective protection of the rights of the women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto. The 2005 Act is a detailed Act. The dictionary clause of the 2005 Act, which we shall advert to slightly at a later stage, is in a broader spectrum. The definition of "domestic

violence" covers a range of violence which takes within its sweep "economic abuse" and the words "economic abuse", as the provision would show, has many a facet.

4. Regard being had to the nature of the legislation, a more sensitive approach is expected from the courts where under the 2005 Act no relief can be granted, it should never be conceived of but, before throwing a petition at the threshold on the ground of maintainability, there has to be an apposite discussion and thorough deliberation on the issues raised. It should be borne in mind that helpless and hapless "aggrieved person" under the 2005 Act approaches the court under the compelling circumstances. It is the duty of the court to scrutinise the facts from all angles whether a plea advanced by the respondent to nullify the grievance of the aggrieved person is really legally sound and correct. The principle "justice to the cause is equivalent to the salt of ocean" should be kept in mind. The court of law is bound to uphold the truth which sparkles when justice is done. Before throwing a petition at the threshold, it is obligatory to see that the person aggrieved under such a legislation is not faced with a situation of non-adjudication, for the 2005 Act as we have stated is a beneficial as well as assertively affirmative enactment for the realisation of the constitutional rights of women and to ensure that they do not become victims of any kind of domestic violence.

5. Presently to the narration of the facts. The marriage between the appellant and the respondent No. 1 was solemnised on 27.11.2005 and they lived as husband and wife. As the allegations proceed, there was demand of dowry by the husband including his relatives and, demands not being satisfied, the appellant was driven out from the matrimonial home. However, due to intervention of the elderly people of the locality, there was some kind of conciliation as a consequence of which both the husband and the wife stayed in a rented house for two months. With the efflux of time, the husband filed a petition seeking judicial separation before the Family Court and eventually the said prayer was granted by the learned Judge, Family Court. After the judicial separation, on 22.5.2010 the appellant filed an application under Section 12 of the 2005 Act before the Child Development Protection Officer (CDPO), O/O the District Inspector, Social Welfare & Social Education, A.D. Nagar, Agartala, Tripura West seeking necessary help as per the provisions contained in the 2005 Act. She sought seizure of Stridhan articles from the possession of the husband. The application which was made before the CDPO was forwarded by the said authority to the learned Chief Judicial Magistrate, Agartala Sadar, West Tripura by letter dated 1.6.2010. The learned Magistrate issued notice to the respondent who filed his written objections on 14.2.2011.

6. Before the learned Magistrate it was contended by the respondent that the application preferred by the wife was barred by limitation and that she could not have raised claim as regards Stridhan after the decree of judicial separation passed by the competent court. The learned Magistrate taking into consideration the admitted fact that respondent and the appellant had entered into wedlock treated her as an "aggrieved person", but opined that no "domestic relationship" as defined under Section 2(f) of the 2005 Act existed between the parties and, therefore, wife was not entitled to file the application under Section 12 of the 2005 Act. The learned Magistrate came to hold that though the parties had not been divorced but the decree of judicial separation would be an impediment for entertaining the application and being of this view, he opined that no domestic relationship subsisted under the 2005 Act and hence, no relief could be granted.

Be it stated here that before the learned Magistrate, apart from herself, the appellant examined three witnesses and the husband had examined himself as DW-1. The learned Magistrate while dealing with the maintainability of the petition had noted the contentions of the parties as regards merits, but has really not recorded any finding thereon.

7. The aggrieved wife preferred criminal appeal No. 6(1) of 2014 which has been decided by the learned Additional Sessions Judge, Agartala holding, inter alia, that the object of the 2005 Act is primarily to give immediate relief to the victims; that as per the decision of this Court in ***Inderjit Singh Grewal v. State of Punjab***[1] that Section 468 of the Code of Criminal Procedure applies to the proceedings under the 2005 Act and, therefore, her application was barred by time. Being of this view, the appellate court dismissed the appeal.

8. On a revision being preferred, the High Court, as is demonstrable from the impugned order, after referring to the decision in Inderjit Singh Grewal (supra), has stated that the wife had filed a criminal case under Section 498(A) IPC in the year 2006 and the husband had obtained a decree of judicial separation in 2008, and hence, the proceedings under the 2005 Act was barred by limitation. That apart, it has also in a way expressed the view that the proceedings under the 2005 Act was not maintainable.

9. In our prefatory note, we have stated about the need of sensitive approach to these kinds of cases. There can be erroneous perception of law, but as we find, neither the learned Magistrate nor the appellate court nor the High Court has made any effort to understand and appreciate the stand of the appellant. Such type of cases and at such stage should not travel to this Court. We are compelled to say so as we are of the considered opinion that had the appellate court and the High Court been more vigilant, in all possibility, there could have been adjudication on merits. Be that as it may.

10. The facts that we have enumerated as regards the "status of the parties", "judicial separation" and "the claim for Stridhan" are not in dispute. Regard being had to the undisputed facts, it is necessary to appreciate the scheme of the 2005 Act. Section 2(a) defines "aggrieved person" which means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent. Section 2(f) defines "domestic relationship" which means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family. Section 2(g) defines the term "domestic violence" which has been assigned and given the same meaning as in Section 3. Sub-section (iv) of Section 3 deals with "economic abuse". As in the facts at hand, we are concerned with the "economic abuse", we reproduce Section 3(iv) which reads as follows:-

"Section 3. Definition of domestic violence.

(iv) "economic abuse" includes-

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

1 (2011) 12 SCC 588

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

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

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

Explanation II.-For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes "domestic violence" under this section, the overall facts and circumstances of the case shall be taken into consideration."

11. Section 8(1) empowers the State Government to appoint such number of Protection Officers in each district as it may consider necessary and also to notify the area or areas within which a Protection Officer shall exercise the powers and perform the duties conferred on him by or under the 2005 Act. The provision, as is manifest, is mandatory and the State Government is under the legal obligation to appoint such Protection Officers. Section 12 deals with application to Magistrate. Sub-sections (1) and (2) being relevant are reproduced below:-

"Section 12. Application to Magistrate.-(1) An aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act: Provided that before passing any order on such application, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider.

(2) The relief sought for under sub-section (1) may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent: Provided that where a decree for any amount as compensation or damages has been passed by any court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree and the decree shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, be executable for the balance amount, if any, left after such set off."

12. Section 18 deals with passing of protection orders by the Magistrate. Section 19 deals with the residence orders and Section 20 deals with monetary reliefs. Section 28 deals with procedure and stipulates that all proceedings under Sections 12, 18, 19, 20, 21, 22 and 23 and offences under Section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973.

Section 36 lays down that the provisions of the 2005 Act shall be in addition to, and not in derogation of the provisions of any other law, for the time being in force.

13. Having scanned the anatomy of the 2005 Act, we may now refer to a few decisions of this Courts that have dealt with the provisions of the 2005 Act. In ***V.D. Bhanot v. Savita Bhanot***[2] the question arose whether the provisions of the 2005 Act can be made applicable in relation to an incident that had occurred prior to the coming into force of the said Act. Be it noted, the High Court had rejected the stand of the respondent therein that the provisions of the 2005 Act cannot be invoked if the occurrence had taken place prior to the coming into force of the 2005 Act. This Court while dealing with the same referred to the decision rendered in the High Court which after considering the constitutional safeguards under Article 21 of the Constitution vis-à-vis the provisions of Sections 31 and 33 of the 2005 Act and after examining the Statement of Objects and Reasons for the enactment of the 2005 Act, had held that it was with the view of protecting the rights of women under Articles 14, 15 and 21 of the Constitution that Parliament enacted the 2005 Act in order to provide for some effective protection of rights guaranteed under the Constitution to women, who are victims of any kind of violence occurring within the family and matters connected therewith and incidental thereto, and to provide an efficient and expeditious civil remedy to them and further that a petition under the provisions of the 2005 Act is maintainable even if the acts of domestic violence had been committed prior to the coming into force of the said Act, notwithstanding the fact that in the past she had lived together with her husband in a shared household, but was no more living with him, at the time when the Act came into force. After analyzing the verdict of the High Court, the Court concurred with the view expressed by the High Court by stating thus:-

> *"We agree with the view expressed by the High Court that in looking into a complaint under Section 12 of the PWD Act, 2005, the conduct of the parties even prior to the coming into force of the PWD Act, could be taken into consideration while passing an order under Sections 18, 19 and 20 thereof. In our view, the Delhi High Court has also rightly held that even if a wife, who had shared a household in the past, but was no longer doing so when the Act came into force, would still be entitled to the protection of the PWD Act, 2005."*

14. In ***Saraswathy v. Babu***[3] a two-Judge Bench, after referring to the decision in *V.D. Bhanot* (supra), reiterated the principle. It has been held therein:-

> *"We are of the view that the act of the respondent husband squarely comes within the ambit of Section 3 of the DVA, 2005, which defines "domestic violence" in wide terms. The High Court made an apparent error in holding that the conduct of the parties prior to the coming into force of the DVA, 2005 cannot be taken into consideration while passing an order. This is a case where the respondent husband has not complied with the order and direction passed by the trial court and the appellate court. He also misleads the Court by giving wrong statement before the High Court in the contempt petition filed by the appellant wife. The appellant wife having being harassed since 2000 is entitled for protection order and residence order under Sections 18 and 19 of the DVA, 2005 along with the maintenance as allowed by the trial court under Section 20(1)(d) of the DVA, 2005. Apart from these reliefs, she is also entitled for*

2 (2012) 3 SCC 183
3 (2014) 3 SCC 712

compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by the respondent husband. Therefore, in addition to the reliefs granted by the courts below, we are of the view that the appellant wife should be compensated by the respondent husband. Hence, the respondent is hereby directed to pay compensation and damages to the extent of Rs 5,00,000 in favour of the appellant wife."

15. In the instant case, as has been indicated earlier, the courts below as well as the High Court have referred to the decision in Inderjit Singh Grewal (supra). The said case has to be understood regard being had to the factual exposè therein. The Court had referred to the decision in ***D. Velusamy v. D. Patchaiammal***[4] wherein this Court had considered the expression "domestic relationship" under Section 2(f) of the Act and judgment in Savitaben ***Somabhai Bhatiya v. State of Gujarat***[5] and distinguished the said judgments as those cases related to live-in relationship without marriage. The Court analyzing the earlier judgments opined that the couple must hold themselves out to society as being akin to spouses in addition to fulfilling all other requisite conditions for a valid marriage. The said judgments were distinguished on facts as those cases related to live-in relationship without marriage. The Court opined that the parties therein had got married and the decree of the civil court for divorce subsisted and that apart a suit to declare the said judgment and decree as a nullity was still pending consideration before the competent court. In that background, the Court ruled that:-

"In the facts and circumstances of the case, the submission made on behalf of Respondent 2 that the judgment and decree of a civil court granting divorce is null and void and they continued to be the husband and wife, cannot be taken note of at this stage unless the suit filed by Respondent 2 to declare the said judgment and decree dated 20-3-2008 is decided in her favour. In view thereof, the evidence adduced by her particularly the record of the telephone calls, photographs attending a wedding together and her signatures in school diary of the child cannot be taken into consideration so long as the judgment and decree of the civil court subsists. On a similar footing, the contention advanced by her counsel that even after the decree of divorce, they continued to live together as husband and wife and therefore the complaint under the 2005 Act is maintainable, is not worth acceptance at this stage."

[Emphasis supplied]

16. It may be noted that a submission was advanced by the wife with regard to the applicability of Section 468 CrPC. While dealing with the submission on the issue of limitation, the Court opined:-

"..... in view of the provisions of Section 468 CrPC, that the complaint could be filed only within a period of one year from the date of the incident seem to be preponderous in view of the provisions of Sections 28 and 32 of the 2005 Act read with Rule 15(6) of the Protection of Women from Domestic Violence Rules, 2006 which make the provisions of CrPC applicable and stand fortified by the judgments of this Court in ***Japani Sahoo v. Chandra Sekhar Mohanty,*** *(2007) 7 SCC 394, and* ***NOIDA Entrepreneurs Assn. v. NOIDA****, (2011) 6 SCC 508."*

4 (2010) 10 SCC 46
5 (2005) 3 SCC 636

17. As it appears, the High Court has referred to the same but the same has really not been adverted. In fact, it is not necessary to advert to the said aspect in the present case.

18. The core issue that is requisite to be addressed is whether the appellant has ceased to be an "aggrieved person" because of the decree of judicial separation. Once the decree of divorce is passed, the status of the parties becomes different, but that is not so when there is a decree for judicial separation. A three-Judge Bench in ***Jeet Singh and Others Vs. State of U.P.***[6] though in a different context, adverted to the concept of judicial separation and ruled that the judicial separation creates rights and obligations. A decree or an order for judicial separation permits the parties to live apart. There would be no obligation for either party to cohabit with the other. Mutual rights and obligations arising out of a marriage are suspended. The decree however, does not sever or dissolve the marriage. It affords an opportunity for reconciliation and adjustment. Though judicial separation after a certain period may become a ground for divorce, it is not necessary and the parties are not bound to have recourse to that remedy and the parties can live keeping their status as wife and husband till their lifetime.

19. In this regard, we may fruitfully refer to the authority in ***Hirachand Srinivas Managaonkar v. Sunanda***[7] wherein the issue that arose for determination was whether the husband who had filed a petition seeking dissolution of the marriage by a decree of divorce under Section 13(1-A)(i) of the Hindu Marriage Act, 1955 can be declined relief on the ground that he had failed to pay maintenance for his wife and daughter despite an order of the court. The husband was appellant before this Court and had filed an application under Section 10 of the Hindu Marriage Act, 1955 for seeking judicial separation on the ground of adultery on the part of the appellant. Thereafter, the appellant presented the petition for dissolution of marriage by decree of divorce on the ground that there has been no resumption of cohabitation as between the parties to the marriage for a period of more than one year after passing of the decree for judicial separation. The stand of the wife was that the appellant having failed to pay the maintenance as ordered by the court, the petition for divorce filed by the husband was liable to be rejected inasmuch he was trying to get advantage of his own wrong for getting the relief. The High Court accepted the plea of the wife and refused to grant the prayer of the appellant seeking divorce. It was contended before this Court that the only condition for getting divorce under Section 13(1-A)(i) of the Hindu Marriage Act, 1955 is that there has been no resumption of cohabitation between the parties to the marriage for a period of one year or upwards after the passing of the decree for judicial separation in a proceeding to which both the spouses are parties. It was urged that if the said condition is satisfied the court is required to pass a decree of divorce. On behalf of the wife, the said submissions were resisted on the score that the husband had been living in continuous adultery even after passing of the decree of judicial separation and had reasonably failed to maintain the wife and daughter. The Court proceeded to analyse Section 13(1-A)(i) of the Hindu Marriage Act, 1955. Analysing the provisions at length and speaking about judicial separation, it expressed that after the decree for judicial separation was passed on the petition filed by the wife it was the duty of both the spouses to do their part for cohabitation. The husband was expected to act as a dutiful husband towards the wife and the wife was to act as a devoted wife towards the husband. If this concept of both the spouses making sincere contribution for the purpose of successful cohabitation after a judicial separation is ordered then it can reasonably be said that in the facts and circumstances of the case the husband in refusing to pay maintenance to the wife

6 (1993) 1 SCC 325
7 (2001) 4 SCC 125

failed to act as a husband. Thereby he committed a "wrong" within the meaning of Section 23 of the Act. Therefore, the High Court was justified in declining to allow the prayer of the husband for dissolution of the marriage by divorce under Section 13(1-A) of the Act.

20. And, the Court further stated thus:-

> *"... The effect of the decree is that certain mutual rights and obligations arising from the marriage are as it were suspended and the rights and duties prescribed in the decree are substituted therefor. The decree for judicial separation does not sever or dissolve the marriage tie which continues to subsist. It affords an opportunity to the spouse for reconciliation and readjustment. The decree may fall by a conciliation of the parties in which case the rights of the respective parties which float from the marriage and were suspended are restored. Therefore the impression that Section 10(2) vests a right in the petitioner to get the decree of divorce notwithstanding the fact that he has not made any attempt for cohabitation with the respondent and has even acted in a manner to thwart any move for cohabitation does not flow from a reasonable interpretation of the statutory provisions. At the cost of repetition it may be stated here that the object and purpose of the Act is to maintain the marital relationship between the spouses and not to encourage snapping of such relationship."*

21. It is interesting to note that an issue arose whether matrimonial offence of adultery had exhausted itself when the decree for judicial separation was granted and, therefore, it cannot be said that it is a new fact or circumstance amounting to wrong which will stand as an obstacle in the way of the husband to obtain the relief which he claims in the divorce proceedings. Be it stated that reliance was placed on the decision of Gujarat High Court in ***Bai Mani v. Jayantilal Dahyabhai***[8]. This Court did not accept the contention by holding that living in adultery on the part of the husband is a continuing matrimonial offence, and it does not get frozen or wiped out merely on passing of a decree for judicial separation which merely suspends certain duties and obligations of the spouses in connection with their marriage and does not snap the matrimonial tie. The Court ruled that the decision of the Gujarat High Court does not lay down the correct position of law. The Court approved the principle stated by the Madras High Court in the case of ***Soundarammal v. Sundara Mahalinga Nadar***[9] in which a Single Judge had taken the view that the husband who continued to live in adultery even after decree at the instance of the wife could not succeed in a petition seeking decree for divorce and that Section 23(1)(a) barred the relief.

22. In view of the aforesaid pronouncement, it is quite clear that there is a distinction between a decree for divorce and decree of judicial separation; in the former, there is a severance of status and the parties do not remain as husband and wife, whereas in the latter, the relationship between husband and wife continues and the legal relationship continues as it has not been snapped. Thus understood, the finding recorded by the courts below which have been concurred by the High Court that the parties having been judicial separated, the appellant wife has ceased to be an "aggrieved person" is wholly unsustainable.

23. The next issue that arises for consideration is the issue of limitation. In the application preferred by the wife, she was claiming to get back her stridhan. Stridhan has been described as saudayika by Sir Gooroodas Banerjee in "Hindu Law of Marriage and Stridhan" which is as follows:-

8 AIR 1979 Guj 209
9 AIR 1980 Mad 294

"First, take the case of property obtained by gift. Gifts of affectionate kindred, which are known by the name of saudayika stridhan, constitute a woman's absolute property, which she has at all times independent power to alienate, and over which her husband has only a qualified right, namely, the right of use in times of distress."

24. The said passage, be it noted, has been quoted ***Pratibha Rani v. Suraj Kumar and Another***[10]. In the said case, the majority referred to the stridhan as described in "Hindu Law" by N.R. Raghavachariar and Maine's "Treatise on Hindu Law". The Court after analyzing the classical texts opined that:-

"It is, therefore, manifest that the position of stridhan of a Hindu married woman's property during coverture is absolutely clear and unambiguous; she is the absolute owner of such property and can deal with it in any manner she likes — she may spend the whole of it or give it away at her own pleasure by gift or will without any reference to her husband. Ordinarily, the husband has no right or interest in it with the sole exception that in times of extreme distress, as in famine, illness or the like, the husband can utilise it but he is morally bound to restore it or its value when he is able to do so. It may be further noted that this right is purely personal to the husband and the property so received by him in marriage cannot be proceeded against even in execution of a decree for debt."

25. In the said case, the Court ruled:-

"... a pure and simple entrustment of stridhan without creating any rights in the husband excepting putting the articles in his possession does not entitle him to use the same to the detriment of his wife without her consent. The husband has no justification for not returning the said articles as and when demanded by the wife nor can he burden her with losses of business by using the said property which was never intended by her while entrusting possession of stridhan. On the allegations in the complaint, the husband is no more and no less than a pure and simple custodian acting on behalf of his wife and if he diverts the entrusted property elsewhere or for different purposes he takes a clear risk of prosecution under Section 406 of the IPC. On a parity of reasoning, it is manifest that the husband, being only a custodian of the stridhan of his wife, cannot be said to be in joint possession thereof and thus acquire a joint interest in the property."

26. The decision rendered in the said case was referred for a fresh look by a three-Judge Bench. The three-Judge Bench ***Rashmi Kumar (Smt) v. Mahesh Kumar Bhada***[11] while considering the issue in the said case, ruled that :-

"9. A woman's power of disposal, independent of her husband's control, is not confined to saudayika but extends to other properties as well. Devala says: "A woman's maintenance (vritti), ornaments, perquisites (sulka), gains (labha), are her stridhana. She herself has the exclusive right to enjoy it. Her husband has no right to use it except in distress…." In N.R. Raghavachariar's Hindu Law — Principles and Precedents, (8th Edn.) edited by Prof. S. Venkataraman, one of the renowned Professors of Hindu Law para 468 deals with "Definition of Stridhana". In para 469 dealing with "Sources of acquisition" it is stated that the sources of acquisition of property in a woman's possession are: gifts

10 (1985) 2 SCC 370
11 (1997) 2 SCC 397

before marriage, wedding gifts, gifts subsequent to marriage etc. Para 470 deals with "Gifts to a maiden". Para 471 deals with "Wedding gifts" and it is stated therein that properties gifted at the time of marriage to the bride, whether by relations or strangers, either Adhiyagni or Adhyavahanika, are the bride's stridhana. In para 481 at page 426, it is stated that ornaments presented to the bride by her husband or father constitute her Stridhana property. In para 487 dealing with "powers during coverture" it is stated that saudayika meaning the gift of affectionate kindred, includes both Yautaka or gifts received at the time of marriage as well as its negative Ayautaka. In respect of such property, whether given by gift or will she is the absolute owner and can deal with it in any way she likes. She may spend, sell or give it away at her own pleasure.

10. It is thus clear that the properties gifted to her before the marriage, at the time of marriage or at the time of giving farewell or thereafter are her stridhana properties. It is her absolute property with all rights to dispose at her own pleasure. He has no control over her stridhana property. Husband may use it during the time of his distress but nonetheless he has a moral obligation to restore the same or its value to his wife. Therefore, stridhana property does not become a joint property of the wife and the husband and the husband has no title or independent dominion over the property as owner thereof."

27. After so stating the Court proceeded to rule that stridhana property is the exclusive property of the wife on proof that she entrusted the property or dominion over the stridhana property to her husband or any other member of the family, there is no need to establish any further special agreement to establish that the property was given to the husband or other member of the family. Further, the Court observed that it is always a question of fact in each case as to how the property came to be entrusted to the husband or any other member of the family by the wife when she left the matrimonial home or was driven out therefrom. Thereafter, the Court adverted to the concept of entrustment and eventually concurred with the view in the case of Pratibha Rani (supra). It is necessary to note here that the question had arisen whether it is a continuing offence and limitation could begin to run everyday lost its relevance in the said case, for the Court on scrutiny came to hold that the complaint preferred by the complainant for the commission of the criminal breach of trust under Section 406 of the Indian Penal Code was within limitation.

28. Having appreciated the concept of Stridhan, we shall now proceed to deal with the meaning of "continuing cause of action". In ***Raja Bhadur Singh v. Provident Fund Inspector and Others***[12] the Court while dealing with the continuous offence opined that the expression "continuing offence" is not defined in the Code but that is because the expressions which do not have a fixed connotation or a static import are difficult to define. The Court referred to the earlier decision in ***State of Bihar v. Deokaran Nenshi***[13] and reproduced a passage from the same which is to the following effect:-

"A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or

12 (1984) 4 SCC 222
13 (1972) 2 SCC 890

complied with. On every occasion that such disobedience or non-compliance occurs and reoccurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues, and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all."

29. The Court further observed :-

"This passage shows that apart from saying that a continuing offence is one which continues and a non-continuing offence is one which is committed once and for all, the Court found it difficult to explain as to when an offence can be described as a continuing offence. Seeing that difficulty, the Court observed that a few illustrative cases would help to bring out the distinction between a continuing offence and a non-continuing offence. The illustrative cases referred to by the Court are three from England, two from Bombay and one from Bihar."

30. Thereafter, the Court referred to the authorities and adverted to *Deokaran Nenshi* (supra) and eventually held:-

"The question whether a particular offence is a continuing offence must necessarily depend upon the language of the statute which creates that offence, the nature of the offence and, above all, the purpose which is intended to be achieved by constituting the particular act as an offence..."

31. Regard being had to the aforesaid statement of law, we have to see whether retention of stridhan by the husband or any other family members is a continuing offence or not. There can be no dispute that wife can file a suit for realization of the stridhan but it does not debar her to lodge a criminal complaint for criminal breach of trust. We must state that was the situation before the 2005 Act came into force. In the 2005 Act, the definition of "aggrieved person" clearly postulates about the status of any woman who has been subjected to domestic violence as defined under Section 3 of the said Act. "Economic abuse" as it has been defined in Section 3(iv) of the said Act has a large canvass. Section 12, relevant portion of which have been reproduced hereinbefore, provides for procedure for obtaining orders of reliefs. It has been held in *Inderjit Singh Grewal* (supra) that Section 498 of the Code of Criminal Procedure applies to the said case under the 2005 Act as envisaged under Sections 28 and 32 of the said Act read with Rule 15(6) of the Protection of Women from Domestic Violence Rules, 2006. We need not advert to the same as we are of the considered opinion that as long as the status of the aggrieved person remains and stridhan remains in the custody of the husband, the wife can always put forth her claim under Section 12 of the 2005 Act. We are disposed to think so as the status between the parties is not severed because of the decree of dissolution of marriage. The concept of "continuing offence" gets attracted from the date of deprivation of stridhan, for neither the husband nor any other family members can have any right over the stridhan and they remain the custodians. For the purpose of the 2005 Act, she can submit an application to the Protection Officer for one or more of the reliefs under the 2005 Act. In the present case, the wife had submitted the application on 22.05.2010 and the said authority had forwarded the same on 01.06.2010. In the application, the wife had mentioned that the husband had stopped payment of monthly maintenance from

January 2010 and, therefore, she had been compelled to file the application for stridhan. Regard being had to the said concept of "continuing offence" and the demands made, we are disposed to think that the application was not barred by limitation and the courts below as well as the High Court had fallen into a grave error by dismissng the application being barred by limitation.

32. Consequently, the appeal is allowed and the orders passed by the High Court and the courts below are set aside. The matter is remitted to the learned Magistrate to proceed with the application under Section 12 of the 2005 Act on merits.

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LANDMARK JUDGMENTS ON

ALIMONY & MAINTENANCE

RAJ TALREJA VERSUS KAVITA TALREJA

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Bench: Honble Mr. Justice Adarsh Kumar Goel & Honble Mr. Justice Deepak Gupta

Raj Talreja ..... Appellant(s)
Versus
Kavita Talreja ..... Respondent(s)

Civil Appeal No. 10719 of 2013

Decided on April 24, 2017

Headnotes : Parties to the appeal got married in 1989 according to Hindu rites. Out of this wedlock a son was born in the year 1990.

- **On 19.03.2000, the husband left the matrimonial home and, soon thereafter, on 25.03.2000, filed a petition for grant of a decree of divorce dissolving the marriage.**
- **Though we have held that the acts of the wife in filing false complaints against the husband amounts to cruelty, we are, however, not oblivious to the requirements of the wife to have a decent house where she can live. Her son and daughter-in-law may not continue to live with her forever. Therefore, somepermanent arrangement has to be made for heralimony and residence.**
- **Keeping in view the status of the parties, we direct that the husband shall pay to the wife a sum of Rs. 50,00,000/- (Rupees Fifty Lakhs only) as one time permanent alimony and she will not claim any further amount at any later stage. This amount be paid within three months from today. We further direct that the wife shall continue to live in the house which belongs to the mother of the husband till the husband provides her a flat of similar size in a similar locality. For this purpose, the husband is directed to ensure that a flat of the value up to Rs. 1,00,00,000/- (Rupees One Crore Only) be transferred in the name of his wife and till it is provided, she shall continue to live in the house in which she is residing at present.**

The Judgment of the Court was delivered by

Hon'ble Mr. Justice Deepak Gupta :—

Parties to the appeal got married in 1989 according to Hindu rites. Out of this wedlock a son was born in the year 1990. It is not disputed that till the year 1999 both husband and wife lived together with the parents of the husband. In the year 1999, the couple shifted to their own residence. On 19.03.2000, the husband left the matrimonial home and, soon thereafter, on 25.03.2000, filed a petition for grant of a decree of divorce dissolving the marriage.

2. It is not disputed that the wife filed a suit praying for injunction that the husband should not be permitted to enter the matrimonial home. On 07.11.2000, certain news items appeared in the newspapers in which serious allegations were made against the husband. These newspaper reports were based on the intimation given by the wife. On 04.12.2000, the wife filed a

complaint to the State Women Commission making serious allegations against the husband. Thereafter, on 05.12.2000, she sent a similar letter to the Chief Justice of the High Court as well as the Superintendent of Police. Finally, on 07.12.2000, she made another complaint to the Chief Minister. On 16.03.2001, these complaints were found to be false. On 12.04.2001, a First Information Report (for short the 'FIR') was registered at the instance of the wife against the appellant husband under Section 452, 323 and 341 of the Indian Penal Code. The police investigated the matter and filed a report on 30.04.2001 stating that there is no merit in the FIR. According to the police, the injuries on the person of the wife were self inflictedand she has filed a false FIR. It was recommended that the criminal proceedings be initiated against her underSection 182 of the Indian Penal Code (for short 'IPC'). It is not disputed that till 16.03.2001, such criminal proceedings were initiated against the wife.

3. The husband moved an amendment application in the divorce petition incorporating all these facts andalleging that due to filing of the false complaints before various authorities he had been subjected to cruelty by the wife. This is the only issue raised before us. The learned trial Judge dismissed the petition. The appeal filed by the husband was also dismissed. Hence, this appeal.

4. It would be pertinent to mention that in the year 2012, 11 years after the police had submitted its reportand after proceedings had been initiated against the wife, the wife filed a protest petition against the cancellation of FIR against the husband, in which notice was issued by the court below. However, on a revision being filed by the husband, the revisional court allowed the revision petition and quashed the order of the trial court. As a result, there are no criminal proceedings pending against the husband.

5. We have heard Mr. Gaurav Agrawal, learned counsel for the appellant and Ms. Vibha Datta Makhija, learned senior counsel for the respondent.

6. Mr. Agrawal, learned counsel has contended that the acts of the wife in levelling defamatory allegationsand filing false complaints against the husband amounts to cruelty. On the other hand, Ms. Makhija, learned senior counsel has submitted that her client is not at fault and cruelty has not been proved. She further submits that her client wants the status of being a legally married woman and she prays that the appeal be dismissed.

7. We may now refer to the evidence relied upon by the husband. The first is a newspaper report dated 07.11.2000, in which it is reported that the wife had alleged that she was beaten by her husband and his family members many times for not fulfilling the demand of dowry. There were allegations that she was kept like an orphan and twice attempts had been made to set her on fire. These allegations were made in a letter sent by the wife to the police. Thereafter, the wife sent a similar complaint to various authorities including the State Women Commission, Rajasthan. She sent a telegram to the Chief Justice of the Rajasthan High Court again alleging that her husband and in-laws had attempted to burn her and engaged goondas to eliminate her. Complaint was also made to Chief Minister of Rajasthan. The matter was referred to the police. On investigation by the police, the allegations were found to be totally false. Thereafter, the wife filed a complaint against her husband and 3 other persons alleging house trespass against them and that she had been assaulted and threatened to leave the house. In this case also, the final report of the police is that the complaint is baseless and false and the injuries were self-inflicted.

8. As noted above, these findings of the police have attained finality and as on date there is no criminal case pending against the husband. It is more than obvious that the allegations levelled

by the wife are false. It may be true that these allegations were levelled after the divorce petition had been filed and the wife may have been in an agitated state of mind. However, that did not give her a right to make defamatory statements against the husband. The falseness of the allegations is borne out from the fact that the police did not even find it a fit case to be tried. After the police filed its cancellation report, the wife kept silent andafter 11 years she filed a protest petition.

9. This Court in Para 16 of K. Srinivas Rao v. D.A Deepa has held as follows:

> "16. Thus, to the instances illustrative of mental cruelty noted in Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511, 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."

10. In Ravi Kumar v. Julmidevi, this Court while dealing with the definition of cruelty held as follows:

> "19. It may be true that there is no definition of cruelty under the said Act. Actually such a definition is not possible. In matrimonial relationship, cruelty would obviously mean absence of mutual respectand understanding between the spouses which embitters the relationship and often leads to various outbursts of behaviour which can be termed as cruelty. Sometime cruelty in a matrimonial relationship may take the form of violence, sometime it may take a different form. At times, it may be just an attitude or an approach. Silence in some situations may amount to cruelty.
>
> 20. Therefore, cruelty in matrimonial behaviour defies any definition and its categories can never be closed. Whether the husband is cruel to his wife or the wife is cruel to her husband has to be ascertained and judged by taking into account the entire facts and circumstances of the given caseand not by any predetermined rigid formula. Cruelty in matrimonial cases can be of infinite variety—it may be subtle or even brutal and may be by gestures and words. That possibly explains why Lord Denning in Sheldon v. Sheldon, (1966) 2 WLR 993 held that categories of cruelty in matrimonial cases are never closed."

11. Cruelty can never be defined with exactitude. What is cruelty will depend upon the facts andcircumstances 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 andcolleagues, 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 'the Act'). 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 houseand 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 underSection 182 of IPC.

12. We have perused the judgment of the High Court. The High Court while dealing with the plea of false complaints held that there was no reason to hold that the criminal complaint filed by the respondent-wife was false and mala fide. We are unable to agree with this finding of the High Court and the court below. Both the courts below relied upon the statement of the wife that her husband had often visited her house andshe fulfilled her marital obligations. These observations are not based on any reliable or cogent evidence on record. It is not disputed before us that the wife continues to live in the house which belongs to the mother of the husband whereas the husband lives along with his parents in a separate house and the sonand daughter-in-law of the parties live with the wife. The son is working with the husband. We may note that Ms. Makhija has very fairly stated before us that the husband had always fulfilled his paternal obligations to his son and is continuing to pay maintenance to his wife as fixed by the court.

13. Though we have held that the acts of the wife in filing false complaints against the husband amounts to cruelty, we are, however, not oblivious to the requirements of the wife to have a decent house where she can live. Her son and daughter-in-law may not continue to live with her forever. Therefore, somepermanent arrangement has to be made for heralimony and residence. Keeping in view the status of the parties, we direct that the husband shall pay to the wife a sum of Rs. 50,00,000/- (Rupees Fifty Lakhs only) as one time permanent alimony and she will not claim any further amount at any later stage. This amount be paid within three months from today. We further direct that the wife shall continue to live in the house which belongs to the mother of the husband till the husband provides her a flat of similar size in a similar locality. For this purpose, the husband is directed to ensure that a flat of the value up to Rs. 1,00,00,000/- (Rupees One Crore Only) be transferred in the name of his wife and till it is provided, she shall continue to live in the house in which she is residing at present.

14. The appeal is accordingly allowed. The judgmentand order dated 01.03.2013, passed by the High Court in D.B Civil Miscellaneous Appeal No. 1432 of 2004 andthe judgment and decree dated 05.08.2004, passed by the Family Court, Udaipur in Civil Case No. 56 of 2000 are set aside. The petition for divorce filed by the husband under Section 13 of the Act is decreed andthe marriage of the parties solemnized on 13.04.1989 is dissolved by a decree of divorce. The wife shall be entitled to permanent alimony of Rs. 50,00,000/- (Rupees Fifty Lakhs Only) and a residential flat of the value of up to Rs. 1,00,00,000/- (Rupees One Crore Only), as directed hereinabove. Pending application(s), if any, stand(s) disposed of.

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MRS. ARUNA BASU MULLICK VERSUS MRS. DOROTHEA MITRA

Supreme Court of India

Bench: Hon'ble Mr. Justice Rangnath Misra, Hon'ble Mr. Justice P.N. Bhagwati & Hon'ble Mr. Justice Amarendra Nath Sen

Mrs. Aruna Basu Mullick
Versus
Mrs. Dorothea Mitra

Civil Appeal No. 1997 of 1980.

Decided on 2 August, 1983

Act :

Alimony-Permanent alimony, a decree for-Whether a decree for permanent alimony passed under Section 37 of the Special Marriage Act, 1954, is wiped out with the death of the husband, judgment-debtor.

Words and Phrases- "In the circumstances of either party" and "at the instance of either party" occurring in clause (2) of Section 37 of the Special Marriage Act, 1954, meaning of-Whether referable only to the spouses.

Headnote :

Respondent Dorothea and one Prafulla Kumar Mitra were married under the Special Marriage Act, 1872, in January 1952. Respondent asked for a divorce in 1961 and obtained a decree on May 2, 1962 and as per the decree she was to be paid Rs. 300.0 per month as alimony until she remarries. Respondent levied execution of the decree and the same was compromised and payment of arrears was undertaken to be made in instalments. On March 31, 1965, Mitra executed a will but made no provision therein for the satisfaction of the maintenance decree. He died on April 3, 1965 and the appellant who was the executrix under the will got it duty probated. Since no payment was made by the executrix after December 1975, rcspmldent filed execution in Matrimoniai Case 1 of 1977 claiming recovery of Rs. 19,500.00. Appellant objected to the claim under Section 47 of the Code of Civil Procedure by pleading that the order of alimony not being charged the claim under decree for alimony abated with the death of Mitra. The executing court overruled the objection and the Division Bench of the Calcutta High Court, while dismissing the revision petition, however, granted certificate of appeal to this Court.

Dismissing the appeal, the Court

Held :

1:1. The language of Section 37 does not warrant the conclusion that there is extinguishment of the decree for alimony upon the death of the judgment debtor husband. [519 G]

1:2. The Special Marriage Act is a statute of 1954 made by the Indian Parliament after independence. There is no ambiguity in Section 37 for the interpretation of which it is necessary to go beyond the provision itself. It is one of the settled principles of interpretation

that the Court should lean in favour of sustaining a decree and should not permit the benefits under a decree to be lost unless there be Act, any special reason for it. In incorporating a provision like Section 37 in the Act, Parliament intended to protect the wife at the time of divorce by providing for payment of maintenance. If the husband has left behind an estate at the time of his death there can be no justification for the view that the decree is wiped out and the heirs would succeed to the property without the liability of satisfying' the decree. [523 A-C]

1:3. There is no doubt that matrimonial Proceedings abate on the death of either spouse and legal representatives cannot be brought on record and the proceedings cannot be continued any further and where maintenance has been made a charge on the husband's estate, the death of the husband would not at all effect the decree and notwithstanding such death, the estate can be proceeded against for realisation of the maintenance dues for post death period. But, there is no rationality in the contention that where the matrimonial proceedings have terminated during the lifetime of the husband and a decree has emerged such a decree for maintence or alimony gets extinguished with the death of the husband when any other decree even though not charged on the husband's property would not get so extinguished. A decrees against the husband is executable against the estate of the husband in the hands of the heirs and' there is no personal liability. In law a maintenance decree would not make any difference. The decree indicates that maintenance was payable during the life time of the widow. To make such a decree contingent upon the life of the husband is contrary to the terms and the spirit of the decree. Therefore, the assets left behind by Mitra are liable to be proceeded against in the hands of his legal heirs for satisfaction of the decree for maintenance. [522 C-H]

2. The phrase "at the instance of either party" occurring in sub-section (2) of Section 37 of the Act are not confined to the spouses only. Sub-section 3 clearly provides that on remarriage or on a finding that the wife is not leading a chaste life, the order of maintenance can be rescinded. Upon the husband's death his estate passes on to his legal heirs and intention of the Legislature being clear that upon remarriage or non-leading of a chaste life the benefit conferred by the statute should expire and the estate should become free from the liability of satisfying the decree for maintenance, the application for varying. modifying or rescinding the order for maintenance can be made even by those who have succeeded to the husband's estate and the estate can be freed from the liability. Examining the scheme of the statute and the purpose for which such a provision has been made, it is clear; that the words `either party' would also cover the legal heirs who have stepped into the shoes of the spouses under the law and such persons would also be competent to ask for variation, modification or rescission of the order for maintenance. That term would also include the holders of the estate with lawful title for the time being. [523 E-H, 524 A-B]

JUDGMENT

From the Judgment and order the 25th April 1980 of the Calcutta High Court in C.R. No. 1529 of 1979.

Shanker Ghose, Sobhan Tagore and P.K. Mukherjee for the Appellant.

L.N. Sinha, Attorney General, V. Subba Rao and R.S. Poddar for the Respondent.

R.B. Mehrotra for the Substituted Respondent.

The Judgment of the Court was delivered by

Hon'ble Mr. Justice Ranganath Misra :—

This appeal by certificate from the Calcutta High Court raises the question whether a decree for permanent alimony passed under section 37 of the Special Marriage Act, 1954 (hereinafter referred to as 'the Act'), is wiped out with the death of the husband judgment-debtor. Respondent Dorothea and one Prafulla Kumar Mitra were married under the Special Marriage Act, 1872, in January 1952. Respondent asked for divorce in 1961 and obtained a decree on May 2, 1962, to the effect: "The petitioner's (Dorothea Mitra's) marriage with the respondent Prafulla Kumar Mitra be dissolved by a decree of divorce. The petitioner do get Rs. 300 p.m. as maintenance from the respondent to be paid by the 1st week of each month following for which it is due until she re-marries ....." Respondent levied execution of the decree and the same was compromised and payment of the arrears was undertaken to be made in instalments. Prafulla Kumar Mitra executed a Will on March 31, 1965, but made no provision therein for satisfaction of the maintence decree. He died on April, 3, 1965, and the appellant who was the executrix under the Will got it duly probated. There is no dispute that the executrix paid the maintenance in December 1975 for a period after the death of Prafulla Kumar Mitra. But since no payment was made thereafter, respondent levied execution in Matrimonial Case No. 1/77 claiming recovery of arrears of Rs. 19,500. Appellant objected to the claim under s. 47 of the Code of Civil Procedure by pleading that the order of alimony not being charged, the death of Parfulla Kumar Mitra has extinguished the claim of the purported decree holder. The executing court overruled the objection whereupon the appellant invoked the revisional jurisdiction of the High Court. A Division Bench agreed with the executing Court but while dismissing the revision application, granted certificate of appeal to this Court. The sole controversy is whether the order for alimony got extinguished with the death of Prafulla Kumar Mitra. Admittedly, the order was made in exercise of powers under s. 37 of the Act. lt provides:

"37. Permanent alimony and maintence-(1) Any Court exercising jurisdiction under Chapter V or Chapter VI may, at the time of passing any decree or at any time subsequent to the decree, on application made to it for the purpose, order that the husband shall secure to the wife for her maintenance and support, if necessary, by a charge on the husband's property, such gross sum or such monthly or periodical payment of money for a term not exceeding her life, as having regard to her own property, if any her husband's property and ability and the conduct of the parties, it may seem to the Court to be just; (2) If the District Court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as it may seem to the Court to be just (3) If the District Court is satisfied that the wife in whose favour an order has been made under this section has remarried or is not leading a chaste life, it shall rescind the order."

The language of the section does not warrant the conclusion that there is extinguishment of the decree for alimony upon the death of the judgment-debtor husband. We have been told at the Bar that there is no decision on the point and, therefore, English decisions should be considered for deciding the matter.

Section 37 of the Act more or less corresponds to the provisions of ss. 19, 20 and 22 of the English Matrimonial Causes Act, 1950, except that there is nn corresponding provision in the English Act for sub-s. (3) of the Indian Act. A close look at sub-ss. (2) and (3) of s. 19 of the English Act will

indicate that maintenance can be required to be paid for a term not exceeding the life of the wife or during the joint lives of the husband and tho wife. These two sub-sections of the English Act read thus:

"(2). On any petition for divorce or nullity of marriage the Court may, if it thinks fit, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money or annual sum for any term not exceeding her life, as having regard to her fortune, if any, to the ability of the husband and to the conduct of the parties, the court may deem to be reasonable. (3). On any decree for divorce or nullity of marriage, the court may, if it thinks fit, by order direct the husband to pay to the wife, during their joint lives, such monthly or weekly sum for maintenance and support of the wife as the court may think reasonable, and any such order may either be in addition to or be instead of an order made under the last foregoing sub-section."

We have also been referred to some other English statutes where this distinction has been manintained. In case of a direction for payment during the joint lives, there can be no dispute that on the death of one of the spouses the obligation under the decree ceases. English Courts have taken the view that even where a direction is for payment during the life of the wife, it abates with the death of the husband. In paragraph 891, Vol. 13, Halsbsury' Laws of England, 4th Edn., it has been said that "in the absence of an order directing security for periodical payments the court has no jurisdiction to order a man's personal representatives to make payments for his children after his death." The decision in Sugden v. Sugden,(1) of the Court of Appeal has been relied upon for this view. Lord Denning in the leading judgment said:

"There is no difficulty in an ordinary action in determining when the right or liability accrued due; but there is more difficulty in proceedings in the Divorce Court. In that court there is no right to maintenance, or to a secured provision, or the life, until the court R makes an order directing it. There is therefore no cause of action for such matters until an order is made. In order that the cause of action should subsist at the death, the right under the order must itself have accrued at the time of death. Thus a cause of action subsists against a husband for arrears of maintenance due at his death, but not for later payments."

This view of proceedings in the Divorce Court is supported by the decision of Hodson, J. in Dipple v. Dipple,(1) where he pointed out that "all that the wife had was the hope that the court would in its discretion order a secured provision .. In the present case, there was no right or liability subsisting against the father at the time of his death. He had paid everything up to that time. If there had been any arrears of maintence payable by him at that time, then no doubt they would be payable by his estate after his death under s. 1 (1) of the Act of 1934; but there were no arrears. There was nothing, therefore, to come within the Act of 1934 at all. The right to maintenance after his death must come from the terms of the order itself or not at all." Under the order in Sugden's case the maintenance of 1s. a year for the wife was payable by the husband during their joint lives. On the terms of the order, therefore, the liability was to come to an end upon the death of the husband. We have no difficulty in accepting the submission of Mr. Ghosh for the appellant that matrimonial proceedings abate on the death of either party and legal representatives cannot be brought on record and the proceedings cannot be continued any further. Bowen, L.J. in Stanhope v. Stanhope,(1) very appropriately said:

"A man can no more be divorced after his death, than he can after his death be married or sentenced to death. Marriage is a union of husband and wife for their joint lives, unless it be dissolved sooner, and the court cannot dissolve a union which has already been determined. No person can dissolve a marriage which is dissolved by act of God. If a decree nisi is made, and the husband dies

before it is made absolute, he dies while he is still at law a husband, and his wife becomes his widow. Thus how can a decree be made which would displace a dissolution of the marriage by death, and untie a knot that no longer exists ? How can a woman, once a widow, be converted into a divorcee, unless there is some enactment enabling the court such a retrospective order"

The question to ask at this stage is, while a matrimonial proceeding comes to an end with the death of either spouse, where the proceeding has terminated and a decree has emerged, would the decree also abate.

There can be no manner of doubt and it has also been fairly conceded before us that where maintenance has been made a charge on the husband's estate, the death of the husband would not at all affect the decree and notwithstanding such death, the estate can be proceeded against for realisation of the maintenance dues for post- death period.

Mr. Ghosh had to concede that if there be a decree arising out of a civil action death would not result in wiping out the decree. If decree arising not out of a matrimonial dispute would not abate and the estate of the judgment-debtor would be liable for its satisfaction and a decree for alimony or maintenance would not abate when the same is charged upon the husband's estate, we asked Mr. Ghosh to indicate the justification for his contention that a decree for maintenance or alimony not charged upon the husband's estate would abate with the death of the husband. Apart from relying on the English decisions, Mr. Ghosh was not able to indicate any independent reason. We have not been able to find any legal principle in the cases placed before us except that the view taken in the English Courts appears to be based on precedents. There is no rationality in the contention that a decree for maintenance or alimony gets extinguished with the death of the husband when any other decree even though not charged on the husband's property would not get so extinguished. A decree against the husband is executable against the estate of the husband in the hands of the heirs and there is no personal liability. In law a maintenance decree would not make any difference. The decree indicates that maintenance was payable during the life time of the widow. To make such a decree contingent upon the life of the husband is contrary to the terms and the spirit of the decree and the appellant has taken a stand that though the widow is alive, the decree obtained by her would become ineffective with the passing away of the husband.

The Special Marriage Act is a statute of 1954 made by the Indian Parliament after independence. For the interpreation of a provision of this statute there is no warrant to be guided by English decisions. There is no ambiguity in s. 37 for the interpretation of which it is necessary to go beyond the provision itself. It is one of the settled principles of interpretation that the Court should lean in favour of sustaining a decree and should not permit the benefits under a decree to be lost unless there be any special reason for it. In incorporating a provision like s. 37 in the Act, Parliament intended to protect the wife at the time of divorce by providing for payment of maintenance. If the husband has left behind an estate at the time of his death there can be no justification for the view that the decree is wiped out and the heirs would succeed to the property without the liability of satisfying the decree.

We are incline(1 to agree with the view of the Calcutta High Court that the decree in the instant case was not extinguished with the death of Prafulla Kumar Mitra and the assets left behind by him are liable to be proceeded against in the hands of his legal heirs for satisfaction of the decree for maintenance.

Before the Calcutta High Court it had been contended that the phrase 'at the instance of either party' occurring in sub-s. (2) of s. 37 would cover the husband and the wife and no one else and on

this meaning given to the phrase, support was sought for the contention that the order of maintenance was intended to continue only during the life of the husband. This question was left open by the High Court. We, however, see no justification for the view that the phrase should be confined to the spouses. There is no dispute that the order for maintenance can be varied or rescinded with change of circumstances. Sub-section (3) clearly provides that on remarriage or on a finding that the wife is not leading a chaste life, the order of maintenance can be rescinded. Upon the husband's death his estate passes on to his legal heirs and the intention of the Legislature being clear that upon remarriage or non-leading of a chaste life, the benefit conferred by the statute should empire and the estate should become free from the liability of satisfying the decree for maintenance, the application for varying, modifying or rescinding the order for maintenance can be made even by those who have succeeded to the husband's estate and the estate can be freed from the liability. There is nothing in the provision to support the view that the words 'either party' should be confined to the spouses. Examining the scheme of the statute and the purpose for which such a provision has been made, we are inclined to agree with the learned counsel for the respondent that the words 'either party' would also cover the legal heirs who have stepped into the shoes of the spouses under the law and such persons would also be competent to ask for variation, modification or rescission of the order for maintenance. That term would also include the holders of the estate with lawful title for the time being. Once such a meaning is given to the phrase, the support which Mr. Ghosh wanted to draw by restricting the phrase to spouses and contending that it indicated the legislative intention that the order of maintenance should survive only until the life time of the husband, loses force.

We accordingly dismiss the appeal and confirm the order of Calcutta High Court. The respondent shall be entitled to her costs throughout.

Appeal dismissed

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SHAMIM BANO VERSUS ASRAF KHAN

(2014) 12 Supreme Court Cases 636

Bench: Hon'ble Mr. Justice Dipak Misra & Hon'ble Mr. Justice Vikramajit Sen

Shamim Bano … Appellant
Versus
Asraf Khan …Respondent

Criminal Appeal No. 820 of 2014

decided on April 16, 2014

Criminal Procedure Code, 1973 — S. 125 — Maintainability of claim under — Muslim wife claiming maintenance under S. 125 CrPC — Subsequently divorce took place — Wife as a consequence of divorce taking recourse to S. 3 of Muslim Women (Protection of Rights on Divorce) Act, 1986 for grant of mahr and return of articles and obtaining relief — Application under S. 125 CrPC, held, not to be restricted to the date of divorce and, as arrancillary to it, further held, filing of application under S. 3 of the 1986 Act after divorce for grant of mahr and return of gifts would not disentitle the wife to sustain her application under S. 125 CrPC — Lastly, regard being had to present fact situation, consent under S. 5 of the 1986 Act was not imperative to maintain application under S. 125 CrPC — Thus, having regard to fact that High Court rejected the challenge to dismissal of application under S. 125 CrPC mainly guided by issue as to maintainability of that application, matter remitted to trial Magistrate for re-adjudication of controversy in question keeping in view the principles stated herein — Muslim Women (Protection of Rights on Divorce) Act, 1986, Ss. 3 and 5

The appellant and the respondent were married as per the Muslim Shariyat law. At the instance of the appellant, a criminal case under Section 498-A read with Section 34 IPC was lodged against the respondent husband and his family members. But all the accused in the said case were acquitted. During pendency of the said case, the appellant filed an application under Section 125 CrPC for grant of maintenance on the ground of desertion and cruelty. While the said application was pending, divorce between the appellant and the respondent took place. At that juncture, the appellant filed an application under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as "the 1986 Act"). The Magistrate hearing the application preferred under Section 125 CrPC, dismissed the same on the ground that the appellant had not been able to prove her case. But, while dealing with the application preferred under Section 3 of the 1986 Act, the Magistrate allowed that application directing the husband and others to pay a sum of Rs 11,786 towards mahr, return of goods and ornaments and a sum of Rs 1750 towards maintenance during the iddat period.

Being aggrieved with the order not granting maintenance, the appellant approached the Revisional Court, but did not succeed. Thereafter, the appellant approached the High Court by way of a petition under Section 482 CrPC. The High Court, after referring to certain authorities, held that a Muslim woman was entitled to claim maintenance under Section 125 CrPC even beyond the period of Iddat if she was unable to maintain herself; that where an application under Section 3 of the 1986 Act had already been moved, the applicability of the provisions contained in Sections 125 to 128 CrPC in

the matter of claim of maintenance would depend upon exercise of statutory option by the divorced woman and her former husband by way of declaration either in the form of affidavit or in any other declaration in writing in such format as has been provided either jointly or separately that they would prefer to be governed by the provisions of the CrPC; that the applicability of Sections 125 to 128 CrPC would depend upon exercise of statutory option available to parties under Section 5 of the 1986 Act and as the appellant wife had taken recourse to the provisions contained in the 1986 Act, it was to be concluded that she was to be governed by the provisions of the 1986 Act; that the claim of the appellant under Section 125 CrPC until she was divorced would be maintainable but after the divorce on filing of an application under Section 3 of the 1986 Act, the claim of maintenance, in the absence of exercise of option under Section 5 of the 1986 Act to be governed by Section 125 CrPC, was to be governed by the provisions contained in the

1986 Act; that as the application under Section 3 of the 1986 Act had already been allowed and that was affirmed by the High Court too, the claim of the appellant for grant of maintenance had to be confined only to the period before her divorce; and that the courts below had rightly concluded that the wife was not entitled to maintenance as she had not been able to make out a case for grant of maintenance under Section 125 CrPC; and further that the said orders deserved affirmation as interim maintenance was granted during the pendency of the proceeding up to the date of divorce. Being of this view, the High Court declined to interfere with the orders of the courts below in exercise of inherent jurisdiction. Hence the present appeal.

The two seminal issues that arose for consideration were: (i) whether the appellant's application for grant of maintenance under Section 125 CrPC was to be restricted to the date of divorce and, as an ancillary to it, whether filing of an application under Section 3 of the 1986 Act after the divorce for grant of mahr and return of gifts would disentitle the appellant to sustain her application under Section 125 CrPC; and (ii), whether regard being had to the present fact situation, the consent under Section 5 of the 1986 Act was an imperative to maintain the application under Section 125 CrPC.

Allowing the appeal, the Supreme Court

Held :

The High Court held that as the appellant had already taken recourse to Section 3 of the 1986 Act after divorce took place and obtained relief which has been upheld by the High Court, the application for grant of maintenance under Section 125 CrPC would only be maintainable till she was divorced. It is to be noted that the divorce took place during the pendency of the appellant's application under Section 125 CrPC. The appellant preferred an application under Section 3 of the 1986 Act for grant of mahr and return of articles. The Magistrate directed for return of the articles, payment of quantum of mahr and also thought it appropriate to grant maintenance for the iddat period. Thus, in effect, no maintenance had been granted to the wife beyond the iddat period by the Magistrate as the petition was different. That apart, the authoritative interpretation in Danial Latifi, (2001) 7 SCC 740, was not available. In any case, it would be travesty of justice if the appellant would be made remediless. Her application under Section 125 CrPC was continuing. The husband contested the same on merits without raising the plea of absence of consent. Even if an application under Section 3 of the 1986 Act for grant of maintenance was filed, the parameters of Section 125 CrPC would have been made applicable. Quite apart from that, the application for grant of maintenance was filed prior to the date of divorce and hearing of the application continued. (Para 15)

Regard being had to the dictum in Khatoon Nisa, (2014) 12 SCC 646, seeking of option under Section 5 of the 1986 Act would not make any difference. The High Court is not correct in opining that when the appellant wife filed application under Section 3 of the 1986 Act, she exercised her option. As the Magistrate still retains the power of granting maintenance under Section 125 CrPC to a divorced Muslim woman and the proceeding was continuing without any objection and the ultimate result would be the same, there was no justification on the part of the High Court to hold that the proceeding after the divorce took place was not maintainable. (Paras 13 and 17)

The High Court was principally guided by the issue of maintainability and affirmed the findings of the courts below. In this view, the matter is remitted to the trial Magistrate for re-adjudication of the controversy in question keeping in view the principles stated herein. Be it clarified, if, in the meantime, the appellant has remarried, the same has to be taken into consideration. It would be open to the appellant wife to file a fresh application for grant of interim maintenance, if so advised.

(Paras 18 and 19)

Danial Latifi v. Union of India, (2001) 7 SCC 740 : (2007) 3 SCC (Cri) 266; *Khatoon Nisa v. State of U.P.*, (2014) 12 SCC 646; *Shabana Bano v. Imran Khan*, (2010) 1 SCC 666 : (2010) 1 SCC (Civ) 216 : (2010) 1 SCC (Cri) 873, *applied*

Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556 : 1985 SCC (Cri) 245, *considered*

Shamim Bano v. AsrafKhan, Misc. Criminal Case No. 188 of 2005, order dated 1-3-2012 (Chh), reversed

W-M/53216/SRV

Advocates who appeared in this case:

Fakhruddin, Senior Advocate (Raj Kishor Choudhary, Ms Neeru Sharma and Surya Kamal Mishra (for T. Mahipal) Advocates, for the Appellant;

Kaustubh Anshuraj and Vikrant Singh Bais, Advocates, for the Respondent.

Chronological list of cases cited on page(s)

1. (2014) 12 SCC 646, Khatoon Nisa v. State of U.P. 643c-d, 644e, 645c-d
2. Misc. Criminal Case No. 188 of 2005, order dated 1-3-2012 (Chh), Shamim Bano v. Asraf Khan (reversed) 640a
3. (2010) 1 SCC 666 : (2010) 1 SCC (Civ) 216 : (2010) 1 SCC (Cri) 873, Shabana Bano v. Imran Khan 644c, 644c-d
4. (2001) 7 SCC 740 : (2007) 3 SCC (Cri) 266", Danial Latifi v. Union of India 641d, 641e-f, 642a, 642d-e, 643a, 643e-f, 643g-h, 644c-d, 644g-h
5. (1985) 2 SCC 556 : 1985 SCC (Cri) 245, Mohd. Ahmed Khan v. Shah BanoBegum 641a-b, 641d-e, 642a-d

The Judgment of the Court was delivered by

Hon'ble Mr. Justice Dipak Misra :—

Leave granted. The appellant, Shamim Bano, and the respondent, Asraf Khan, were married on 17.11.1993 according to the Muslim Shariyat law. As the appellant was meted with cruelty and torture by the husband and his family members regarding demand of dowry, she was compelled to lodge a report at the Mahila Thana, Durg, on 6.9.1994, on the basis of which a criminal case under Section 498-A read with Section 34 IPC was initiated and, eventually, it was tried by the learned Magistrate at Rajnandgaon who acquitted the accused persons of the said charges.

2. Be it noted, during the pendency of the criminal case under Section 498-A/34 IPC before the trial court, the appellant filed an application under Section 125 of the Code of Criminal Procedure (for short "the Code") in the Court of Judicial Magistrate First Class, Durg for grant of maintenance on the ground of desertion and cruelty. While the application for grant of maintenance was pending, divorce between the appellant and the respondent took place on 5.5.1997. At that juncture, the appellant filed Criminal Case No. 56 of 1997 under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (for brevity "the Act") before the learned Judicial Magistrate First Class, Durg. The learned Magistrate, who was hearing the application preferred under Section 125 of the Code, dismissed the same on 14.7.1999 on the ground that the appellant had not been able to prove cruelty and had been living separately and hence, she was not entitled to get the benefit of maintenance. The learned Magistrate, while dealing with the application preferred under Section 3 of the Act, allowed the application directing the husband and others to pay a sum of Rs.11,786/- towards mahr, return of goods and ornaments and a sum of Rs.1,750/- towards maintenance during the *Iddat* period.

3. Being grieved by the order not granting maintenance, the appellant filed Criminal Revision No. 275 of 1999 and the revisional court concurred with the view expressed by the learned Magistrate and upheld the order of dismissal. The aforesaid situation constrained the appellant to invoke the jurisdiction of the High Court under Section 482 of the code in Misc. Crl. Case No. 188 of 2005. Before the High Court a preliminary objection was raised on behalf of the respondent-husband that the petition under Section 125 of the Code was not maintainable by a divorced woman without complying with the provisions contained in Section 5 of the Act. It was further put forth that initial action under Section 125 of the Code by the appellant wife was tenable but the same deserved to be thrown overboard after she had filed an application under Section 3 of the Act for return of gifts and properties, for payment of mahr and also for grant of maintenance during the 'Iddat' period. It was also urged that the wife was only entitled to maintenance during the Iddat period and the same having been granted in the application, which was filed after the divorce, grant of any maintenance did not arise in exercise of power under Section 125 of the Code. Quite apart from the above, both the parties also had advanced certain contentions with regard to obtaining factual score.

4. The High Court, after referring to certain authorities, came to hold[1] that a Muslim woman is entitled to claim maintenance under Section 125 of the Code even beyond the period of Iddat if she was unable to maintain herself; that where an application under Section 3 of the Act had already been moved, the applicability of the provisions contained in Sections 125 to 128 of the Code in the matter of claim of maintenance would depend upon exercise of statutory option by the divorced woman and her former husband by way of declaration either in the form of affidavit or in any other declaration in writing in such format as has been provided either jointly or separately that they would be preferred to be governed by the provisions of the Code; that the applicability of Sections 125 to 128 of the Code would depend upon exercise of statutory option available to parties under Section 5 of the Act and as the appellant-wife had taken recourse to the provisions contained in the Act, it was to be concluded that she was to be governed by the provisions of the Act; that the claim of the appellant under Section 125 of the Code until she was divorced would be maintainable but after the divorce on filing of an application under Section 3 of the Act, the claim of maintenance, in the absence of exercise of option under Section 5 of the Act to be governed by Section 125 of the Code, was to be governed by the provisions contained

1 Shamim Bano v. Asraf Khan, Criminal Case No. 188 of 2005, order dated 1-3-2012 (Chh)

in the Act; that as the application under Section 3 of the Act having already been dealt with by the learned Magistrate and allowed and affirmed by the High Court under Section 482 of the Code, the claim of the appellant for grant of maintenance had to be confined only to the period before her divorce; and that the courts below had rightly concluded that the wife was not entitled to maintenance as she had not been able to make out a case for grant of maintenance under Section 125 of the Code; and further that the said orders deserved affirmation as interim maintenance was granted during the pendency of the proceeding upto the date of divorce. Being of this view, the High Court declined to interfere with the orders of the courts below in exercise of inherent jurisdiction.

5. We have heard Mr. Fakhruddin, learned senior counsel appearing for the appellant, and Mr. Kaustubh Anshuraj, learned counsel appearing for the respondent.

6. The two seminal issues that emanate for consideration are, first, whether the appellant's application for grant of maintenance under Section 125 of the Code is to be restricted to the date of divorce and, as an ancillary to it, because of filing of an application under Section 3 of the Act after the divorce for grant of mahr and return of gifts would disentitle the appellant to sustain the application under Section 125 of the Code; and second, whether regard being had to the present fact situation, as observed by the High Court, the consent under Section 5 of the Act was an imperative to maintain the application.

7. To appreciate the central controversy, it is necessary to sit in a time machine for apt recapitulation. In ***Mohd. Ahmed Khan v. Shah Bano Begum***[2], entertaining an application under Section 125 of the Code, the learned Magistrate had granted monthly maintenance for a particular sum which was enhanced by the High Court in exercise of revisional jurisdiction. The core issue before the Constitution Bench was whether a Muslim divorced woman was entitled to grant of maintenance under Section 125 of the Code. Answering the said issue, after referring to number of texts and principles of Mohammedan Law, the larger Bench opined that taking the language of the statute, as one finds it, there is no escape from the conclusion that a divorced Muslim wife is entitled to apply for maintenance under Section 125 of the Code and that mahr is not such a quantum which can ipso facto absolve the husband of the liability under the Code, and would not bring him under Section 127(3)(b) of the Code.

8. After the aforesaid decision was rendered, the Parliament enacted the Act. The constitutional validity of the said Act was assailed in ***Danial Latifi and another v. Union of India***[3] wherein the Constitution bench referred to the Statement of Objects and Reasons of the Act, took note of the true position of the ratio laid down in *Shah Bano*[2] case and after adverting to many a facet upheld the constitutional validity of the Act. While interpreting Sections 3 and 4 of the Act, the Court came to hold that the intention of the Parliament is that the divorced woman gets sufficient means of livelihood after the divorce and, therefore, the word "provision" indicates that something is provided in advance for meeting some needs. Thereafter, the Court proceeded to state thus: (*Danial Latifi* case[3], SCC pp. 760-61, para 28)

> *"28. ... In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her clothes, and other articles. The expression "within" should be*

2 (1985) 2 SCC 556
3 (2001) 7 SCC 740

read as "during" or "for" and this cannot be done because words cannot be construed contrary to their meaning as the word "within" would mean "on or before", "not beyond" and, therefore, it was held that the Act would mean that on or before the expiration of the iddat period, the husband is bound to make and pay maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided in Section 3(3) but nowhere has Parliament provided that reasonable and fair provision and maintenance is limited only for the iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time."

9. In the said case the Constitution Bench[3] observed that in actuality the Act has codified the rationale contained in *Shah Bano's case*2. While interpreting Section 3 of the Act, it was observed that the said provision provides that a divorced woman is entitled to obtain from her former husband "maintenance", "provision" and "mahr", and to recover from his possession her wedding presents and dowry and authorizes the Magistrate to order payment or restoration of these sums or properties and further indicates that the husband has two separate and distinct obligations: (1) to make a "reasonable and fair provision" for his divorced wife; and (2) to provide "maintenance" for her. The Court further observed that the emphasis of this section is not on the nature or duration of any such "provision" or "maintenance", but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely, "within the iddat period", and if the provisions are so read, the Act would exclude from liability for post-iddat period maintenance to a man who has already discharged his obligations of both "reasonable and fair provision" and "maintenance" by paying these amounts in a lump sum to his wife, in addition to having paid his wife's mahr and restored her dowry as per Sections 3(1)(c) and 3(1)(d) of the Act.

10. Thereafter the larger Bench opined thus: (*Danial Latifi* case[3], SCC pp. 762, para 30-31)

"30. A comparison of these provisions with Section 125 CrPC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support are satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by us from the one provided under the Code of Criminal Procedure deprive them of their right, loses its significance. The object and scope of Section 125 CrPC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled, we find it difficult to accept the contention urged on behalf of the petitioners.

31. Even under the Act, the parties agree that the provisions of Section 125 CrPC would still be attracted and even otherwise, the Magistrate has been conferred with the power to make appropriate provision for maintenance and, therefore, what could be earlier granted by a Magistrate under Section 125 CrPC would now be granted under the very Act itself. This being the position, the Act cannot be held to be unconstitutional."

11. Eventually the larger Bench in *Danial Latifi* case[3] concluded that a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes

her maintenance as well and such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3 of the Act; that liability of a Muslim husband to his divorced wife arising under Section 3 of the Act to pay maintenance is not confined to the iddat period; and that a divorced Muslim woman who has not remarried and who is not able to maintain herself after the iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents and if any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.

12. At this Juncture, it is profitable to refer to another Constitution Bench decision in ***Khatoon Nisa v. State of U.P. and Ors.***,[4] wherein question arose whether a Magistrate is entitled to invoke his jurisdiction under Section 125 of the Code to grant maintenance in favour of a divorced Muslim woman. Dealing with the said issue the Court ruled that subsequent to the enactment of the Act as it was considered that the jurisdiction of the Magistrate under Section 125 of the Code can be invoked only when the conditions precedent mentioned in Section 5 of the Act are complied with. The Court noticed that in the said case the Magistrate had returned a finding that there having been no divorce in the eye of law, he had the jurisdiction to grant maintenance under Section 125 of the Code. The said finding of the magistrate had been upheld by the High Court. The Constitution Bench, in that context, ruled thus: (SCC p. 649, para 10)

> *"10. ... The validity of the provisions of the Act was for consideration before the constitution bench in the case of Danial Latifi and Anr. v. Union of India[3]. In the said case by reading down the provisions of the Act, the validity of the Act has been upheld and it has been observed that under the Act itself when parties agree, the provisions of Section 125 Cr.P.C. could be invoked as contained in Section 5 of the Act and even otherwise, the magistrate under the Act has the power to grant maintenance in favour of a divorced woman, and the parameters and considerations are the same as those in Section 125 Cr.P.C.. It is undoubtedly true that in the case in hand, Section 5 of the Act has not been invoked. Necessarily, therefore, the magistrate has exercised his jurisdiction under Section 125 Cr.P.C. But, since the magistrate retains the power of granting maintenance in view of the constitution bench decision in Danial Latifi's case[3] under the Act and since the parameters for exercise of that power are the same as those contained in Section 125 Cr.P.C., we see no ground to interfere with the orders of the magistrate granting maintenance in favour of a divorced Muslim woman."*

13. The aforesaid principle clearly lays down that even an application has been filed under the provisions of the Act, the Magistrate under the Act has the power to grant maintenance in favour of a divorced Muslim woman and the parameters and the considerations are the same as stipulated in Section 125 of the Code. We may note that while taking note of the factual score to the effect that the plea of divorce was not accepted by the Magistrate which was upheld by the High Court, the Constitution Bench opined that as the Magistrate could exercise power under Section 125 of the Code for grant of maintenance in favour of a divorced Muslim woman under the Act, the order did not warrant any interference. Thus, the emphasis was laid on the retention of the power by the Magistrate under Section 125 of the Code and the effect of ultimate consequence.

4 2002 (6) SCALE 165

14. Slightly recently, in ***Shabana Bano v. Imran Khan***[5], a two-Judge Bench, placing reliance on *Danial Latifi*[3], has ruled that: (Shabana Bano case[5], SCC p. 672, para 21)

> *"21. ... The appellant's petition under Section 125 CrPC would be maintainable before the Family Court as long as the appellant does not remarry. The amount of maintenance to be awarded under Section 125 CrPC cannot be restricted for the iddat period only."*

Though the aforesaid decision was rendered interpreting Section 7 of the Family Courts Act, 1984, yet the principle stated therein would be applicable, for the same is in consonance with the principle stated by the Constitution Bench in *Khatoon Nisa*[4].

15. Coming to the case at hand, it is found that the High Court has held that as the appellant had already taken recourse to Section 3 of the Act after divorce took place and obtained relief which has been upheld by the High Court, the application for grant of maintenance under Section 125 of the Code would only be maintainable till she was divorced. It may be noted here that during the pendency of her application under Section 125 of the Code the divorce took place. The wife preferred an application under Section 3 of the Act for grant of mahr and return of articles. The learned Magistrate, as is seen, directed for return of the articles, payment of quantum of mahr and also thought it appropriate to grant maintenance for the Iddat period. Thus, in effect, no maintenance had been granted to the wife beyond the Iddat period by the learned Magistrate as the petition was different. We are disposed to think so as the said application, which has been brought on record, was not filed for grant of maintenance. That apart, the authoritative interpretation in *Danial Latifi*[3] was not available. In any case, it would be travesty of justice if the appellant would be made remediless. Her application under Section 125 of the Code was continuing. The husband contested the same on merits without raising the plea of absence of consent. Even if an application under Section 3 of the Act for grant of maintenance was filed, the parameters of Section 125 of the Code would have been made applicable. Quite apart from that, the application for grant of maintenance was filed prior to the date of divorce and hearing of the application continued.

16. Another aspect which has to be kept uppermost in mind is that when the marriage breaks up, a woman suffers from emotional fractures, fragmentation of sentiments, loss of economic and social security and, in certain cases, inadequate requisites for survival. A marriage is fundamentally a unique bond between two parties. When it perishes like a mushroom, the dignity of the female fame gets corroded. It is the law's duty to recompense, and the primary obligation is that of the husband. Needless to emphasise, the entitlement and the necessitous provisions have to be made in accordance with the parameters of law.

17. Under these circumstances, regard being had to the dictum in Khatoon Nisa's case, seeking of option would not make any difference. The High Court is not correct in opining that when the appellant-wife filed application under Section 3 of the Act, she exercised her option. As the Magistrate still retains the power of granting maintenance under Section 125 of the Code to a divorced Muslim woman and the proceeding was continuing without any objection and the ultimate result would be the same, there was no justification on the part of the High Court to hold that the proceeding after the divorce took place was not maintainable.

18. It is noticed that the High Court has been principally guided by the issue of maintainability and affirmed the findings. Ordinarily, we would have thought of remanding the matter to the High Court for reconsideration from all spectrums but we think it appropriate that the matter should be heard and dealt with by the Magistrate so that parties can lead further evidence. Be it clarified,

5 (2010) 1 SCC 666

if, in the meantime, the appellant has remarried, the same has to be taken into consideration, as has been stated in the aforestated authorities for grant of maintenance. It would be open to the appellant-wife to file a fresh application for grant of interim maintenance, if so advised. Be it clarified, we have not expressed anything on the merits of the case.

19. In the result, the appeal is allowed and the impugned orders are set aside and the matter is remitted to the learned Magistrate for re-adjudication of the controversy in question keeping in view the principles stated hereinabove.

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SHABANA BANO VERSUS IMRAN KHAN

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

Bench: Hon'ble Mr. Justice B. Sudershan Reddy & Hon'ble Mr. Justice Deepak Verma

Shabana Bano ....Appellant
Versus
Imran Khan ....Respondent

Crl.A. @ SLP(Crl.)NO.717/09

CRIMINAL APPEAL NO.2309 OF 2009
[Arising out of S.L.P.(Crl.) No.717 of 2009]
(2010) 1 SCC 666

The point stands settled by judgment of this Court reported in (2001) 7 SCC 740 titled Danial Latifi & Anr. Vs. Union of India pronounced by a Constitution Bench of this Court. Paras 30, 31 and 32 thereof fully establish the said right of the appellant. The said paragraphs are reproduced herein under:

i) A comparison of these provisions with Section 125 CrPC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support are satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by us from the one provided under the Code of Criminal Procedure deprive them of their right, loses its significance. The object and scope of Section 125 CrPC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled, we find it difficult to accept the contention urged on behalf of the petitioners.

ii) Even under the Act, the parties agreed that the provisions of Section 125 CrPC would still be attracted and even otherwise, the Magistrate has been conferred with the power to make appropriate provision for maintenance and, therefore, what could be earlier granted by a Magistrate under Section 125 CrPC would now be granted under the very Act itself. This being the position, the Act cannot be held to be unconstitutional.

As on the date the Act came into force the law applicable to Muslim divorced women is as declared by this Court in Shah Bano's case [(1985) 2 SCC 556 Mohd. Ahmed Khan vs. Shah Bano Begum & Ors.]. In this case to find out the personal law of Muslims with regard to divorced women's rights, the starting point should be Shah Bano's case and not the original texts or any other material - all the more so when varying versions as to the authenticity of the source are shown to exist. Hence, we have refrained from referring to them in detail. That declaration was made after considering the Holy Quran, and other commentaries or other texts. When a Constitution Bench of this Court analysed Suras 241-242 of Chapter II of the Holy Quran and other relevant textual material, we do not think, it is open for us to re-examine that position and delve into a research to reach another

conclusion. We respectfully abide by what has been stated therein. All that needs to be considered is whether in the Act specific deviation has been made from the personal laws as declared by this Court in Shah Bano's case without mutilating its underlying ratio. We have carefully analysed the same and come to the conclusion that the Act actually and in reality codifies what was stated in Shah Bano's case. The learned Solicitor General contended that what has been stated in the Objects and Reasons in Bill leading to the Act is a fact and that we should presume to be correct. We have analysed the facts and the law in Shah Bano's case and proceeded to find out the impact of the same on the Act. If the language of the Act is as we have stated, the mere fact that the Legislature took note of certain facts in enacting the law will not be of much materiality."

The appellant's petition under Section 125 of the Cr.P.C. would be maintainable before the Family Court as long as appellant does not remarry. The amount of maintenance to be awarded under Section 125 of the Cr.P.C. cannot be restricted for the iddat period only.

JUDGMENT

Hon'ble Mr. Justice Deepak Verma:—

1. Leave granted.

2. Appellant Shabana Bano was married to the respondent Imran Khan according to Muslim rites at Gwalior on 26.11.2001. According to the appellant, at the time of marriage, necessary household goods to be used by the couple were given. However, despite this, the respondent-husband and his family members treated the appellant with cruelty and continued to demand more dowry.

3. After some time, the appellant became pregnant and was taken to her parents' house by the respondent. The respondent threatened the appellant that in case his demand of dowry is not met by the appellant's parents, then she would not be taken back to her matrimonial home even after delivery.

4. Appellant delivered a child in her parental home. Since even after delivery, respondent did not think it proper to discharge his responsibility by taking her back, she was constrained to file a petition under Section 125 of the Code of Criminal Procedure (for short, 'Cr.P.C.') against the respondent in the Court of Family Judge, Gwalior. It was averred by the appellant that respondent has been earning a sum of Rs. 12,000/- per month by doing some private work and she had no money to maintain herself and her new-born child. Thus, she claimed a sum of Rs.3000/- per month from the respondent towards maintenance.

5. On notice being issued to the respondent, he denied all the contents of the petition filed by the appellant under Section 125 of the Cr.P.C. except admitting his marriage with the appellant.

6. Preliminary objections were raised by the respondent that appellant has already been divorced on 20.8.2004 in accordance with Muslim Law. Thus, under the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as `Muslim Act'), appellant is not entitled to any maintenance after the divorce and after the expiry of the iddat period. It was also contended by him that appellant herself is earning Rs.6,000/- per month by giving private tuitions and is not dependent on the income of the respondent, thus, she is not entitled to any maintenance. It was also contended by respondent that appellant had gone to her parental home on her own free-will and accord, after taking all the jewellery and a sum of Rs.1000/- and

despite notice being sent, she has not returned to her matrimonial home. Thus, for all these reasons, she is not entitled to receive any amount of maintenance.

7. The Family Court was pleased to frame issues and parties went to trial. After considering the matter from all angles, the learned Judge of the Family Court partly allowed the appellant's application as under:

"(1) respondent shall pay Rs.2000/- per month as maintenance allowance to the petitioner from 26.4.2004, date of institution of petition to the date of divorce, i.e. 20.8.2004 and thereafter from 20.8.2004 to the period of iddat.

(2) respondent will bear cost of the suit of himself as well as of petitioner."

8. Thus, the claim of the appellant was allowed to the extent of Rs. 2,000/- per month towards maintenance from the date of institution of the petition till the date of divorce, i.e., 20.8.2004 and further from the said date till the expiry of iddat period but amount of maintenance thereafter was denied.

9. The appellant was, therefore, constrained to carry the matter further by filing Criminal Revision before the Gwalior Bench of the High Court of Madhya Pradesh. The said Criminal Revision came to be disposed of by learned Single Judge on 26.9.2008 and the order of the Family Court has substantially been upheld and consequently, the appellant's Revision has been dismissed. It is this order and the order passed by the Family Court which are the subject-matter of challenge in this appeal by grant of special leave.

10. At the outset, learned counsel for the appellant contended that learned Single Judge has gravely erred in dismissing the appellant's Revision on misconception of law on the ground that after divorce of a Muslim wife, a petition under Section 125 of the Cr.P.C. would not be maintainable. It was also contended that learned Single Judge proceeded on wrong assumption in dismissing appellant's Revision claiming maintenance under Section 125 of the Cr.P.C. It was also argued that both the courts below completely lost sight of the provisions of Section 7(1)(f) of the Family Courts Act, 1984 (hereinafter referred to as the 'Family Act').

11. On the other hand, Shri S.K. Dubey, learned Senior Counsel for the respondent contended that no illegality or perversity can be found in the order passed by the learned Single Judge and the same calls for no interference. It was also contended that the appeal being devoid of any merit and substance, deserves to be dismissed.

12. In the light of the aforesaid contentions, we have heard the learned counsel for the parties and perused the records.

13. The basic and foremost question that arises for consideration is whether a Muslim divorced wife would be entitled to receive the amount of maintenance from her divorced husband underSection 125 of the Cr.P.C. and, if yes, then through which forum.

14. Section 4 of Muslim Act reads as under:

"4. Order for payment of maintenance:

-(1) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where a Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the iddat period, he may make an order

directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order:

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

Provided further that if any of the parents is unable to pay his or her share of the maintenance ordered by the Magistrate on the ground of his or her not having the means to pay the same, the Magistrate may, on proof of such inability being furnished to him, order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order.

(2) Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the second proviso to sub-section (1), the Magistrate may, by order, direct the State Wakf Board established under Section 9 of the Wakf Act, 1954 (29 of 1954), or under any other law for the time being in force in a State, functioning in the area in which the woman resides, to pay such maintenance as determined by him under sub-section (1) or, as the case may be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order."

15. Section 5 thereof deals with the option to be governed by the provisions of Section 125 to 128of the Cr.P.C. It appears that parties had not given any joint or separate application for being considered by the Court. Section 7 thereof deals with transitional provisions.

16. Family Act, was enacted w.e.f. 14th September, 1984 with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith.

17. The purpose of enactment was essentially to set up family courts for the settlement of family disputes, emphasizing on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. In other words, the purpose was for early settlement of family disputes.

18. The Act, inter alia, seeks to exclusively provide within jurisdiction of the family courts the matters relating to maintenance, including proceedings under Chapter IX of the Cr.P.C.

19. Section 7 appearing in Chapter III of the Family Act deals with Jurisdiction. Relevant provisions thereof 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) ....

(b) ....

(c) ....

(d) ....

(e) ....

(f) a suit or proceeding for maintenance;

(g) ...."

20. Section 20 of the Family Act appearing in Chapter VI deals with overriding effect of the provisions of the Act. The said section reads as under :

"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."

21. Bare perusal of Section 20 of the Family Act makes it crystal clear that the provisions of this Act shall have overriding effect on all other enactments in force dealing with this issue.

22. Thus, from the abovementioned provisions it is quite discernible that a Family Court established under the Family Act shall exclusively have jurisdiction to adjudicate upon the applications filed under Section 125 of Cr.P.C.

23. In the light of the aforesaid contentions and in view of the pronouncement of judgments detailing the said issue, learned counsel for the appellant submits that matter stands finally settled but learned Single Judge wholly misconstrued the various provisions of the different Acts as mentioned hereinabove, thus, committed a grave error in rejecting the appellant's prayer.

24. In our opinion, the point stands settled by judgment of this Court reported in (2001) 7 SCC 740 titled Danial Latifi & Anr. Vs. Union of India pronounced by a Constitution Bench of this Court. Paras 30, 31 and 32 thereof fully establish the said right of the appellant. The said paragraphs are reproduced hereinunder :

"30. A comparison of these provisions with Section 125 CrPC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support are satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by us from the one provided under the Code of Criminal

Procedure deprive them of their right, loses its significance. The object and scope of Section 125 CrPC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled, we find it difficult to accept the contention urged on behalf of the petitioners.

31. Even under the Act, the parties agreed that the provisions of Section 125 CrPC would still be attracted and even otherwise, the Magistrate has been conferred with the power to make appropriate provision for maintenance and, therefore, what could be earlier granted by a Magistrate under Section 125 CrPC would now be granted under the very Act itself. This being the position, the Act cannot be held to be unconstitutional.

32. As on the date the Act came into force the law applicable to Muslim divorced women is as declared by this Court in Shah Bano's case [(1985) 2 SCC 556 Mohd. Ahmed Khan vs. Shah Bano Begum & Ors.]. In this case to find out the personal law of Muslims with regard to divorced women's rights, the starting point should be Shah Bano's case and not the original texts or any other material - all the more so when varying versions as to the authenticity of the source are shown to exist. Hence, we have refrained from referring to them in detail. That declaration was made after considering the Holy Quran, and other commentaries or other texts. When a Constitution Bench of this Court analysed Suras 241-242 of Chapter II of the Holy Quran and other relevant textual material, we do not think, it is open for us to re-examine that position and delve into a research to reach another conclusion. We respectfully abide by what has been stated therein. All that needs to be considered is whether in the Act specific deviation has been made from the personal laws as declared by this Court in Shah Bano's case without mutilating its underlying ratio. We have carefully analysed the same and come to the conclusion that the Act actually and in reality codifies what was stated in Shah Bano's case. The learned Solicitor General contended that what has been stated in the Objects and Reasons in Bill leading to the Act is a fact and that we should presume to be correct. We have analysed the facts and the law in Shah Bano's case and proceeded to find out the impact of the same on the Act. If the language of the Act is as we have stated, the mere fact that the Legislature took note of certain facts in enacting the law will not be of much materiality."

25. Judgment of this Court reported in (2007) 6 SCC 785 titled Iqbal Bano Vs. State of U.P.& Anr. whereby the provisions contained in Section 125 of the Cr.P.C. have been aptly considered and the relevant portion of the order passed in Iqbal Bano's case reads as under:

"10. Proceedings under Section 125 Cr.P.C. are civil in nature. Even if the Court noticed that there was a divorced woman in the case in question, it was open to it to treat it as a petition under the Act considering the beneficial nature of the legislation. Proceedings under Section 125 Cr.P.C. and claims made under the Act are tried by the same court. In Vijay Kumar Prasad Vs State of Bihar (2004) 5 SCC 196 it was held that proceedings under Section 125 Cr.P.C. are civil in nature. It was noted as follows: (SCC p.200, Para 14).

14. The basic distinction between Section 488 of the old Code and Section 126 of the Code is that Section 126 has essentially enlarged the venue of proceedings for maintenance so as to move the place where the wife may be residing on the date of application. The change was thought necessary because of certain observations by the Law Commission, taking note of the fact that often deserted wives are compelled to live with their relatives far away from the place where the husband and wife last resided together. As noted by this Court in several cases, proceedings

under Section 125 of the Code are of civil nature. Unlike clauses (b) and (c) of Section 126 (1) an application by the father or the mother claiming maintenance has to be filed where the person from whom maintenance is claimed lives."

26. In the light of the findings already recorded in earlier paras, it is not necessary for us to go into the merits. The point stands well settled which we would like to reiterate.

27. The appellant's petition under Section 125 of the Cr.P.C. would be maintainable before the Family Court as long as appellant does not remarry. The amount of maintenance to be awarded under Section 125 of the Cr.P.C. cannot be restricted for the iddat period only.

28. Learned Single Judge appeared to be little confused with regard to different provisions ofMuslim Act, Family Act and Cr.P.C. and thus was wholly unjustified in rejecting the appellant's Revision.

29. Cumulative reading of the relevant portions of judgments of this Court in Danial Latifi (supra) and Iqbal Bano (supra) would make it crystal clear that even a divorced Muslim woman would be entitled to claim maintenance from her divorced husband, as long as she does not remarry. This being a beneficial piece of legislation, the benefit thereof must accrue to the divorced Muslim women.

30. In the light of the aforesaid discussion, the impugned orders are hereby set aside and quashed. It is held that even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under Section 125 of the Cr.P.C. after the expiry of period of iddat also, as long as she does not remarry.

31. As a necessary consequence thereof, the matter is remanded to the Family Court at Gwalior for its disposal on merits at an early date, in accordance with law. The respondent shall bear the cost of litigation of the appellant. Counsel's fees Rs.5,000/-.

32. Consequently, the appeal stands allowed to the extent indicated above.

[B. SUDERSHAN REDDY]
[DEEPAK VERMA]

New Delhi.

December 04, 2009.

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KHATOON NISA VERSUS STATE OF U.P. AND ORS.

Bench: Hon'ble Mr. Justice G. Pattanaik, Hon'ble Mr. Justice M Shah, Hon'ble Mr. Justice D Raju, Hon'ble Mr. Justice S Variava & Hon'ble Mr. Justice D Dharmadhikari

2003 (1) AWC 128 SC, JT 2002 (7) SC 631, 2002 (6) SCALE 165

In Crl. A. Nos. 213-216/96 and 569/95

These appeals raise the question, as to whether a magistrate is entitled to invoke his jurisdiction under Section 125 of the Code of Criminal Procedure (Cr. P.C.) to grant maintenance in favour of divorced Muslim women.

Subsequent to the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (for short "the Act") as it was considered that the jurisdiction of the magistrate underSection 125 Cr. P.C. can be invoked only when the condition precedent mentioned in Section 5 of the Act are complied with, in the case in hand, the magistrate came to a finding that there has been no divorce in the eye of law and as such, the magistrate has the jurisdiction to grant maintenance under Section 125 of the Cr. P.C. This finding of the magistrate has been upheld by the High Court. The validity of the provisions of the Act was for consideration before the constitution bench in the case of Danial Latifi and Anr. v. Union of India. In the said case by reading down the provisions of the Act, the validity of the Act has been upheld and it has been observed that under the Act itself when parties agree, the provisions of Section 125 Cr. P.C. could be invoked as contained in Section 5 of the Act and even otherwise, the magistrate under the Act has the power to grant maintenance in favour of a divorced woman, and the parameters and considerations are the same as those in Section 125 Cr. P.C.. It is undoubtedly true that in the case in hand, Section 5 of the Act has not been invoked. Necessarily, therefore, the magistrate has exercised his jurisdiction under Section 125 Cr. P.C. But, since the magistrate retains the power of granting maintenance in view of the constitution bench decision in Danial Latifi's case (supra) under the Act and since the parameters for exercise of that power are the same as those contained in Section 125 Cr. P.C., we see no ground to interfere with the orders of the magistrate granting maintenance in favour of a divorced Muslim woman. In fact, Mr. Qamaruddin, learned counsel appearing for the appellants, never objected to pay maintenance as ordered by the magistrate. But he seriously disputes the findings of the magistrate on the status of the parties and contends that the magistrate was wholly in error in coming to the conclusion that there has been no divorce between the parties in the eye of law.

ORDER

1. These two appeals are directed against the judgment of a learned single judge of the Allahabad High Court, Lucknow bench, by grant of certificate from the said judgment. The two appeals are filed by the ceiling surplus tenure holder and his wife and one of the dispute was whether there has been a divorce between them as early as in the year 1969.

2. After coming into force of the U.P. Imposition of Ceiling on Land Holdings Act, 1960 (hereinafter referred to as 'the Act') before the prescribed authority, the tenure holder took a stand that the land recorded in the name of his wife who has already been divorced since 1969 cannot be clubbed. The wife also took a similar stand. Section 3(7) of the Act defines the expression 'family'

in relation to a tenure holder to mean himself or herself and his wife or her husband as the case may be, (other than a judicially separated wife or husband), minor sons and minor daughters (other than married daughters). Since the prescribed authority was required to determine the ceiling surplus in the hand of the tenure holder, one of the questions for consideration was whether in fact there has been a divorce between the tenure holder and his wife as claimed by them or it was merely a subterfuge to get over the rigours of the provisions of the Ceiling Act. On the basis of materials produced before it, the prescribed authority came to the conclusion that in fact there had been no divorce and the parties adopted divorce attempts for escaping the ceiling law. The said prescribed authority also came to the conclusion that there was no other document excepting the family register kept with the pradhan, where the wife and the husband have been entered separately. In fact the prescribed authority gave due weight to the family register which had been kept with the rural development officer who was the competent authority to issue the family register. Having come to the aforesaid conclusion, the prescribed authority concluded that the land standing in the name of Khatoon Nisa, wife of Rahmatullah, the tenure holder, has to be clubbed with the holding of the tenure holder, inasmuch as they come within the definition of the 'family' under Section 3 (7) of the Act.

3. Being aggrieved by the aforesaid order of the prescribed authority, both Sh. Rahmatullah and his wife, Smt. Khatoon Nisa, preferred appeals under Section 13 of the Act and the appellate authority affirmed the conclusion arrived at by the prescribed authority and came to the conclusion that there has been no error committed by the prescribed authority in treating the appellant being members of the same family for the purpose of the provisions of the Act. The two appeals thus having been dismissed, the matter was carried to the High Court under Article 226of the Constitution. The learned judge of the High Court, without being guided by the parameters for exercise of power under Article 226 against an order of an inferior tribunal, went on to examine the issue as to whether there can be a divorce under the Muslim law by uttering three times the word 'talaq' in one sitting and having elaborately delved into the same came to the conclusion that such 'talaq' is unconstitutional and cannot be sustained. Having thus came to the aforesaid conclusion, the court affirmed the conclusion of the prescribed authority under the Ceiling Act in the matter of determination of the surplus land in the hands of the tenure holder. The court having granted certificate against the judgment the appeals came to be filed.

4. Dr. Dhawan learned senior counsel appearing for the appellants, contended that the High Court while exercising its power of supervisory jurisdiction of a writ of certiorari is called upon to examine the correctness of the conclusion arrived at by the inferior tribunal and will be justified in interfering with those conclusions if the inferior tribunal either has admitted inadmissible evidence under consideration or has rejected any admissible piece of material or that the conclusion is such which cannot be said to be a reasonable one on the materials on record or that the finding is based on no evidence. These being the parameters for exercise of the power, the High Court should have limited its consideration only to the materials on which the prescribed authority and appellate authority under the Act came to the conclusion and the High Court was not called upon to examine the larger issue about the constitutionality and legality of a divorce made by a Muslim male by uttering talaq three times at one sitting. Dr. Dhawan also urged that the conclusion of the prescribed authority as well as that of the appellate authority cannot be sustained in law since the judgment is not based on the relevant materials. So far as the first submission of Dr. Dhawan is concerned, we find force in the same as in our opinion in the writ

petition filed by the tenure holder and his wife, it was not necessary for the court to examine a larger issue on the question of the constitutionality and validity of a divorce by a Muslim man by uttering 'talaq' thrice in one sitting. We, therefore, do not intend to delve into that question and in our opinion the aforesaid conclusion of the High Court was not required to be gone into in the case in hand and the said conclusion would not operate as law of the land until and unless the same arises in an appropriate case and decided accordingly. So far as the second contention of Dr. Dhawan is concerned we, however, do not agree with the same and after perusing the order of the prescribed authority as well as that of the appellate authority, we do not find any error of law much less any error apparent on the face of the order which required to be corrected by issuance of a writ of certio-rari. The materials on the basis of which the conclusion of the prescribed authority as well as that of the appellate authority was based cannot be said to be on irrelevant materials nor the ultimate conclusion can be said to be one without any evidence for the same. In that view of the matter the ultimate determination of the ceiling land in the hand of the surplus holder does not require any interference by the Court. These appeals are, therefore, disposed of accordingly.

5. All applications filed in these matters also stand disposed of.

6. This appeal stands disposed of in terms of our judgment delivered today in crl. appeal Nos. 213-216/1996.

7. This writ petition was filed as a counterblast to criminal appeals nos. 213-216/1996 which have already been disposed of by us today.

8. After going through the prayer of the writ petition and on examining the averments made in the writ petition, we find that there is no material on the basis of which the Court is in a position to grant any appropriate relief. This writ petition accordingly stands dismissed.

9. These appeals raise the question, as to whether a magistrate is entitled to invoke his jurisdiction under Section 125 of the Code of Criminal Procedure (Cr. P.C.) to grant maintenance in favour of divorced Muslim women.

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

contained in Section 125 Cr. P.C., we see no ground to interfere with the orders of the magistrate granting maintenance in favour of a divorced Muslim woman. In fact, Mr. Qamaruddin, learned counsel appearing for the appellants, never objected to pay maintenance as ordered by the magistrate. But he seriously disputes the findings of the magistrate on the status of the parties and contends that the magistrate was wholly in error in coming to the conclusion that there has been no divorce between the parties in the eye of law.

11. In view of our aforesaid conclusion, it is not necessary for us to examine the correctness of the finding on the status of the parties, inasmuch as that finding was merely for the purpose of exercising jurisdiction under Section 125 Cr. P.C. and has no bearing at all in deciding the status of the parties.

12. These appeals stand disposed of accordingly.

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SAVITABEN SOMABHAI BHATIYA VERSUS STATE OF GUJARAT AND ORS

Bench: Hon'ble Dr. Justice Arijit Pasayat & Hon'ble Mr. Justice S.H. Kapadia

Savitaben Somabhai Bhatiya
Vs.
State of Gujarat and Ors.

Appeal (crl.) 399 of 2005

(2005) 3 SCC 636
Date of Judgment : 10/03/2005

Scope and ambit of Section 125 of the Code of Criminal Procedure, 1973 (in short the 'Code').

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.

Legislature considered it necessary to include within the scope of the provision an illegitimate child but it has not done so with respect to woman not lawfully married. However, desirable it may be, as contended by learned counsel for the appellant to take note of the plight of the unfortunate woman, the legislative intent being clearly reflected in Section 125 of the Code, there is no scope for enlarging its scope by introducing any artificial definition to include woman not lawfully married in the expression 'wife'.

JUDGMENT

Hon'ble Mr. Justice Arijit Pasayat :—

Leave granted.

A brief reference to the factual position would suffice because essentially the dispute has to be adjudicated with reference to scope and ambit of Section 125 of the Code of Criminal Procedure, 1973 (in short the 'Code').

The case at hand according to appellant is a classic example of the inadequacies of law in protecting a woman who unwittingly entered into relationships with a married man.

Factual position as projected by the appellant is as follows:-

Appellant claims that she was married to respondent No.2 some time in 1994 according to the customary rites and rituals of their caste. Though initially, the respondent No.2 treated her nicely, thereafter he started ill-treating her and she was subjected to mental and physical torture. On enquiry about the reason for such a sudden change in his behaviour, the appellant came to know that respondent No.2 had developed illicit relationship with a lady named Veenaben. During the period the appellant stayed with the respondent, she became pregnant and subsequently, a child was born. As respondent No.2 neglected the appellant and the child born, an application in terms of Section 125 of the Code was filed claiming maintenance. The application was filed before the learned Judicial Magistrate, First Class (hereinafter referred to as the 'JMFC') Himmatnagar. Respondent No.2 opposed the application

by filing written statements taking the stand that the appellant was not his legally married wife and the child (respondent No.3) was not his son. He also denied having developed illicit relationship with Veenaben. He claimed that actually she was married to him more than 22 years back and two children were born. Their son Hament had died in the road accident in July 1990. In the Claim Petition name of Veenaben was mentioned as the legal heir and in the Voters List, Ration Card and Provident Fund records, Veenaben was shown as the wife of respondent No.2. On 23.6.1998 learned JMFC allowed the Claim Petition and granted maintenance. A criminal revision was filed by respondent No.2 before learned Additional Sessions Judge, Sabaakatha, Dist. Himmatnagar, who by his order dated 26.11.1998 set aside the judgment dated 23.6.1998 as passed by the learned JMFC and remanded the matter to the trial Court for adjudication afresh after affording an opportunity to respondent No.2 to cross examine the witnesses of the appellant. By order dated 31.7.1999, learned JMFC after considering the matter afresh awarded maintenance to both the appellant and the child.

A Criminal Revision Application No.65/95 was filed by respondent No.2 against the order dated 31.7.1999. By order dated 12.7.2001, learned Additional District Judge, Sabarkatha dismissed the application. The respondent No.2 filed a Special Criminal Application No.568/2001 before the Gujarat High Court which by the impugned order held that the appellant was not legally wedded wife of respondent No.2. Reliance was placed on documents filed by respondent No.2 to conclude that before the alleged date of marriage between the appellant and respondent No.2, the latter was already married to Veenaben with reference to the documents produced. However, maintenance granted to the child (respondent No.3) was maintained and amount as awarded to him i.e. Rs.350/- was enhanced to Rs.500/-. A direction was also given to pay the enhanced amount from the date of order of the learned JMFC i.e. 31.7.1999.

In support of the appeal, learned counsel for the appellant submitted that the High Court has taken a too technical view in the matter. Strict proof about a valid marriage is not the sine qua non for getting maintenance under Section 125 of the Code. The documents produced by respondent No.2 to substantiate the plea of earlier marriage with Veenaben should not have been given primacy over the clinching evidence adduced by the appellant to show that she was unaware of the alleged marriage. Since respondent No.2 is guilty of fraud and mis-representation, the equity should not weigh in his favour. Law is intended to protect destitute and harassed woman and rigid interpretation given to the word 'wife' goes against the legislative intent. In any event, nothing has been shown by respondent No.2 to show that there is any customary bar for a second marriage. Customs outweigh enacted law. That being the position, the order passed by the learned JMFC should be restored. It was residually submitted that when the amount was claimed as maintenance there was statutory limitation prescribed at Rs.500/- which has been done away with by omitting the words of limitation so far as the amount is concerned by amendment in 2001 to the Cr.P.C. Therefore, taking into account the high cost of living the quantum of maintenance should be enhanced for the child.

In response, learned counsel for respondent No.2 submitted that law is fairly well settled regarding the definition of the expression 'wife' and there is no scope for giving an extended meaning to include a woman who is not legally married.

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 Section 125 of the Code refers to only legally married wife.

The provision is enacted for social justice and specially to protect women and children as also old and infirm poor parents and falls within the constitutional sweep of Article 15(3) reinforced byArticle 39 of the Constitution of India, 1950 (in short the 'Constitution'). The provision gives effect to the natural and fundamental duty of a man to maintain his wife, children and parents so long as they are unable to maintain themselves. Its provisions are applicable and enforceable whatever may be personal law by which the persons concerned are governed. (See Nanak Chand v. Chandra Kishore (AIR 1970 SC 446). But the personal law of the parties is relevant for deciding the validity of the marriage and therefore cannot be altogether excluded from consideration. (See Smt. Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav and Anr.(AIR 1988 SC 644) 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'). The scope of the two laws is different.

Section 125 of the Code at the point of time when the petition for maintenance was filed reads as follows:

"125(1)- If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from 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 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."

By the Code of Criminal Procedure (Amendment) Act, 2001 (Central Act 50 of 2001) the words 'not exceeding five hundred rupees in the whole' have been omitted w.e.f. 24.9.2001.

In Dwarika Prasad Satpathy v. Bidyut Prava Dixit and Anr. (AIR 1999 SC 3348) it was held that the validity of the marriage for the purpose of summary proceedings under Section 125 of the Code is to be determined on the basis of the evidence brought on record by the parties. The standard of proof of marriage in such proceedings is not as strict as is required in a trial of offence under Section 494 of Indian Penal Code, 1860 (in short the 'IPC'). If the claimant in proceedings under Section 125 succeeds in showing that she and the respondent have lived together as husband and wife, the Court has to presume that they are legally wedded spouses, and in such a situation one who denies the marital

status can rebut the presumption. Once it is admitted that the marriage procedure was followed then it is not necessary to further probe as to whether the said procedure was complete as per the Hindu rites, in the proceedings under Section 125 of the Code. It is to be noted that when the respondent does not dispute the paternity of the child and accepts the fact that marriage ceremony was performed though not legally perfect, it would hardly lie in his mouth to contend in proceedings under Section 125 of the Code that there was no valid marriage as essential rites were not performed at the time of said marriage. The provision under Section 125 cannot be utilized for defeating the rights conferred by the legislature on the destitute women, children or parents who are victims of social environment. The provision is a measure of social justice and as noted above specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution.

The sections of statutes calling for construction by courts are not petrified print but vibrant words with social functions to fulfill. 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. (See Captain Ramesh Chander Kaushal v. Mrs. Veena Kaushal and Ors. (AIR 1978 SC 1807).

In Smt. Yamunabai's case (supra), it was held that expression 'wife' used in Section 125 of the Code should be interpreted to mean only a legally wedded wife. The word 'wife' is not defined inthe Code except indicating in the Explanation to Section 125 its inclusive character so as to cover a divorcee. A woman cannot be a divorcee unless there was a marriage in the eye of law preceding that status. The expression must therefore be given the meaning in which it is understood in law applicable to the parties. The marriage of a woman in accordance with the Hindu rites with a man having a living spouse is a complete nullity in the eye of law and she is therefore not entitled to the benefit of Section 125 of the Code or the Hindu Marriage Act, 1955 (in short the 'Marriage Act'). Marriage with person having living spouse is null and void and not voidable. However, the attempt to exclude altogether the personal law applicable to the parties from consideration is improper. Section 125 of the Code has been enacted in the interest of a wife and one who intends to take benefit under sub- section (1) (a) has to establish the necessary condition, namely, that she is the wife of the person concerned. The issue can be decided only by a reference to the law applicable to the parties. It is only where an applicant establishes such status or relationship with reference to the personal law that an application for maintenance can be maintained. Once the right under the provision in Section 125 of the Code is established by proof of necessary conditions mentioned therein, it cannot be defeated by further reference to the personal law. The issue whether the Section is attracted or not cannot be answered except by reference to the appropriate law governing the parties.

But it does not further the case of the appellant in the instant case. Even if it is accepted as stated by learned counsel for the appellant that husband was treating her as his wife it is really inconsequential. It is the intention of the legislature which is relevant and not the attitude of the party.

In Smt. Yamunabai's case (supra) plea similar to the one advanced in the present case that the appellant was not informed about the respondent's earlier marriage when she married him was held to be of no avail. The principle of estoppel cannot be pressed into service to defeat the provision of Section 125 of the Code.

It may be noted at this juncture that the legislature considered it necessary to include within the scope of the provision an illegitimate child but it has not done so with respect to woman not lawfully married. However, desirable it may be, as contended by learned counsel for the appellant to take note of the plight of the unfortunate woman, the legislative intent being clearly reflected inSection 125 of the Code, there is no scope for enlarging its scope by introducing any artificial definition to include woman not lawfully married in the expression 'wife'.

As noted by this Court in Vimala (K.) v. Veeraswamy (K.) (1991 (2) SCC 375) when a plea of subsisting marriage is raised by the respondent-husband it has to be satisfactorily proved by tendering evidence to substantiate that he was already married.

In the instant case the evidence on record has been found sufficient by the Courts below by recording findings of fact that earlier marriage of respondent was established.

In that view of the matter, the application so far as claim of maintenance of the wife is concerned stands dismissed.

That brings us to the other question relating to adequacy of the quantum of maintenance awarded to the child. It is not in dispute that when the Claim Petition was filed, Rs.500/- was claimed as maintenance as that was the maximum amount which could have been granted because of the un-amended Section 125. But presently, there is no such limitation in view of the amendment as referred to above.

Learned counsel for respondent No.2 submitted that there was no amendment made to the Claim Petition seeking enhancement. We find that this is a too technical plea. As a matter of fact,Section 127 of the Code permits increase in the quantum. The application for maintenance was filed on 1.9.1995. The order granting maintenance was passed by the learned JMFC on 31.7.1999. The High Court enhanced the quantum awarded to the child from Rs.350/- to Rs.500/- with effect from the order passed by learned JMFC. No dispute has been raised regarding enhancement and in fact there was a concession to the prayer for enhancement before the High Court as recorded in the impugned judgment. Considering the peculiar facts of the case, we feel that the amount of maintenance to the child can be enhanced to Rs.850/- with effect from today.

Learned counsel for the respondent No.2 has submitted that as a humanitarian gesture, the respondent No.2 agrees to pay a lump-sum amount to settle the dispute. In case the respondent No.2 pays a sum of rupees two lakhs only within a period of four months to the appellant, the same shall be in full and final settlement of the claim of respondent No.3 for maintenance. While fixing the quantum we have taken note of the likely return as interest in case it is invested in fixed deposit in a Nationalised Bank, and the likely increase in the quantum of maintenance till respondent No.3 attains majority. Till deposit is made, the quantum fixed by this order shall be paid. If the respondent No.2 wants to make lump-sum payment in terms of this order, the amount shall be paid by the Bank draft in the name of respondent No.3 with appellant as mother guardian. The amount shall be kept in a fixed deposit with monthly interest payment facility till respondent No.3 attains majority.

The appeal is accordingly disposed of.

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DANIAL LATIFI & ANR VERSUS UNION OF INDIA

Bench: Hon'ble Mr. Justice G.B. Pattanaik, Hon'ble Mr. Justice S. Rajendra Babu, Hon'ble Mr. Justice D.P. Mohapatra, Hon'ble Mr. Justice Doraiswamy Raju & Hon'ble Mr. Justice Shivaraj V. Patil

Danial Latifi & Anr.
Vs.
Union of India

Writ Petition (Civil) 868 of 1986

(2001) 7 SCC 740
Date of Judgment : 28/09/2001

The Supreme Court in the case of Daniel Latifi v. Union of India a held that reasonable and fair provisions include provision for the future of the divorced wife (including maintenance) and it does not confine itself to the iddat period only. The Constitutional validity of the Act was also upheld.

JUDGMENT

Hon'ble Mr. Justice S. Rajendra Babu :—

The constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 [hereinafter referred to as the Act] is in challenge before us in these cases.

The facts in Mohd. Ahmed Khan vs. Shah Bano Begum & Ors. (1985) 2 SCC 556, are as follows.

The husband appealed against the judgment of the Madhya Pradesh High Court directing him to pay to his divorced wife Rs.179/- per month, enhancing the paltry sum of Rs.25 per month originally granted by the Magistrate. The parties had been married for 43 years before the ill and elderly wife had been thrown out of her husbands residence. For about two years the husband paid maintenance to his wife at the rate of Rs.200/- per month. When these payments ceased she petitioned under Section 125 CrPC. The husband immediately dissolved the marriage by pronouncing a triple talaq. He paid Rs.3000/- as deferred mahr and a further sum to cover arrears of maintenance and maintenance for the iddat period and he sought thereafter to have the petition dismissed on the ground that she had received the amount due to her on divorce under the Muslim law applicable to the parties. The important feature of the case was that the wife had managed the matrimonial home for more than 40 years and had borne and reared five children and was incapable of taking up any career or independently supporting herself at that late stage of her life - remarriage was an impossibility in that case. The husband, a successful Advocate with an approximate income of Rs.5,000/- per month provided Rs.200/- per month to the divorced wife, who had shared his life for half a century and mothered his five children and was in desperate need of money to survive.

Thus, the principle question for consideration before this Court was the interpretation of Section 127(3)(b) CrPC that where a Muslim woman had been divorced by her husband and paid her mahr, would it indemnify the husband from his obligation under the provisions of Section 125CrPC. A Five-Judge Bench of this Court reiterated that the Code of Criminal Procedure controls the proceedings in

such matters and overrides the personal law of the parties. If there was a conflict between the terms of the Code and the rights and obligations of the individuals, the former would prevail. This Court pointed out that mahr is more closely connected with marriage than with divorce though mahr or a significant portion of it, is usually payable at the time the marriage is dissolved, whether by death or divorce. This fact is relevant in the context of Section 125 CrPC even if it is not relevant in the context of Section 127(3)(b) CrPC. Therefore, this Court held that it is a sum payable on divorce within the meaning of Section 127(3)(b) CrPC and held that mahr is such a sum which cannot ipso facto absolve the husbands liability under the Act.

It was next considered whether the amount of mahr constitutes a reasonable alternative to the maintenance order. If mahr is not such a sum, it cannot absolve the husband from the rigour ofSection 127(3)(b) CrPC but even in that case, mahr is part of the resources available to the woman and will be taken into account in considering her eligibility for a maintenance order and the quantum of maintenance. Thus this Court concluded that the divorced women were entitled to apply for maintenance orders against their former husbands under Section 125 CrPC and such applications were not barred under Section 127(3)(b) CrPC. The husband had based his entire case on the claim to be excluded from the operation of Section 125 CrPC on the ground that Muslim law exempted from any responsibility for his divorced wife beyond payment of any mahr due to her and an amount to cover maintenance during the iddat period and Section 127(3)(b)CrPC conferred statutory recognition on this principle. Several Muslim organisations, which intervened in the matter, also addressed arguments. Some of the Muslim social workers who appeared as interveners in the case supported the wife brought in question the issue of mata contending that Muslim law entitled a Muslim divorced woman to claim provision for maintenance from her husband after the iddat period. Thus, the issue before this Court was: the husband was claiming exemption on the basis of Section 127(3)(b) CrPC on the ground that he had given to his wife the whole of the sum which, under the Muslim law applicable to the parties, was payable on such divorce while the woman contended that he had not paid the whole of the sum, he had paid only the mahr and iddat maintenance and had not provided the mata i.e. provision or maintenance referred to in the Holy Quran, Chapter II, Sura

241. This Court, after referring to the various text books on Muslim law, held that the divorced wifes right to maintenance ceased on expiration of iddat period but this Court proceeded to observe that the general propositions reflected in those statements did not deal with the special situation where the divorced wife was unable to maintain herself. In such cases, it was stated that it would be not only incorrect but unjust to extend the scope of the statements referred to in those text books in which a divorced wife is unable to maintain herself and opined that the application of those statements of law must be restricted to that class of cases in which there is no possibility of vagrancy or destitution arising out of the indigence of the divorced wife. This Court concluded that these Aiyats [the Holy Quran, Chapter II, Suras 241-242] leave no doubt that the Holy Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the teaching of the Holy Quran. On this note, this Court concluded its judgment.

There was a big uproar thereafter and Parliament enacted the Act perhaps, with the intention of making the decision in Shah Banos case ineffective.

The Statement of Objects & Reasons to the bill, which resulted in the Act, reads as follows :

The Supreme Court, in Mohd. Ahmed Khan vs. Shah Bano Begum & Ors. [AIR 1985 SC 945), has held that although the Muslim Law limits the husbands liability to provide for maintenance of the

divorced wife to the period of iddat, it does not contemplate or countenance the situation envisaged by Section 125 of the Code of Criminal Procedure, 1973. The Court held that it would be incorrect and unjust to extend the above principle of Muslim Law to cases in which the divorced wife is unable to maintain herself. The Court, therefore, came to the conclusion that if the divorced wife is able to maintain herself, the husbands liability ceases with the expiration of the period of iddat but if she is unable to maintain herself after the period of iddat, she is entitled to have recourse to Section 125 of the Code of Criminal Procedure.

2. This decision has led to some controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife. Opportunity has, therefore, been taken to specify the rights which a Muslim divorced woman is entitled to at the time of divorce and to protect her interests. The Bill accordingly provides for the following among other things, namely:-

   (a) a Muslim divorced woman shall be entitled to a reasonable and fair provision and maintenance within the period of iddat by her former husband and in case she maintains the children born to her before or after her divorce, such reasonable provision and maintenance would be extended to a period of two years from the dates of birth of the children. She will also be entitled to mahr or dower and all the properties given to her by her relatives, friends, husband and the husbands relatives. If the above benefits are not given to her at the time of divorce, she is entitled to apply to the Magistrate for an order directing her former husband to provide for such maintenance, the payment of mahr or dower or the deliver of the properties;

   (b) where a Muslim divorced woman is unable to maintain herself after the period of iddat, the Magistrate is empowered to make an order for the payment of maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim Law in the proportions in which they would inherit her property. If any one of such relatives is unable to pay his or her share on the ground of his or her not having the means to pay, the Magistrate would direct the other relatives who have sufficient means to pay the shares of these relatives also. But where, a divorced woman has no relatives or such relatives or any one of them has not enough means to pay the maintenance or the other relatives who have been asked to pay the shares of the defaulting relatives also do not have the means to pay the shares of the defaulting relatives the Magistrate would order the State Wakf Board to pay the maintenance ordered by him or the shares of the relatives who are unable to pay.

The object of enacting the Act, as stated in the Statement of Objects & Reasons to the Act, is that this Court, in Shah Banos case held that Muslim Law limits the husbands liability to provide for maintenance of the divorced wife to the period of iddat, but it does not contemplate or countenance the situation envisaged by Section 125 of the Code of Criminal Procedure, 1973 and, therefore, it cannot be said that the Muslim husband, according to his personal law, is not under an obligation to provide maintenance beyond the period of iddat to his divorced wife, who is unable to maintain herself.

As held in Shah Banos case, the true position is that if the divorced wife is able to maintain herself, the husbands liability to provide maintenance for her ceases with the expiration of the period of iddat but if she is unable to maintain herself after the period of iddat, she is entitled to have recourse to Section 125 CrPC. Thus it was held that there is no conflict between the provisions of Section 125 CrPC and those of the Muslim Personal Law on the question of the Muslim husbands obligation to provide

maintenance to his divorced wife, who is unable to maintain herself. This view is a reiteration of what is stated in two other decisions earlier rendered by this Court in Bai Tahira vs. Ali Hussain Fidaalli Chothia, (1979) 2 SCC 316, andFuzlunbi vs. K.Khader Vali & Anr., (1980) 4 SCC 125.

Smt. Kapila Hingorani and Smt. Indira Jaisingh raised the following contentions in support of the petitioners and they are summarised as follows :

1. Muslim marriage is a contract and an element of consideration is necessary by way of mahr or dower and absence of consideration will discharge the marriage. On the other hand, Section 125CrPC has been enacted as a matter of public policy.

2. To enable a divorced wife, who is unable to maintain herself, to seek from her husband, who is having sufficient means and neglects or refuses to maintain her, payment of maintenance at a monthly rate not exceeding Rs.500/-. The expression wife includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried. The religion professed by a spouse or the spouses has no relevance in the scheme of these provisions whether they are Hindus, Muslims, Christians or the Parsis, pagans or heathens. It is submitted thatSection 125 CrPC is part of the Code of Criminal Procedure and not a civil law, which defines and governs rights and obligations of the parties belonging to a particular religion like the Hindu Adoptions and Maintenance Act, the Shariat, or the Parsi Matrimonial Act. Section 125 CrPC, it is submitted, was enacted in order to provide a quick and summary remedy. The basis there being, neglect by a person of sufficient means to maintain these and the inability of these persons to maintain themselves, these provisions have been made and the moral edict of the law and morality cannot be clubbed with religion.

3. The argument is that the rationale of Section 125 CrPC is to off- set or to meet a situation where a divorced wife is likely to be led into destitution or vagrancy. Section 125 CrPC is enacted to prevent the same in furtherance of the concept of social justice embodied in Article 21 of the Constitution.

4. It is, therefore, submitted that this Court will have to examine the questions raised before us not on the basis of Personal Law but on the basis that Section 125 CrPC is a provision made in respect of women belonging to all religions and exclusion of Muslim women from the same results in discrimination between women and women. Apart from the gender injustice caused in the country, this discrimination further leads to a monstrous proposition of nullifying a law declared by this Court in Shah Banos case. Thus there is a violation of not only equality before law but also equal protection of laws and inherent infringement of Article 21 as well as basic human values. If the object of Section 125 CrPC is to avoid vagrancy, the remedy thereunder cannot be denied to Muslim women.

5. The Act is an un-islamic, unconstitutional and it has the potential of suffocating the muslim women and it undermines the secular character, which is the basic feature of the Constitution; that there is no rhyme or reason to deprive the muslim women from the applicability of the provisions of Section 125 CrPC and consequently, the present Act must be held to be discriminatory and violative of Article 14 of the Constitution; that excluding the application ofSection 125 CrPC is violative of Articles 14 and 21 of the Constitution; that the conferment of power on the Magistrate under sub-section (2) of Section 3 and Section 4 of the Act is different from the right of a muslim woman like any other woman in the country to avail of the remedies under Section 125 CrPC and such deprivement would make the Act unconstitutional, as there

is no nexus to deprive a muslim woman from availing of the remedies available under Section 125CrPC, notwithstanding the fact that the conditions precedent for availing of the said remedies are satisfied.

The learned Solicitor General, who appeared for the Union of India, submitted that when a question of maintenance arises which forms part of the personal law of a community, what is fair and reasonable is a question of fact in that context. Under Section 3 of the Act, it is provided that a reasonable and fair provision and maintenance to be made and paid by her former husband within the iddat period would make it clear that it cannot be for life but would only be for a period of iddat and when that fact has clearly been stated in the provision, the question of interpretation as to whether it is for life or for the period of iddat would not arise. Challenge raised in this petition is dehors the personal law. Personal law is a legitimate basis for discrimination, if at all, and, therefore, does not offend Article 14 of the Constitution. If the legislature, as a matter of policy, wants to apply Section 125 CrPC to Muslims, it could also be stated that the same legislature can, by implication, withdraw such application and make some other provision in that regard. Parliament can amend Section 125 CrPC so as to exclude them and apply personal law and the policy of Section 125 CrPC is not to create a right of maintenance dehors the personal law. He further submitted that in Shah Banos case, it has been held that a divorced woman is entitled to maintenance even after the iddat period from the husband and that is how Parliament also understood the ratio of that decision. To overcome the ratio of the said decision, the present Act has been enacted and Section 3(1)(a) is not in discord with the personal law.

Shri Y.H.Muchhala, learned Senior Advocate appearing for the All India Muslim Personal Law Board, submitted that the main object of the Act is to undo the Shah Banos case. He submitted that this Court has harzarded interpretation of an unfamiliar language in relation to religious tenets and such a course is not safe as has been made clear by Aga Mahomed Jaffer Bindaneem vs. Koolsom Bee Bee & Ors., 24 IA 196, particularly in relation to Suras 241 and 242 Chapter II, the Holy Quran.. He submitted that in interpreting Section 3(1)(a) of the Act, the expressions provision and maintenance are clearly the same and not different as has been held by some of the High Courts. He contended that the aim of the Act is not to penalise the husband but to avoid vagrancy and in this context Section 4 of the Act is good enough to take care of such a situation and he, after making reference to several works on interpretation and religious thoughts as applicable to Muslims, submitted that social ethos of Muslim society spreads a wider net to take care of a Muslim divorced wife and not at all dependent on the husband. He adverted to the works of religious thoughts by Sir Syed Ahmad Khan and Bashir Ahmad, published from Lahore in 1957 at p. 735. He also referred to the English translation of the Holy Quran to explain the meaning of gift in Sura 241. In conclusion, he submitted that the interpretation to be placed on the enactment should be in consonance with the Muslim personal law and also meet a situation of vagrancy of a Muslim divorced wife even when there is a denial of the remedy provided underSection 125 CrPC and such a course would not lead to vagrancy since provisions have been made in the Act. This Court will have to bear in mind the social ethos of Muslims, which are different and the enactment is consistent with law and justice.

It was further contended on behalf of the respondents that the Parliament enacted the impugned Act, respecting the personal law of muslims and that itself is a legitimate basis for making a differentiation; that a separate law for a community on the basis of personal law applicable to such community, cannot be held to be discriminatory; that the personal law is now being continued by a legislative enactment and the entire policy behind the Act is not to confer a right of maintenance, unrelated to the personal law; that the object of the Act itself was to preserve the personal law and prevent inroad into the same;

that the Act aims to prevent the vagaries and not to make a muslim woman, destitute and at the same time, not to penalise the husband; that the impugned Act resolves all issues, bearing in mind the personal law of muslim community and the fact that the benefits of Section 125 CrPC have not been extended to muslim women, would not necessarily lead to a conclusion that there is no provision to protect the muslim women from vagaries and from being a destitute; that therefore, the Act is not invalid or unconstitutional.

On behalf of the All India Muslim Personal Law Board, certain other contentions have also been advanced identical to those advanced by the other authorities and their submission is that the interpretation placed on the Arabic word mata by this Court in Shah Banos case is incorrect and submitted that the maintenance which includes the provision for residence during the iddat period is the obligation of the husband but such provision should be construed synonymously with the religious tenets and, so construed, the expression would only include the right of residence of a Muslim divorced wife during iddat period and also during the extended period under Section 3(1)(a) of the Act and thus reiterated various other contentions advanced on behalf of others and they have also referred to several opinions expressed in various text books, such as, -

1. The Turjuman al-Quran by Maulana Abul Kalam Azad, translated into English by Dr. Syed Abdul Latif;
2. Persian Translation of the Quran by Shah Waliullah Dahlavi
3. Al-Manar Commentary on the Quran (Arabic);
4. Al-Isaba by Ibne Hajar Asqualani [Part-2]; Siyar Alam-in-Nubla by Shamsuddin Mohd. Bin Ahmed BinUsman Az-Zahbi;
5. Al-Maratu Bayn Al-Fiqha Wa Al Qanun by Dr. Mustafa As- Sabai;
6. Al-Jamil ahkam-il Al-Quran by Abu Abdullah Mohammad Bin Ahmed Al Ansari Al-Qurtubi;
7. Commentary on the Quran by Baidavi (Arabic);
8. Rooh-ul-Bayan (Arabic) by Ismail Haqqi Affendi;
9. Al Muhalla by Ibne Hazm (Arabic);
10. Al-Ahwalus Shakhsiah (the Personal Law) by Mohammad abu Zuhra Darul Fikrul Arabi.

On the basis of the aforementioned text books, it is contended that the view taken in Shah Banos case on the expression mata is not correct and the whole object of the enactment has been to nullify the effect of the Shah Banos case so as to exclude the application of the provision ofSection 125 CrPC, however, giving recognition to the personal law as stated in Sections 3 and 4 of the Act. As stated earlier, the interpretation of the provisions will have to be made bearing in mind the social ethos of the Muslim and there should not be erosion of the personal law.

[On behalf of the Islamic Shariat Board, it is submitted that except for Mr. M. Asad and Dr. Mustafa-as-Sabayi no author subscribed to the view that the Verse 241 of Chapter II of the Holy Quran casts an obligation on a former husband to pay maintenance to the Muslim divorced wife beyond the iddat period. It is submitted that Mr. M. Asads translation and commentary has been held to be unauthentic and unreliable and has been subscribed by the Islamic World League only. It is submitted that Dr. Mustafa-as-Sabayi is a well-known author in Arabic but his field was history and literature and not the Muslim law. It was submitted that neither are they the theologists nor jurists in terms of Muslim law. It is contended that this Court wrongly relied upon Verse 241 of Chapter II of the Holy Quran and the decree in this regard is to be referred to Verse 236 of Chapter II which makes paying mata as obligatory for such divorcees who were not touched before divorce and whose Mahr was not stipulated. It is

submitted that such divorcees do not have to observe iddat period and hence not entitled to any maintenance. Thus the obligation for mata has been imposed which is a one time transaction related to the capacity of the former husband. The impugned Act has no application to this type of case. On the basis of certain texts, it is contended that the expression mata which according to different schools of Muslim law, is obligatory only in typical case of a divorce before consummation to the woman whose mahr was not stipulated and deals with obligatory rights of maintenance for observing iddat period or for breast-feeding the child. Thereafter, various other contentions were raised on behalf of the Islamic Shariat Board as to why the views expressed by different authors should not be accepted.

Dr. A.M.Singhvi, learned Senior Advocate who appeared for the National Commission for Women, submitted that the interpretation placed by the decisions of the Gujarat, Bombay, Kerala and the minority view of the Andhra Pradesh High Courts should be accepted by us. As regards the constitutional validity of the Act, he submitted that if the interpretation of Section 3 of the Act as stated later in the course of this judgment is not acceptable then the consequence would be that a Muslim divorced wife is permanently rendered without remedy insofar as her former husband is concerned for the purpose of her survival after the iddat period. Such relief is neither available under Section 125 CrPC nor is it properly compensated by the provision made in Section 4 of the Act. He contended that the remedy provided under Section 4 of the Act is illusory inasmuch as firstly, she cannot get sustenance from the parties who were not only strangers to the marital relationship which led to divorce; secondly, wakf boards would usually not have the means to support such destitute women since they are themselves perennially starved of funds and thirdly, the potential legatees of a destitute woman would either be too young or too old so as to be able to extend requisite support. Therefore, realistic appreciation of the matter will have to be taken and this provision will have to be decided on the touch stone of Articles 14, 15 and alsoArticle 21 of the Constitution and thus the denial of right to life and liberty is exasperated by the fact that it operates oppressively, unequally and unreasonably only against one class of women. While Section 5 of the Act makes the availability and applicability of the remedy as provided bySection 125 CrPC dependent upon the whim, caprice, choice and option of the husband of the Muslim divorcee who in the first place is sought to be excluded from the ambit of Section 3 of the post-iddat period and, therefore, submitted that this provision will have to be held unconstitutional.

This Court in Shah Banos case held that although Muslim personal law limits the husbands liability to provide maintenance for his divorced wife to the period of iddat, it does not contemplate a situation envisaged by Section 125 CrPC of 1973. The Court held that it would not be incorrect or unjustified to extend the above principle of Muslim Law to cases in which a divorced wife is unable to maintain herself and, therefore, the Court came to the conclusion that if the divorced wife is able to maintain herself the husbands liability ceases with the expiration of the period of iddat, but if she is unable to maintain herself after the period of iddat, she is entitled to recourse to Section 125 CrPC. This decision having imposed obligations as to the liability of Muslim husband to pay maintenance to his divorced wife, Parliament endorsed by the Act the right of a Muslim woman to be paid maintenance at the time of divorce and to protect her rights.

The learned counsel have also raised certain incidental questions arising in these matters to the following effect-

1) Whether the husband who had not complied with the orders passed prior to the enactments and were in arrears of payments could escape from their obligation on the basis of the Act, or in other words, whether the Act is retrospective in effect?

2) Whether Family Courts have jurisdiction to decide the issues under the Act?

3) What is the extent to which the Wakf Board is liable under the Act?

The learned counsel for the parties have elaborately argued on a very wide canvass. Since we are only concerned in this Bench with the constitutional validity of the provisions of the Act, we will consider only such questions as are germane to this aspect. We will decide only the question of constitutional validity of the Act and relegate the matters when other issues arise to be dealt with by respective Benches of this Court either in appeal or special leave petitions or writ petitions.

In interpreting the provisions where matrimonial relationship is involved, we have to consider the social conditions prevalent in our society. In our society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Our society is male dominated both economically and socially and women are assigned, invariably, a dependant role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, gives up her all other avocations and entirely devotes herself to the welfare of the family, in particular she shares with her husband, her emotions, sentiments, mind and body, and her investment in the marriage is her entire life a sacramental sacrifice of her individual self and is far too enormous to be measured in terms of money. When a relationship of this nature breaks up, in what manner we could compensate her so far as emotional fracture or loss of investment is concerned, there can be no answer. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognised by persons belonging to all religions and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the wakf boards. Such an approach appears to us to be a kind of distortion of the social facts. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constraints. Bearing this aspect in mind, we have to interpret the provisions of the Act in question.

Now it is necessary to analyse the provisions of the Act to understand the scope of the same. The Preamble to the Act sets out that it is an Act to protect the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto. A divorced woman is defined under Section 2(a) of the Act to mean a divorced woman who was married according to Muslim Law, and has been divorced by, or has obtained divorce from her husband in accordance with Muslim Law; iddat period is defined under Section 2(b) of the Act to mean, in the case of a divorced woman,-

(i) three menstrual courses after the date of divorce, if she is subject to menstruation;

(ii) three lunar months after her divorce, if she is not subject to menstruation; and

(iii) if she is enceinte at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy whichever is earlier. Sections 3 and 4 of the Act are the principal sections, which are under attack before us. Section 3 opens up with a non-obstante clause overriding all other laws and provides that a divorced woman shall be entitled to -

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

(b) where she maintains the children born to her before or after her divorce, a reasonable provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;

(c) an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim Law; and

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

Where such reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made and paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties, as the case may be. Rest of the provisions of Section 3 of the Act may not be of much relevance, which are procedural in nature.

Section 4 of the Act provides that, with an overriding clause as to what is stated earlier in the Act or in any other law for the time being in force, where the Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the iddat period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim Law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order. If any of the relatives do not have the necessary means to pay the same, the Magistrate may order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order. Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them has not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the second proviso to sub-section (1), the Magistrate may, by order direct the State Wakf Board, functioning in the area in which the divorced woman resides, to pay such maintenance as determined by him as the case may be. It is, however, significant to note thatSection 4 of the Act refers only to payment of maintenance and does not touch upon the provision to be made by the husband referred to in Section 3(1)(a) of the Act.

Section 5 of the Act provides for option to be governed by the provisions of Sections 125 to 128CrPC. It lays down that if, on the date of the first hearing of the application under Section 3(2), a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of Sections 125 to 128 CrPC, and file such affidavit or declaration in the court hearing the application, the Magistrate shall dispose of such application accordingly.

A reading of the Act will indicate that it codifies and regulates the obligations due to a Muslim woman divorcee by putting them outside the scope of Section 125 CrPC as the divorced woman has been defined as Muslim woman who was married according to Muslim law and has been divorced by or has obtained divorce from her husband in accordance with the Muslim law. But the Act does not apply to

a Muslim woman whose marriage is solemnized either under the Indian Special Marriage Act, 1954 or a Muslim woman whose marriage was dissolved either underIndian Divorce Act, 1969 or the Indian Special Marriage Act, 1954. The Act does not apply to the deserted and separated Muslim wives. The maintenance under the Act is to be paid by the husband for the duration of the iddat period and this obligation does not extend beyond the period of iddat. Once the relationship with the husband has come to an end with the expiry of the iddat period, the responsibility devolves upon the relatives of the divorcee. The Act follows Muslim personal law in determining which relatives are responsible under which circumstances. If there are no relatives, or no relatives are able to support the divorcee, then the Court can order the State Wakf Boards to pay the maintenance.

Section 3(1) of the Act provides that a divorced woman shall be entitled to have from her husband, a reasonable and fair maintenance which is to be made and paid to her within the iddat period. Under Section 3(2) the Muslim divorcee can file an application before a Magistrate if the former husband has not paid to her a reasonable and fair provision and maintenance or mahr due to her or has not delivered the properties given to her before or at the time of marriage by her relatives, or friends, or the husband or any of his relatives or friends. Section 3(3) provides for procedure wherein the Magistrate can pass an order directing the former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may think fit and proper having regard to the needs of the divorced woman, standard of life enjoyed by her during her marriage and means of her former husband. The judicial enforceability of the Muslim divorced womans right to provision and maintenance under Section (3)(1)(a) of the Act has been subjected to the condition of husband having sufficient means which, strictly speaking, is contrary to the principles of Muslim law as the liability to pay maintenance during the iddat period is unconditional and cannot be circumscribed by the financial means of the husband. The purpose of the Act appears to be to allow the Muslim husband to retain his freedom of avoiding payment of maintenance to his erstwhile wife after divorce and the period of iddat.

A careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair provision for maintenance. It was stated that Parliament seems to intend that the divorced woman gets sufficient means of livelihood, after the divorce and, therefore, the word provision indicates that something is provided in advance for meeting some needs. In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her cloths, and other articles. The expression within should be read as during or for and this cannot be done because words cannot be construed contrary to their meaning as the word within would mean on or before, not beyond and, therefore, it was held that the Act would mean that on or before the expiration of the iddat period, the husband is bound to make and pay a maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided inSection 3(3) but no where the Parliament has provided that reasonable and fair provision and maintenance is limited only for the iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time.

The important section in the Act is Section 3 which provides that divorced woman is entitled to obtain from her former husband maintenance, provision and mahr, and to recover from his possession her wedding presents and dowry and authorizes the magistrate to order payment or restoration of these sums or properties. The crux of the matter is that the divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former

husband. The wordings of Section 3 of the Act appear to indicate that the husband has two separate and distinct obligations : (1) to make a reasonable and fair provision for his divorced wife; and (2) to provide maintenance for her. The emphasis of this section is not on the nature or duration of any such provision or maintenance, but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely, within the iddat period. If the provisions are so read, the Act would exclude from liability for post-iddat period maintenance to a man who has already discharged his obligations of both reasonable and fair provision and maintenance by paying these amounts in a lump sum to his wife, in addition to having paid his wifes mahr and restored her dowry as per Section 3(1)(c) and3(1)(d) of the Act. Precisely, the point that arose for consideration in Shah Banos case was that the husband has not made a reasonable and fair provision for his divorced wife even if he had paid the amount agreed as mahr half a century earlier and provided iddat maintenance and he was, therefore, ordered to pay a specified sum monthly to her under Section 125 CrPC. This position was available to Parliament on the date it enacted the law but even so, the provisions enacted under the Act are a reasonable and fair provision and maintenance to be made and paid as provided under Section 3(1)(a) of the Act and these expressions cover different things, firstly, by the use of two different verbs to be made and paid to her within the iddat period, it is clear that a fair and reasonable provision is to be made while maintenance is to be paid; secondly, Section 4of the Act, which empowers the magistrate to issue an order for payment of maintenance to the divorced woman against various of her relatives, contains no reference to provision. Obviously, the right to have a fair and reasonable provision in her favour is a right enforceable only against the womans former husband, and in addition to what he is obliged to pay as maintenance; thirdly, the words of the Holy Quran, as translated by Yusuf Ali of mata as maintenance though may be incorrect and that other translations employed the word provision, this Court in Shah Banos case dismissed this aspect by holding that it is a distinction without a difference. Indeed, whether mata was rendered maintenance or provision, there could be no pretence that the husband in Shah Banos case had provided anything at all by way of mata to his divorced wife. The contention put forth on behalf of the other side is that a divorced Muslim woman who is entitled to mata is only a single or one time transaction which does not mean payment of maintenance continuously at all. This contention, apart from supporting the view that the word provision inSection 3(1)(a) of the Act incorporates mata as a right of the divorced Muslim woman distinct from and in addition to mahr and maintenance for the iddat period, also enables a reasonable and fair provision and a reasonable and fair provision as provided under Section 3(3) of the Act would be with reference to the needs of the divorced woman, the means of the husband, and the standard of life the woman enjoyed during the marriage and there is no reason why such provision could not take the form of the regular payment of alimony to the divorced woman, though it may look ironical that the enactment intended to reverse the decision in Shah Banos case, actually codifies the very rationale contained therein.

A comparison of these provisions with Section 125 CrPC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support is satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by us from the one provided under the Code of Criminal Procedure deprive them of their right loses its significance. The object and scope of Section 125CrPC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled, we find it difficult to accept the contention urged on behalf of the petitioners.

Even under the Act, the parties agreed that the provisions of Section 125 CrPC would still be attracted and even otherwise, the Magistrate has been conferred with the power to make appropriate provision for maintenance and, therefore, what could be earlier granted by a Magistrate under Section 125 CrPC would now be granted under the very Act itself. This being the position, the Act cannot be held to be unconstitutional.

As on the date the Act came into force the law applicable to Muslim divorced women is as declared by this Court in Shah Banos case. In this case to find out the personal law of Muslims with regard to divorced womens rights, the starting point should be Shah Banos case and not the original texts or any other material all the more so when varying versions as to the authenticity of the source are shown to exist. Hence, we have refrained from referring to them in detail. That declaration was made after considering the Holy Quran, and other commentaries or other texts. When a Constitution Bench of this Court analysed Suras 241-242 of Chapter II of the Holy Quran and other relevant textual material, we do not think, it is open for us to re-examine that position and delve into a research to reach another conclusion. We respectfully abide by what has been stated therein. All that needs to be considered is whether in the Act specific deviation has been made from the personal laws as declared by this Court in Shah Banos case without mutilating its underlying ratio. We have carefully analysed the same and come to the conclusion that the Act actually and in reality codifies what was stated in Shah Banos case. The learned Solicitor General contended that what has been stated in the Objects and Reasons in Bill leading to the Act is a fact and that we should presume to be correct. We have analysed the facts and the law in Shah Banos case and proceeded to find out the impact of the same on the Act. If the language of the Act is as we have stated, the mere fact that the Legislature took note of certain facts in enacting the law will not be of much materiality.

In Shah Banos case this Court has clearly explained as to the rationale behind Section 125 CrPC to make provision for maintenance to be paid to a divorced Muslim wife and this is clearly to avoid vagrancy or destitution on the part of a Muslim woman. The contention put forth on behalf of the Muslims organisations who are interveners before us is that under the Act vagrancy or destitution is sought to be avoided but not by punishing the erring husband, if at all, but by providing for maintenance through others. If for any reason the interpretation placed by us on the language ofSections 3(1)(a) and 4 of the Act is not acceptable, we will have to examine the effect of the provisions as they stand, that is, a Muslim woman will not be entitled to maintenance from her husband after the period of iddat once the Talaq is pronounced and, if at all, thereafter maintenance could only be recovered from the various persons mentioned in Section 4 or from the Wakf Board. This Court in Olga Tellis v. Bombay Municipal Corporation, 1985(3) SCC 545, and Maneka Gandhi v. Union of India, 1978 (1) SCC 248, held that the concept of right to life and personal liberty guaranteed under Article 21 of the Constitution would include the right to live with dignity. Before the Act, a Muslim woman who was divorced by her husband was granted a right to maintenance from her husband under the provisions of Section 125 CrPC until she may re-marry and such a right, if deprived, would not be reasonable, just and fair. Thus the provisions of the Act depriving the divoced Muslim women of such a right to maintenance from her husband and providing for her maintenance to be paid by the former husband only for the period of iddat and thereafter to make her run from pillar to post in search of her relatives one after the other and ultimately to knock at the doors of the Wakf Board does not appear to be reasonable and fair substitute of the provisions of Section 125 CrPC. Such deprivation of the divorced Muslim women of their right to maintenance from their former husbands under the beneficial provisions of the Code of Criminal Procedure which are otherwise available to all other women in India cannot be stated to have been effected by a reasonable, right, just and fair law

and, if these provisions are less beneficial than the provisions of Chapter IX of the Code of Criminal Procedure, a divorced Muslim woman has obviously been unreasonably discriminated and got out of the protection of the provisions of the general law as indicated under the Code which are available to Hindu, Buddhist, Jain, Parsi or Christian women or women belonging to any other community. The provisions prima facie, therefore, appear to be violative of Article 14 of the Constitution mandating equality and equal protection of law to all persons otherwise similarly circumstanced and also violative of Article 15 of the Constitution which prohibits any discrimination on the ground of religion as the Act would obviously apply to Muslim divorced women only and solely on the ground of their belonging to the Muslim religion. It is well settled that on a rule of construction a given statute will become ultra vires or unconstitutional and, therefore, void, whereas another construction which is permissible, the statute remains effective and operative the court will prefer the latter on the ground that Legislature does not intend to enact unconstitutional laws. We think, the latter interpretation should be accepted and, therefore, the interpretation placed by us results in upholding the validity of the Act. It is well settled that when by appropriate reading of an enactment the validity of the Act can be upheld, such interpretation is accepted by courts and not the other way.

The learned counsel appearing for the Muslim organisations contended after referring to various passages from the text books to which we have adverted to earlier to state that the law is very clear that a divorced Muslim woman is entitled to maintenance only upto the stage of iddat and not thereafter. What is to be provided by way of Mata is only a benevolent provision to be made in case of divorced Muslim woman who is unable to maintain herself and that too by way of charity or kindness on the part of her former husband and not as a result of her right flowing to the divorced wife. The effect of various interpretations placed on Suras 241 and 242 of Chapter 2 of Holy Quran has been referred to in Shah Banos case. Shah Banos case clearly enunciated what the present law would be. It made a distinction between the provisions to be made and the maintenance to be paid. It was noticed that the maintenance is payable only upto the stage of iddat and this provision is applicable in case of a normal circumstances, while in case of a divorced Muslim woman who is unable to maintain herself, she is entitled to get Mata. That is the basis on which the Bench of Five Judges of this Court interpreted the various texts and held so. If that is the legal position, we do not think, we can state that any other position is possible nor are we to start on a clean slate after having forgotten the historical background of the enactment. The enactment though purports to overcome the view expressed in Shah Banos case in relation to a divorced Muslim woman getting something by way of maintenance in the nature of Mata is indeed the statutorily recognised by making provision under the Act for the purpose of the maintenance but also for provision. When these two expressions have been used by the enactment, which obviously means that the Legislature did not intend to obliterate the meaning attributed to these two expressions by this Court in Shah Banos case. Therefore, we are of the view that the contentions advanced on behalf of the parties to the contrary cannot be sustained.

In Arab Ahemadhia Abdulla and etc vs. Arab Bail Mohmuna Saiyadbhai & Ors. etc., AIR 1988 (Guj.) 141; Ali vs. Sufaira, (1988) 3 Crimes 147; K. Kunhashed Hazi v. Amena, 1995 Crl.L.J. 3371;K. Zunaideen v. Ameena Begum, (1998] II DMC 468; Karim Abdul Shaik v. Shenaz Karim Shaik, 2000 Cr.L.J. 3560 and Jaitunbi Mubarak Shaikh v. Mubarak Fakruddin Shaikh & Anr., 1999 (3) Mh.L.J. 694, while interpreting the provision of Sections 3(1)(a) and 4 of the Act, it is held that a divorced Muslim woman is entitled to a fair and reasonable provision for her future being made by her former husband which must include maintenance for future extending beyond the iddat period. It was held that the liability of the former husband to make a reasonable and fair provision under Section 3(1)(a) of the Act is not restricted only for the period of iddat but that divorced Muslim woman is entitled to a reasonable and

fair provision for her future being made by her former husband and also to maintenance being paid to her for the iddat period. A lot of emphasis was laid on the words made and paid and were construed to mean not only to make provision for the iddat period but also to make a reasonable and fair provision for her future. A Full Bench of the Punjab and Haryana High Court in Kaka v. Hassan Bano & Anr., II (1998) DMC 85 (FB), has taken the view that under Section 3(1)(a) of the Act a divorced Muslim woman can claim maintenance which is not restricted to iddat period. To the contrary it has been held that it is not open to the wife to claim fair and reasonable provision for the future in addition to what she had already received at the time of her divorce; that the liability of the husband is limited for the period of iddat and thereafter if she is unable to maintain herself, she has to approach her relative or Wakf Board, by majority decision in Umar Khan Bahamami v. Fathimnurisa, 1990 Cr.L.J. 1364; Abdul Rashid v. Sultana Begum, 1992 Cr.L.J. 76; Abdul Haq v. Yasima Talat; 1998 Cr.L.J. 3433; Md. Marahim v. Raiza Begum, 1993 (1) DMC 60. Thus preponderance of judicial opinion is in favour of what we have concluded in the interpretation of Section 3 of the Act. The decisions of the High Courts referred to herein that are contrary to our decision stand overruled.

While upholding the validity of the Act, we may sum up our conclusions:

1) a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act.

2) Liability of Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to iddat period.

3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.

4) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India.

In the result, the writ petition Nos. 868/86, 996/86, 1001/86, 1055/86, 1062/86, 1236/86, 1259/86 and 1281/86 challenging the validity of the provisions of the Act are dismissed.

All other matters where there are other questions raised, the same shall stand relegated for consideration by appropriate Benches of this Court.

[G.B. PATTANAIK], [S. RAJENDRA BABU], [D.P. MOHAPATRA],
SEPTEMBER 28, 2001. [DORAISWAMY RAJU], [SHIVARAJ V. PATIL]

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ROSY JACOB VERSUS JACOB A. CHAKRAMAKKAL

Bench: Hon'ble Mr. Justice I.D. Dua, Hon'ble Mr. Justice A. Alagiriswami &

Hon'ble Mr. Justice C.A. Vaidyialingam

Petitioner: Rosy Jacob
Vs.
Respondent: Jacob A. Chakramakkal

1973 AIR 2090

1973 SCR (3) 918 1973 SCC (1) 840

DATE OF JUDGMENT 05/04/1973

In Rosy Jacob Vs. Jacob A. Chakramakkal, (1973) 1 SCC 840, a three-Judge Bench of the Supreme Court in a rather curt language had observed that the children are not mere chattels; nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.

The requirement of indispensable tolerance and mental understanding in matrimonial life is its basic foundation. The two spouses before us who are both educated and cultured and who come from highly respectable families must realise that reasonable wear and tear and normal jars and shocks of ordinary married life has to be put up with in the larger interests of their own happiness and of the healthy, normal growth and development of their offspring, whom destiny has entrusted to their joint parental care. Incompatibility of tamprament has to be endeavored to be disciplined into compatibility and not to be magnified by abnormal impluses or impulsive desires and passions. The husband is not disentitled to a house and a housewife, even though the wife has achieved the status of an economically emancipated woman; similarly the wife is not a domestic slave, but a responsible partner in discharging their joint, parental obligation in promoting the welfare of their children and in sharing the pleasure of their children's company. 'Both parents have, therefore, to cooperate and work harmoniously for their children who should feel proud of their parents and of their home, bearing in mind that their children have a right to expect from their parents such a home.

Guardians and Wards. Act, 1890, Sec. 25-Husband's application for the custody of children-Welfare of the children is the dominant consideration.

On the wife's application, judicial separation was granted under the Indian Divorce Act by the single Judge of the High Court. The custody of the eldest son was maintained with the husband while that of the daughter and the youngest son was given to the wife. In the Letters Patent Appeal preferred by the husband, the Division Bench varied the order directing handing over the custody

of the daughter and the youngest son also to the husband. The principal question before the Court was whether the husband's application for the custody of the children u/s 25 of the Guardian and Wards Act, 1890, was maintainable and, if so, what are the considerations which the Court should bear in mind in exercising the discretion regarding custody of children.

Allowing the appeal,

HELD: (i) On the facts and circumstances of the case, namely, that the Court cannot make any order under the Divorce Act, as the daughter had attained majority, and no guardian could be appointed U/S. 19 of the Guardians and Wards Act, 1890 during the life time of the existing guardian, husband's application was competent. Welfare of the children is the primary consideration, and hyper technicalities should not be allowed to deprive the guardian necessary assistance from the Court in effectively discharging his duties and obligations towards his ward.

(ii) The controlling consideration governing the custody of the children is the welfare of the children concerned and not the right of their parents. The Court while exercising the discretion should consider all relevant facts and circumstances so as to ensure the welfare of the children.

The contention that if the husband is not unfit to be the guardian of his minor children, then the question of their welfare does not at all arise, is misleading. If the custody of the father cannot promote the children's welfare, equally or better, than the custody of the mother, then, he cannot claim indefeasible right to their custody u/s 25 merely because there is no defect in his personal character and he has attachment for his children-which every normal parent has. As the daughter has just attained puberty and the youngest son was of the tender age, in the interest of their welfare, the mother should have the custody in preference to the father.

JUDGMENT

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 1295 & 1296 of 1972.

Appeals by special leave from the judgment and order dated April 26, 1972 of the Madras High.Court in O.S.A. Nos. 2 and 3 of 1971.

K. N. Balasubramanian and Lily Thomas, for the appellant.

The respondent appeared in person.

The Judgment of the Court was delivered by

Hon'ble Mr. Justice I.D. Dua :—

The real controversy in these two appeals by special leave preferred by the wife against her husband, lies in a narrow compass. These appeals are directed against the judgment and order of a Division Bench of the Madras High Court allowing the appeals by the husband and dismissing the cross-objections by the wife from the judgment and order of a learned single judge of the same High Court dismissing about 25 applications seeking diverse kinds of reliefs, presented by one or the other party. According to the learned single Judge (Maharajan J.) "these 25 applications represent but a fraction of the bitterness and frustration of an accomplished Syrian Christian couple who after making a mess of their married life have endeavoured to convert this Court into a machinery for wreaking private vengeance'. This observation reflects the feelings of the husband and the wife towards each other in the present litigation. The short question which we are called upon to decide relates to the guardianship

of the three children of the parties and the solution of this problem primarily requires consideration of the welfare of the children.

The appellant, Rosy Chakramakkal (described herein as wife) was married to respondent Jacob A. Chakramakkal (described herein as husband) sometime in 1952. Three children were born from this wedlock. Ajit alias Andrews,, son, was born in 1955, Maya alias Mary was born in 1957 and Mahesh alias Thomas was born in 1961. Sometime in 1962 the wife started proceedings for judicial separation (O.M.S. 12 of 1962). on the ground that the husband had inflicted upon her several acts of physical, mental and moral cruelty and obtained a decree on April 15, 1964. Sadasivam J., while granting the decree directed that Ajit alias Andrews (son) the eldest child should be kept in the custody of the husband and Mary alias Maya (daughter) and Thomas alias Mahesh (youngest son) should be kept in the custody of the wife. The husband was directed to pay to the wife Rs.200/ per mensem towards the expenses and maintenance of the wife and the two children.

The wife applied to Sadasivam J., sometime later for a direction that Ajit alias Andrews should also be handed over to her or in the alternative for a direction 'that the boy should be admitted in a boarding school. In this application (no. 2076 of 1964) it was alleged by the wife that the husband had beaten Ajit on the ground that he had accepted from his mother' (the wife) a fountain pen as a present. This was denied by the husband but the learned Judge, after elaborate enquiry, held that he had no doubt that the husband had caused injuries to the boy on account of his sudden out burst of temper on learning that Ajit had received a fountain pen by way of present from his mother on his birth day. Ajit was accordingly to be handed over to the mother subjected to certain conditions.

The husband preferred an appeal against the decree made in O.A4.S. 12 of 1962 (O.S.A. 65 of 1964) and another appeal against the order made by Sadasivam J., (in application no. 2076 of 1964 in O.M.S. 12 of 1962) directing the custody of the eldest son Ajit to be handed over to the wife (O.S.A. 63 of 1964). On August 2, 1966 the appellate bench confirmed the decree for judicial separation granted by Sadasivam J., and also issued certain, directions based on agreement of the parties with respect to the custody of the children, as. also reduction of the monthly maintenance payable by the husband to the wife from Rs. 200/to Rs. 15011- p.m., inclusive of maintenance payable for Mahesh. According to this order the eldest boy Ajit alias Andrews directed to remain in the custody of the father and to be educated 'by him at his expense : Mahesh alias Thomas was directed to be in the custody of the mother to be educated at her expense: and the second child Maya alias Mary was directed to be put in a boarding school, the expenses of her board and education to be met in equal shares by both the parents.

The husband also undertook that 'he will arrange to have the presence of his mother or sister at his residence to attend to the children whenever they are with him and never to leave the children alone at his residence or to the care of his servants or others". Later both the husband and wife presented a series of applications in the appellate court seeking modifications of its directions. That court ultimately made an order on February 2, 1967 modifying its earlier directions. The modified order directed Maya to be left in the exclusive custody of the wife who was at liberaty to educate her in the manner she thought best at her own cost. The appellate court also modified the direction regarding maintenance and ordered that the husband should pay to the wife maintenance at the rate of Rs. 200/- p.m. as awarded by the learned single judge. Subsequently the directions of the appellate, court regarding access of the mother and the father to the children were also sought by the parties to be modified to the prejudice of each other. The matters are stated to have been heard by most of the Judges of the Madras High Court at one stage or the other and according to Maharajan J., 'he parties even tried to secure

transfer of these proceedings by making wild allegations of partiality against some of the Judges. The husband who is an advocate of the Madras High Court, had, according to the wife, been filing cases systematically against her and the wife, who, in the opinion of Maharajan J., has the gift of the gab also argued her own cases. The children for whose welfare the parents are supposed to have been fighting as observed by Maharajan J., are given a secondary consideration and the quarrelling couple have lost all sense of proportion. On account of these considerations the learned single Judge felt that it would be a waste of public time to consider in detail the trivialities of the controversy pressed by both the parties to this litigation.

According to the learned single Judge the following four points arose for his judicial determination'.

> *"(1) Whether by defaulting to pay the maintenance decreed, the husband must be held guilty of contempt and shall not be allowed to prosecute his applications before he purges himself of contempt?*
>
> *(2) What is the proper order to pass as regards the custody of the three children of the marriage in the light of the events that have occurred subsequent to the judgement of the appellate court and under the Guardians and Wards Act ?*
>
> *(3) What is the proper order to pass as to the access of either parent to the children in the custody of the other?*
>
> *(4) Whether in the light of the subsequent events, the order regarding maintenance allowance should be reduced, enhanced or altered in any manner and if so, how?'*
>
> *On the first point the learned single Judge came to the conclusion that the husband could not be declined hearing merely because he had not paid the maintenance as directed by the matrimonial court. The amount in respect of which the husband had defaulted payment could be recovered through execution proceedings. On point no. 2 the learned single Judge proceeded to consider the question of the custody of the three children with the preliminary observation that the controlling factor governing their custody would be their welfare and not the rights of their parents. The eldest child Ajit alias Andrews, according to the learned Judge, was doing well at the school and was progressing satisfactorily both mentally and physically. There was accordingly no reason 'to. transfer his custody from his father to his mother. As regards the second child Maya alias Mary, as she was about to attain puberty and the wife being anxious that till she got married she must be in the mother's vigilant and affectionate custody she was to remain with her mother. Mahesh alias Thomas, who was considered to be of tender years and in the formative stage of life requiring sense of emotional security which a mother alone could give, was also kept in the custody of his mother. With respect to Maya and Mahesh it was further observed that from their educational. point of view the wife was a more suitable custodian than the husband because she was running a primary school from nursery to fifth standard with more than a hundred pupils and was also residing in a portion or the school premises enjoying certain facilities in her capacity as the founder and principal of that school. The husband, who was described as a grass widower without female relatives to look after the children, was not preferred to the wife as, while being with her, the children would be living in an academic atmosphere. With respect to the husband's complaint that from the moral point of view the wife was not fit to have the custody of the children, Maharajan J.,*

observed that earlier Sadasivam J., had dealt with the entire evidence relating to this charge and had found no sufficient ground for such amputations and that they were likely to cause mental pain to the wife and affect her health. The husband had even been held guilty of mental and moral cruelty to the wife. The husband's contention that his opinion was reversed by the appellate bench was disposed of by Maharajan J., after quoting the following passage from the appellate judgment dated August 2, 1966 "But it is to be clearly understood that there should be no slur on the part of either the appellant or the respondent because of the several proceedings in court and other happenings outside. The decree for judicial separation which is confirmed does not cast any cloud on the reputation or character of the husband or the wife. They have reached this settlement keeping in view all the circumstances and particularly the welfare of their minor children."

According to Maharajan 3., the appellate bench had felt satisfied that the charge of immorality levelled by the husband against the wife was not established because had it not been so satisfied the bench would not have entrusted two of the three children to the wife. The husband was in the circumstances held by Maharajan J., disentitled to reopen the question of the wife's immorality. In any event, Maharajan J., also rejected the charge of immorality as unproved, for the same reasons which had weighed with Sadasivam J. With respect to point no. 3 the learned single Judge gave the following directions :

"(1) On the first Sunday of every month, except during the school vacations, the husband shall send Ajit alias Andrews to the wife by 8.00 a.m. and the wife shall send back the child by 8. p.m. the same day.

(2) The wife shall send Maya alias Mary and Thomas alias Mahesh to the husband's by 8 a.m. on the last Sunday of every month, except during the school vacations, and the husband shall send them back by 8 p.m. the same day.

(3) Each party shall send the children by a conveyance taxi, rickshaw or bus, after prepaying the fare thereof.

(4) The wife shall send Mary alias Maya and Thomas alias Mahesh to the husband, so hat they might stay with him and Ajit alias Andrews for thirty days during the summer vacation. The exact time and dates of departure and arrival will be fixed with reference to the convenience of parties and after change, of letters between them at least one months prior to the commencement of the vacation' Likewise, the husband will send Ajit to the wife to enable him to spend the whole Dasara and Christamas vacations in the company of his mother, sister and brother."

On the fourth point the learned single Judge, fater considering at length the wife's allegations against the husband with respect to his extravagance and inability, reduced the quantum of maintenance payable by him to the wife to Rs. 100/- p.m., the reduced amount being payable with effect from January 1, 1971. The husband was directed to pay the monthly maintenance on or before the 10th of the succeeding month. This order was made with the observation that the earning capacity of the wife was superior to that of the husband.

It is unnecessary to refer to the formal orders separately passed in the various applications. Suffice it to say that the parties were left to bear to their own costs and hope was expressed in the coneluding para of the judgment by Maharajan, J. that "the parties will refrain from rushing to this court with applications

of the kind that have been dismissed and will apply themselves assiduously to the improvement of their status in their respective professions and to alleviation of the pain of material failure, which has unfortunately been visited upon the three lovely and sprightly children that they have produced."

Contrary to the hope expressed by learned Judge, the matter was taken to the appellate bench of the High Court under cl. 15 of the Letters Patent (O S. Appeal Nos. 2 and 3 of 1971). The wife also pressented cross-objections against the reduction of alimony and against directions as regards the father's access of Maya. A large number of applications were presented to the Court parties praying for diverse reliefs including action for contempt of court for disobedience of the court's orders. The hearing of the appeals somewhat surprisingly lasted for more than a year (March 1971 to March 1972). We find no justification for such prolonged hearing on a fairly simple matter like this. According to the Letters Patent Bench the arguments on both sides "mainly rested upon the character of each". The husband is said to have repeatedly accused the wife with immorality. In the opinion of the Letters Pantent Bench "the truth or otherwise of the matter may assume importance only for the purpose of deciding upon the fitness of the person to 'be the guardian of the children". Final orders were passed on April 26, 1972 by means of which the husband was held to be better fitted to be the guardian of the three children and to have their custody. This decision was stated to be based on evidence and in view of ss. 17, 19 and 25 of the Guardians and Wards Act. This is what one of the Judges constituting the Letters Patent Bench (Gokul Krishnan, J.,) said in this connection "In our opinion, the principles to be applied to cases of this kind will be the same both under the Indian Divorce Act and the Guardians and Wards Act, 1890. But since the father has specifically filed a petition, O.P. No. 270 of 1970, under section 25 of the Guardians and Wards Act, and that being a special law for the purpose will certainly apply, we shall concentrate on the Guardians and Wards Act, 1890".

After quoting S. 19 of the Guardians and Wards Act the learned Judge proceeded :

> *"It is thus clear that the special enactment definitely states that the father is the guardian of the minor until he is found unfit to be the guardian of the person of the minor. The welfare of the minor is the paramount consideration in the matter of apointing guardian for the person of minor, and cannot be said to be in conflict with the terms of section 19 of the Guardians and Wards Act which recognize the father as the guardian. Bear ing this in mind, we proceed to consider as to who is fit and proper to be the guardian for the person of the minor children in this case."*

In his view the principle on which the Court should decide the fitness of the guardian mainly depends on two factors :

(i) the father's fitness or otherwise to be the guardian and

(ii) the interests of the minors. Considering these factors it was felt that both the parties in the present case loved their children who were happy during their stay with both of their parents. There was in his view, absolutely no proof as regards disqualification of the husband to be the guardian of the minor children. It may here be pointed out that both the Judges constituting the Letters Patent Bench wrote separate judgments. Gokulakrishnan J., commenting on the Judgment of Maharajan J., observed thus :

"Maharajan J. in his judgment under appeal no doubt referred to section 19 of the Guardians and Wards Act, but would observe that if the Court finds that the welfare of the minor children could be protected only in the maternal custody, the Court has power to put the children in the care of custody

of the mother. The learned Judge clearly observed that Ajit, the eldest boy, who is in the custody of the appellant, is quite healthy and cheerful, doing well at school and that his sojourn with the father has not prejudicially affected him physically or mentally. But at the same breath, the learned Judge says that Maya and Mahesh 'are of tender years and in the formative stage of their life and need a sense of emotional security, which a mother alone can give.'In the case of Maya and Mahesh, the learned Judge has applied a different standard in regard to their custody. Considering the present age of both Maya and Mahesh and taking into consideration the upbringing of Ajit by the appellant having him in his custody, we are of the view that the same amount of sense of emotional security can be enjoyed by Maya and Mahesh at the hands of the appellant also. The learned Judge's reasoning that the mother is running a school and has also facilities to make these two children live in the academic atmosphere rather than with their father, cannot have any force, in. view of the clear and categorical principles laid down in the various decisions noticed (supra) and also in view of the clear intendment and spirit of the Guardians and Wards Act, which prescribes that father is the guardian of his minor child unless other wise found unfit. The academic qualification of the mother, her financial status and the other standards cannot at all weigh in the matter when the appellant has not been rejected as a person unfit to be the guardian of the minors. If they should weigh, the poorer and affectionate father with moderate capacity to protect his children will be deprived of the custody of the minor children on the flimsy ground of 'welfare of the minor children'. That is how and why ',the welfare of the minor children' must be read with 'fitness or unfitness of the father to be guardian of the minors. Once it is found that the father is the fit and proper person to be the guardian of his minor children, unless it is otherwise found that he is not fit, it must be presumed that the children's interests will be properly protected by the father. As far as the present case is concerned, when the trial court itself has found that Ajit has been properly looked after and brought up very well in his academic career by the appellant, there cannot be any difficulty in coming to the conclusion that Maya and Mahesh will also be looked after and protected and imparted with proper education by the affectionate father, the appellants After reproducing certain observations from the judgment', of (i) Sadasivam J., dated April 15, 1964, (ii) Veeraswamy 1.. (as he then was) and Krishnaswami Reddy J., dated February 1967 in C.M.P. 415 in O.S.A. nos. 63 & 65 of 1969, Ramamurthy J., dated April 24, 1968 in application nos. 769 and 770 of 1968 in O.M.S. 12 of 1962 and after referring to the view of Maharajan J., that Ajit when produced in Court was found quite healthy and cheerful and was doing well at school, Venkataraman J. in his concurring judgment observed thus :-

> *"Regarding the other children, he gave their custody to the mother, because he thought that they were of tender years and needed emotional security which a mother alone could give.*
>
> *Here, with respect we must differ from the learned Judge. We find that the father is quite fit to have the custody of the children, and. in law, custody of the minor children cannot be refused to him. We are also satisfied from what we saw of the appellant and, heard from him during the several hearings, that he is very deeply attached to his children and is quite competent to have their custody. It wilt be enough if the mother is allowed a somewhat liberal access to the three children."*

With respect to alimony the appellate bench concluded that the wife was managing her school very successfully; she had purchased a mini-bus and also possessed wet lands in her village The husband on the other hand was not getting on well in his profession which he attributed to the present litigation : his house at Adyar was stated to be under mortgage and he had practically sold everything in his native

village with the exception of one, or one-and-half acres of land. In view of the financial position of the wife and the husband and in view of the fact that all the three children were to be in the custody of the husband the appellate bench considered it unnecessary for the' husband to pay any maintenance to the wife. The payment of the arrears of alimony was also suspended as the appellate bench considered itself empowered to do so under the proviso to s. 37 of the Indian Divorce Act. In so far as access of the wife to' the children is concerned a detailed order was passed by the bench about the right of the wife to take the daughter with her during the summer and Christmas vacations and also during several days every month, particularly during the periods. We do not consider it necessary to state in full the details of that order. With respect to Ajit and Mahesh also a detailed order was made fixing the precise days and even time when the wife could bring the children from the father to stay with her. In the event of any difficulty in getting custody of the children from the wife, it was ordered at the instance of the husband, that he could take the police help on the strength of the High Court judgment. We find it extremely difficult to appreciate this direction. Orders from the Court in execution would have 'been more appropriate. Police intervention in such personal domestic differences in the present case, where parties belong to educated respectable families should have been avoided.

In this Court a preliminary objection to the hearing of the wife's appeal was raised by the husband, who, being an advocate, personally addressed us in opposing these appeals. Indeed in June, 1972 he had presented Civil Miscellaneous Petitions Nos. 4188 and 4189 of 1972 for revoking special leave, and it was these applications which he pressed before us at the outset. These lengthy applications covering nearly 50 pages mainly contain arguments on the merits and there is hardly any cogent ground made out justifying revocation of the special leave. It is no, doubt open to this Court to revoke special leave when it transpires that special leave had been secured by the appellant on deliberate misrepresentation on a material point having a bearing on the question of granting such leave. The extraordinary discretionary power vested in this Court by the Constitution under Act, 136 is in the nature of a special residuary power exercisable in its judicial discretion outside the purview of ordinary law in cases where the needs of justice demand interference. Being discretionary power intended only to Promote the cause of justice when there is no other adequate remedy, this Court expects those seeking resort to this reserve. of constitutional power for securing justice to be absolutely fair and frank with this Court in correctly stating the relevant facts and circumstances of the case. In the event of a party making a misrepresentation on a point having a bearing on the question of the exercise of judicial discretion and thereby-trying to over-reach this Court the party forfeits the claim to the discretionary relief : the same is the case when such misrepresentation is discovered by this Court and brought to its notice after the grant of special leave and this Court is competent and indeed it considers it proper to revoke the special-leave thus Obtained. But the misrepresentation must be deliberate and on a point having such relevance to the question of special leave that if true facts were known this Court would leave in all Probability declined special leave. Applying this test to the, present case we arc unable to find any such deliberate misrepresentation by the, appellant indicating intention to mislead or over-reach this Court. The points to which our attention was drawn seem to relate to the merits of the controversies between the parties which would fall for determination on the hearing of the appeal after considering the arguments pro and con. The preliminary objection thus fails and must be disallowed.

Turning to the merits of these appeals, it may be pointed out that with the exception of O.P. No. 270 of 1970 filed by the husband under S. 25 of the Guardians and Wards Act all the other applications presented by the parties and disposed of by Maharajan J., were off-shoots of O.M.S. 12 of 1962 in which

the wife had obtained a decree for judicial separation. The first contention raised on behalf of the appellant was that O.P. No. 270 of 1970 did not lie. It was strenuously pressed by Shri Balasubaramania lyer the counsel for the appellant wife that the husband's application under s. 25, Guardians and Wards Act was not competent because none of the children had been illegally removed from the lawful custody of their father, the custody of the two children having been lawfully entrusted to the wife in proceedings to which the husband was a party. It was emphasised in this connection that the custody of the girl Maya and of the boy Mahesh had been lawfully entrusted to ,the wife by a competent Court and unless there is actual physical removal of the children from the custody of the father, S. 25 would. not be attracted.

Now the first thing to be notified is that this objection as to the competence of the application under S. 25 is in the nature of a preliminary objection. But it was not raised either before the learned single Judge or before the Letters Patent Bench in the manner in which it is pressed before us. In this Court also in the special leave appeal the objection seems to be based on the argument that the Guardians and Wards Act would be inapplicable to cases where orders have been made in. matrimonial proceedings, and s. 19 of the Guardians and Wards Act cannot control the custody or children given by a consent decree under the Indian Divorce Act. However, as the objection was stated to pertain to jurisdiction we allowed the parties to address us on this point.

For determining the question of competence of the husband's application under s. 25 of the Guardians and Wards Act (18 of 1890) it is necessary to examine the scheme of that Act as also the relevant provisions of the Indian Divorce Act.

The Guardians and Wards Act was enacted in order to consolidate and amend the law relating to Guardian and Ward. But as provided by s.3, this Act is not to be construed, inter alia ,to take away any Power possessed by any High Court. According to s.4, which is the definition section, a "minor' is a Person who, under the provisions of the Indian Majority Act, 1875 is to be deemed not to have attained his majority. Under S. 3 of that Act this age is fixed at 18 years, except for those, for whose person or property or both a guardian has already been appointed by a court of justice (other than a guardian for a suit under Chapter XXXI, C.P.C.) and for whose property, superintendence has been assumed by a Court of Wards, for whom it is fixed at 21 years. A "ward" under this Act means a minor for whose person or property or both there is a guardian and "guardian" is a person having the care of the person of a minor or of his property or both. Chapter 11 of this Act (18 of 1890), consisting of ss.5 to 19 (s. 5 applicable to European British subjects has since been repealed, deals with the Appointment and Declaration of Guardians. Section 7 empowers the Court to make orders as to guardianship where it is satisfied that it is for the welfare of the minor that an order should be made appointing his guardian or declaring a person to be such guardian. Section 7(3) places certain restrictions with respect to cases where guardians have been appointed by will or other instrument or appointed or declared by court. Section 8 provides for persons entitled to apply under s. 7 : they include Collectors as specified in cls. (c) and (d). Sections 9 to 11 provide for jurisdiction of. courts, form of applications and procedure on admission of applications. Section 12 provides for interlocutory orders subject to certain restrictions. Next important sections are ss. 17 and 19. Section 17 which provides for the matters to be considered by the court in appointing or declaring guardian reads :

> *"17. Matters to be considered by the Court in appointing guardian.*

(1) In appointing or declaring the, guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of the deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference."

Section 19, which prohibit the Court from appointing guardians in certain cases, reads :

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

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

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

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

Chapter III (ss. 2O to 42) prescribes duties, rights and liabilities of, guardians. Sections 20-23 (General provisions) do not concern us. Section 20 provides for the fiduciary relationship of guardian towards his wards and S. 22 provides for remuneration of guardians appointed or declared by the Court. Sections 24 to 256 deal with "'Guardian of the person". Under s. 24 the guardian is bound, inter alia, to look to his ward's support, health and education. Section 25 which is of importance for our purpose provides for "Title of Guardian to custody of Ward" and reads

"25. Title of guardian to custody of ward :

(1)If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion ,that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

(2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the Code of Criminal Procedure, 1882.

(3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship."

Sections 27 to 37 deal with "Guardian's Property" and Sections 38 to 48 deal with"'Termination of Guardianship". Chapter IV (ss. 43 to 51) is the last chapter dealing with supplementary provisions.

Now it is clear from the language of S. 25 that it is attracted only if a ward leaves or is removed from the custody of a guardian of his person and the Count is empowered to make an order for,the return of the ward to his guardian if it is of opinion that it will be for the, welfare of the, ward to return to the custody of his guardian. The Court is entrusted with a judicial discretion to order return of the Ward to the custody of his guardian, if it forms an opinion that such return is for the ward's welfare. The use of the words "ward" and "guardian" leave little doubt that it is the guardian who, having the care of the person of his ward, has be-In deprived of the same and is in the capacity of guardian entitled to the custody of such ward, that can seek the assistance of the Court for the return of his ward to his custody. The guardian contemplated by this section includes every kind of guardian known to law. It is not disputed that, as already noticed, the Court dealing with the proceedings for judicial separation under the Indian Divorce Act, (4 of 1869) had made certain orders with respect to the custody, maintenance and education of the three children of the parties. Section 41 of the Divorce Act empowers the Court to make interim orders with respect to the minor children and also to make proper provision to that effect in the decree : s. 42 empowers the Court to make similar orders upon application (by petition) even after the decree. This section expressly embodies the legislative recognition of the ,fundamental rule that the Court as representing the State is vested with the power as also the duty and responsibility of making suitable orders for the custody, maintenance and education of the minor children to suit the changed conditions and circumstances. It is, however, noteworthy that under Indian Divorce Act the sons of Indian fathers cease to be; minors on attaining the age of 16 years and their daughters cease to be minors on attaining the age of 13 years : s. 3(5).

The Court under the Divorce Act would thus be incompetent now to make any order under ss. 41 and 42 with respect to the elder son and the daughter in the present case. According to the respondent husband under these circumstances he cannot approach the Court under the Divorce, Act for relief with respect to the custody of these children and now that those children have ceased to be minors under that Act, the orders made by that Court have also. lost their vitality On this reasoning the husband claimed the right to invoke S. 25 of the Guardians and Wards Act : in case this section is not applicable, then the husband contended, that his application (O.P. 270 of 1970) should be, treated to be an application under S. 19 of the Guardians and Wards Act or under any other competent section of that Act so that he could Let the custody of his children, denied to him by the wife. The label on the application, he argued, should be treated as a matter of mere form and, therefore, immaterial. The appellant's counsel on the other hand contended that the proper procedure for the husband to adopt was to apply under s.7 of the Guardians and Wards Act. Such an application, if made, would have been tried in accordance with the provisions of that Act. The counsel added that ss. 7 and 17 of that Act also postulate welfare of ,the minor in the circumstances of the case, as the basic and primary consideration for the Court to keep in view when appointing or declaring a guardian. The welfare of the minors in the present case, according to the wife, would be best served it they remain in her custody.

In our opinion, S. 25 of the Guardians and Wards Act contemplates not only actual physical custody but also constructive custody of the guardian which term includes all categories of guardians. The object and purpose of this provision being ex facie to ensure the welfare of the minor ward, which necessarily involves due protection of the right of his guardian ,to properly look after the ward's health, maintenance and ,education, this section demands reasonably liberal interpretation so as to effectuate that object.

Hyper-technicalities should not be allowed to deprive the guardian the necessary assistance from the Court in effectively discharging his duties and obligations towards his ward so as to promote the

latter's welfare. If the ,Court under the Divorce Act cannot make any order with respect to the custody of Ajit alias Andrew and Maya alias Mary and it is not open to the Court under the Guardians and Wards Act to appoint or declare guardian of the person of his children under s. 19 during his life-time, if the Court does not consider him unfit, then, the only provision to which the father can have resort for his children's custody is S. 25. Without, therefore, laying down exhaustively the circumstances in which s. 25 can be invoked, 'in our opinion, on the facts and circumstances of this case the husband's application under S. 25 was competent with respect to the two elder children. The Court entitled to consider all the disputed questions of fact or law properly raised before it relating to these two children. With respect to Mahesh alias Thomas. however, the Court under the Divorce Act is at present empowered to make suitable orders relating to his custody, maintenance and education. It is, herefore, somewhat difficult to impute to the legislature an intention to set up, another parallel Court to deal with the question of the custody of a minor which is within the power of a competent Court under the Divorce Act. We are unable to accede to the respondent's suggestion that his application should be considered to have been preferred for appointing or declaring him as a guardian. But whether the respondent's prayer for custody of the minor children be, considered under the Guardians and Wards Act or under the Indian Divorce Act, as observed by Maharajan J., with which observation we entirely agree, "the controlling consideration governing the custody of the children is the welfare of the children concerned and not the right of their parents" It was not disputed that under the Indian Divorce Act this is the controlling consideration. The Court's power under s.25 of the Guardians and Wards Act is also, in our opinion, to be governed primarily by the consideration of the welfare of the minors concerned. The discretion vested in the Court is, as is the case with all judicial discretions to be exercised judiciously in the background of all the relevant facts and circumstances. Each case has to be decided on its own facts and other cases can hardly serve as binding precedents, the facts of two cases in this respect being seldom-if ever-identical. The contention that if the husband is not unfit to be the guardian of his minor children, then, the question of their welfare does not at all arise is to state the proposition a bit too broadly may at times be somewhat misleading. It does not take full notice of the real core of the statutory purpose. In our opinion, the dominant consideration in making orders under s.25 is the welfare of the minor children and in considering this question due regard has of course to be paid to the right of the father to be the guardian and also to all other relevant factors having a bearing on the minor's welfare. There is a presumption that a minor's parents would do their very best to promote their children's welfare and, if necessary, would not grudge any sacrifice of their own personal interest and pleasure. This presumption arises because of the natural, selfless affection normally expected from the parents for their children. From this point of view, in case of conflict or dispute between the mother and the father about the custody of (their children, the approach has to be somewhat different from that adopted by the Letters Patent Bench of the High Court in this case.

There is no dichotomy between the fitness of the father to be entrusted with the custody of his minor children and considerations of their welfare. The father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. If the custody of the father cannot promote their welfare equally or better than the custody of the mother, then, he cannot claim indefeasible right to their custody under s.25 merely because there is no defect in his personal character and he has attachment for his children which every normal parent has. These are the only two aspects pressed before us, apart from the stress laid by the husband on the allegations of immorality against the wife which, in our firm opinion, he was not at all justified in contending. Such allegations, in view of earlier decisions, had to be completely ignored in considering the question of custody of the children in the present case. The father's fitness from the

point of view just mentioned cannot over-ride considerations of the welfare of the minor children. No doubt, the father has been presumed by the statute ,generally to be better fitted to look after the children-being normally the earning member and head of the family-but the Court has in each-case to see primarily to the welfare of the children in determining the question of their custody, in the background of .all the relevant facts having a bearing on their health, maintenance and education.

The family is normally the heart of our society and for a balanced and healthy growth of children it is highly desirable that they got their due share of affection and care from both the parents in their normal parental home.

Where, however, family dissolution due to some unavoidable circumstances becomes necessary the Court has to come to a judicial decision on the question of the welfare of the children on a full consideration of all the relevant circumstances. Merely because the father loves his children and is not shown to be otherwise undesirable cannot necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him as against the wife who may also be equally affectionate towards her children and otherwise equally free from blemish, and who in addition because of her profession and financial resources, may be in a posit-ion to guarantee better health, education and maintenance for them. The children are not mere chattels; nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives.of their children, has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute 'between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them. The approach of the learned single Judge, in our view, was correct and we agree with him. The Letters Patent Bench on appeal seems to us have erred in reversing him on grounds which we are unable to appreciate.

At the bar reference was made to a number of decided cases on 'the question of the right of, father to No appointed or declared as guardian and to be granted custody of his minor children under s. 25 read with S. 19 of the Guardians and Wards Act. Those decisions were mostly decided on their own peculiar facts. We have, therefore not considered it necessary to deal with them. To the extent, however, they go against the view we have taken of s. 25 ,of the Guardians and Wards Act, they must be held to be wrongly, decided. The respondent's contention that the Court under the Divorce Act had granted custody of the two younger children to the wife on the ground of their being of tender age, no longer holds good and that, therefore, their custody must be handed over to him appears to us to be misconceived. The age of the daughter at present is such that she must need the constant company of ,I grown-up female in the house genuinely interested in her welfare. Her mother is in the circumstances the best company for her. The daughter would need her mother's advice and guidance on several matters of importance. It has not been suggested at the bar that any grown-up woman closely related to Maya alias Mary would be available in the husband's house for such motherly advice and guidance. But this apart, even from the point of view of her education, in our opinion, her custody with the wife would be far more beneficial than her custody with the husband. The youngest son would also' in our opinion, be much better looked after by his mother than by his father who will have to work hard to take a mark in his profession.

He has quite clearly neglected his profession and we have no doubt that if he devotes himself' wholeheartedly to it he is sure to find his place fairly high tip in the legal profession.

The appellant's argument based on estoppel and on the orders made by the court under the Indian Divorce Act with respect to the custody of the children did not appeal to us. All orders relating to the custody of the minor wards from their very nature must be considered to be temporary orders made in the existing circumstances. With the changed conditions and Circumstances, including the passage of time, the Court is entitled to vary such orders if such variation is considered to be in the interest of the welfare of the wards. It is unnecessary to refer to some of the decided cases relating to estoppel based, on consent decrees cited at the bar. Orders relating to custody of wards even when based on consent are liable to be varied by the Court, if the welfare of the wards demands variation.

We accordingly allow the appeal with respect to the custody of the two younger children and setting aside the judgment of the Letters Patnet Bench in this respect, restore that of the learned single Judge who, in our view, had correctly exercised his discretion under s. 25 of the Guardians and Wards Act, The directions given by him with respect to access of the parties to their children are also restored. As regards alimony, no doubt. the Letters Patent Bench was, in our opinion, not quite right in withholding payment of the alimony already fallen due and in arrears. But in view of the fact that the financial position of the wife is far superior to that of the husband who according to his own submission. has yet to establish himself in his profession, we do not consider it just and proper to interfere with that order under Art. 136 of the Constitution. With respect to the alimony, therefore, the appeal fails and is dismissed. We also direct that the parties should bear their own costs throughout. ,

Before concluding we must also express our earnest hope, as was done by the learned single Judge, that the two spouses would at least for the sake of happiness of their own offspring if for no other reason, forget the past and turn a new leaf in their family life, so that they can provide to their children a happy, domestic home, to which their children must be considered to be justly entitled. The requirement of indispensable tolerance and mental understanding in matrimonial life is its basic foundation. The two spouses before us who are both educated and cultured and who come from highly respectable families must realise that reasonable wear and tear and normal jars and shocks of ordinary married life has to be put up with in the larger interests of their own happiness and of the healthy, normal growth and development of their offspring, whom destiny has entrusted to their joint parental care. Incompatibility of tamprament has to be endeavored to be disciplined into compatibility and not to be magnified by abnormal impluses or impulsive desires and passions. The husband is not disentitled to a house and a housewife, even though the wife has achieved the status of an economically emancipated woman; similarly the wife is not a domestic slave, but a responsible partner in discharging their joint, parental obligation in promoting the welfare of their children and in sharing the pleasure of their children's company. 'Both parents have, therefore, to cooperate and work harmoniously for their children who should feel proud of their parents and of their home, bearing in mind that their children have a right to expect from their parents such a home.

Appeal allowed in part.

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MOHD. AHMED KHAN VS SHAH BANO BEGUM

Bench: Hon'ble Mr. Justice Y.V. Chandrachud, CJ., Hon'ble Mr. Justice D.A. Desai, Hon'ble Mr. Justice O.Chinappa Reddy, Hon'ble Mr. Justice E.S. Venkataramiah & Hon'ble Mr. Justice Rangnath Misra

Mohd. Ahmed Khan
Vs.
Shah Bano Begum and Ors.

Equivalent citations: 1985 AIR 945, 1985 SCR (3) 844
Date of Judgment : 23/04/1985

(1985) 2 SCC 556

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 103 of 1981.

Fact of the case:

An application was made under Sec125 in regards to maintenance granted to a wife who is unable to maintain herself. Wife includes a women who has been divorced or has obtained divorce and not remarried.

The Appellant was a advocate by Profession married to Respondent in 1932. They begot 3 sons and 2 daughters out of the Marriage.

In 1975 the appellant drove the respondent out of the home. In 1978 respondent filed a petition under sec125 of Crpc, in JMFC Indore for maintenance.

In 1978 the appellant divorced the respondent by irrevocable Talak and took up the defence that since she is no more a wife he has no obligation to provide maintenance to her as he has already paid Rs.200 per month for 2 years in a manner of Dower during the period of Iddat.

In 1979 the Magistrate directed to pay a sum of Rs.25 per month to the respondent by way of maintenance.

The High Court of Madhya Pradesh enhanced the amount to Rs.179.20 per month.

The Husband made a special writ petition to Supreme Court.

It was held that sec125 of the code is truly secular in character. It was enacted to provide quick and summary remedy to the class of persons who are unable to maintain themselves.

Irrespective of the person being of any religion sec 125 is applicable because it is a part of Criminal Procedure Court and not Civil Laws.

Neglect by a person of sufficient means to not give maintenance to any dependents leads to invoking of 125.

The rights conferred by sec125 can be exercised irrespective of Personal Law of the Parties.

In this case held : Husband Liabilities to provide maintenance doesn't get limited into the boundation of time period of Iddat but as long as the wife is unable to maintain herself or remarried even though Iddat period is over.

From the Judgment and Order dated 1. 7. 1980 of the Madhya Pradesh High Court in Crl. Revision No. 320 of 1979.

P. Govindan Nair, Ashok Mahajan, Mrs. Kriplani, Ms. Sangeeta and S.K Gambhir for the Appellant.

Danial Latifi Nafess Ahmad Siddiqui, S.N. Singh and T.N.Singh for the Respondents.

Mohd. Yunus Salim and Shakeel Ahmed for Muslim Personal Law Board.

S.T. Desai and S.A. Syed for the Intervener Jamat- UlemaHind.

JUDGMENT

The Judgment of the Court was delivered by

Hon'ble Mr. Justice Y.V. Chandrachud,C.J. :—

This appeal does not involve any question of constitutional importance but, that is not to say that it does not involve any question of importance. Some questions which arise under the ordinary civil and criminal law are of a far-reaching significance to large segments of society which have been traditionally subjected to unjust treatment. Women are one such segment. ' Nastree swatantramarhati" said Manu, the Law giver: The woman does not deserve independence. And, it is alleged that the 'fatal point in Islam is the 'degradation of woman'(l). To the Prophet is ascribed the statement, hopefully wrongly, that 'Woman was made from a crooked rib, and if you try to bend it straight, it will break; therefore treat your wives kindly.

This appeal, arising out of an appellation filed by a divorced Muslim woman for maintenance under section 125 of the Code of Criminal Procedure, raises a straightforward issue which is of common interest not only to Muslim women, not only to women generally but, to all those who, aspiring to create an equal society of men and women, lure themselves into the belief that mankind has achieved a remarkable degree of progress in that direction. The appellant, who is an advocate by profession, was married to the respondent in 1932. Three sons and two daughters were born of that marriage In 1975, the appellant drove the respondent out of the matrimonial home. In April 1978, the respondent filed a petition against the appellant under section 125 of the Code in the court of the learned Judicial Magistrate (First Class), Indore asking for maintenance at the rate of Rs 500 per month. On November 6, 1978 the appellant divorced the respondent by an irrevocable talaq. His defence to the respondent's petition for maintenance was that she had ceased to be his wife by reason of the divorce granted by him, to provide that he was therefore under no obligation maintenance for her, that he had already paid maintenance to her at the rate of Rs. 200 per month for about two years and that, he had deposited a sum of Rs. 3000 in the court by way of dower during the period the of iddat. In August, 1979 the learned Magistrate directed appellant to pay a princely sum of Rs. 25 per month to the respondent by way of maintenance. It may be mentioned that the respondent had alleged that the appellant earns a professional income of about Rs. 60,000 per year. In July, 1980, in a revisional application filed by the respondent, the High Court of Madhya Pradesh enhanced the amount of maintenance to Rs. 179.20 per month. The husband is before us by special leave.

Does the Muslim Personal Law impose no obligation upon the husband to provide for the maintenance of his divorced wife ? Undoubtedly, the Muslim husband enjoys the privilege of being (1) 'Selections

from Kuran'-Edward William Lane 1843, Reprint 1982, page xc (Introduction) able to discard his wife whenever he chooses to do so, for reasons good, bad or indifferent. Indeed, for no reason at all. But, is the only price of that privilege the dole of a pittance during the period of iddat ? And, is the law so ruthless in its inequality that, no matter how much the husband pays for the maintenance of his divorced wife during the period of iddat, the mere fact that he has paid something, no matter how little, absolves him for ever from the duty of paying adequately so as to enable her to keep her body and soul together ? Then again, is there any provision in the Muslim Personal Law under which a sum is payable to the wife 'on divorce' ? These are some of the important, though agonising, questions which arise for our decision.

The question as to whether section 125 of the Code applies to Muslims also is concluded by two decisions of this Court which are reported in Bai Tahira v. Ali Hussain Fidalli Chothia(1) andFazlunbi v. K. Khader Vali.(2) These decisions took the view that the divorced Muslim wife is entitled to apply for maintenance under section 125. But, a Bench consisting of our learned Brethren, Murtaza Fazal Ali and A. Varadarajan, JJ. were inclined to the view that those cases are not correctly decided. Therefore, they referred this appeal to a larger Bench by an order dated February 3, 1981, which reads thus:

"As this case involves substantial questions of law of far-reaching consequences, we feel that the decisions of this Court in Bai Tahira v. Ali Hussain Fidaalli Chothia & Anrand Fuzlunbi v. K. Khader Vnli & Anr. require reconsideration because, in our opinion, they are not only in direct contravention of the plain and an unambiguous language of s. 127(3)(b) of the Code of Criminal Procedure, 1973 which far from overriding the Muslim Law on the subject protects and applies the same in case where a wife has been divorced by the husband and the dower specified has been paid and the period of iddat has been observed. The decision also appear to us to be against the fundamental concept of divorce by the husband and its consequences (1) 1979 (2) SCR 75 (2) 1980 (3)SCR 1127 under the Muslim law which has been expressly protected bys. 2 of the Muslim Personal Law (Shariat) Application Act, 1937-an Act which was not noticed by the aforesaid decisions. We, therefore, direct that the matter may be placed before the Honorable Chief Justice for being heard by a larger Bench consisting of more than three Judges. "

Section 125 of the Code of Criminal Procedure which deals with the right of maintenance reads thus: "Order for maintenance of wives, children and parents

125. (1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself,

(b) ...

(c) ...

(d) ...

a Magistrate of the first class may, upon proof of such neglecter refusal, order such person to make a monthly allowance for the maintenance of his wife .. at such monthly rate not exceeding five hundred rupees in the whole as such Magistrate think fit Explanation-For the purposes of this Chapter,-

(a).....

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

(2) ..... .

(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 month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided.....

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

Explanation-If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him."

Section 127(3)(b), on which the appellant has built up the edifice of his defence reads thus:

"Alteration in allowance

127. (1).....

(2).....

(3) Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from her husband, the Magistrate shall, if he is satisfied that-

(a).....

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the Sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order,-

(i) in the case where such sum was paid before such order, from the date on which such order was made.

(ii) in any other case, from the date of expiry of the period, if any, for Which maintenance has been actually paid by the husband to the woman."

Under section 125(1)(a), a person who, having sufficient means, neglects or refuses to maintain his wife who is unable to maintain herself, can be asked by the court to pay a monthly maintenance to her at a rate not exceeding Five Hundred rupees. By clause (b) of the Explanation to section 125(1), 'wife' includes a divorced woman who has not remarried. These provisions are too clear and precise to admit of any doubt or refinement. The religion professed by a spouse or by the spouses has no place in the scheme of these provisions. Whether the spouses are Hindus or Muslims, Christians or Parsis, pagans or heathens, is wholly irrelevant in the application of these provisions. The reason for this is axiomatic, in the sense that section 125 is a part of the Code of Criminal Procedure, not of the Civil Laws which define and govern The rights and obligations of the parties belonging to particular, religions, like the Hindu Adoptions and Maintenance Act, the Shariat, or the Parsi Matrimonial Act. Section 125 was enacted in order to provide a quick and summary remedy to a class of persons who are unable to maintain themselves. What difference would it then make as to what is the religion professed by the neglected wife, child or parent ? Neglect by a person of sufficient means to maintain these and

the inability of these persons to maintain themselves are the objective criteria which determine the applicability of section 125. Such provisions, which are essentially of a prophylactic nature, cut across the barriers of religion. True, that they do not supplant the personal law of the parties but, equally the religion professed by the parties or the state of the personal law by which they are governed, cannot have any repercussion on the applicability of such laws unless, within the framework of the Constitution, their application is restricted to a defined category of religious groups or classes. The liability imposed by section 125 to maintain close relatives who are indigent is founded upon the individual's obligation to the society to prevent vagrancy and destitution. That is the moral edict of the law and morality cannot be clubbed with religion. Clause (b) of the Explanation to section 125(1), which defines 'wife' as including a divorced wife, contains no words of limitation to justify the exclusion of Muslim women from its scope. Section 125 is truly secular in character.

Sir James FitzJames Stephen who piloted the Code of Criminal Procedure, 1872 as a Legal Member of the Viceroy's Council, described the precursor of Chapter IX of the Code in whichsection 125 occurs, as 'a mode of preventing vagrancy or at least of preventing its consequences. In Jagir kaur v. Jaswont Singh,(1) Subba Rao, J. speaking for the Court said that Chapter XXXVI of the Code of 1898 which contained section 488, corresponding to section 125, "intends to serve a social purpose". In Nanak Chand v. Shri Chandra Kishore Agarwala.(2) Sikri, J., while pointing out that the scope of the Hindu Adoptions and Maintenance Act, 1956 and that of section 488 was different, said that section 488 was "applicable to all persons belonging to all religions and has no relationship with the personal law of the parties".

Under section 488 of the Code of 1898, the wife's right to maintenance depended upon the continuance of her married status. Therefore, that. right could be defeated by the husband by divorcing her unilaterally as under the Muslim Personal Law, or by obtaining a decree of divorce against her under the other systems of law. It was in order to remove this hardship that the Joint Committee recommended that the benefit of the provisions regarding maintenance should be, extended to a divorced woman, so long as she has not remarried after the divorce. That is the genesis of clause (b) of the Explanation to section 125(1), which provides that 'wife' includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried. Even in the absence of this provision, the courts had held under the Code of 1&98 that the provisions regarding maintenance were independent of the personal law governing the parties. The induction of the definition of 'wife, so as to include a divorced woman lends even greater weight to that (1) 1964 (2) SCR 73, 84.

(2) 1970 (l) S CR 565.

conclusion. 'Wife' means a wife as defined, irrespective of the religion professed by her or by her husband. Therefor, a divorced Muslim woman, so long as she has not remarried, is a 'wife' for the purpose of section 125. The statutory right available to her under that section is unaffected by the provisions of the personal law applicable to her.

The conclusion that the right conferred by section 125 can be exercised irrespective of the personal law of the parties is fortified, especially in regard to Muslims, by the provision contained in the Explanation to the second proviso to section 125(3) of the Code. That proviso says that if the husband offers to maintain his wife on condition that she should live with him, and she refuses to live with him, the Magistrate may consider any grounds of refusal stated by her, and may make an order of maintenance not with standing the offer of the husband, if he is satisfied that there is a just ground for passing such an order. According to the Explanation to the proviso:

"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."

It is too well-known that "A Mahomedan may have as many as four wives at the same time but not more. If he marries a fifth wife when he has already four, the marriage is not void, but merely irregular". (See Mulla's Mahomedan Law,18th Edition, paragraph 25S, page 285, quoting Baillie's Digest of Moohummudan Law; and Ameer Ali's Mahomedan Law, 5th Edition, Vol. II, page 280). The explanation confers upon the wife the right to refuse to live with her husband if he contracts another marriage, leave alone 3 or 4 other marriages. It shows, unmistakably, that section 125overrides the personal law, if is any there conflict between the two.

The whole of this discussion as to whether the right conferred by section 125 prevails over the personal law of the parties, has proceeded on the assumption that there is a conflict between the provisions of that section and those of the Muslim Personal Law. The argument that by reason of section 2 of the Shariat Act, XXVI of 1937, the rule of decision in matters relating, inter alia, to maintenance "shall be the Muslim Personal Law" also proceeds upon a similar assumption. We embarked upon the decision of the question of priority between the Code and the Muslim Personal Law on the assumption that there was a conflict between the two because, in so far as it lies in our power, we wanted to set at rest, once for all, the question whether section 125 would prevail over the personal law of the parties, in cases where they are in conflict.

The next logical step to take is to examine the question, on which considerable argument has been advanced before us, whether there is any conflict between the provisions of section 125 and those of the Muslim Personal Law on the liability of the Muslim husband to provide for the maintenance of his divorced wife.

The contention of the husband and of the interveners who support him is that, under the Muslim Personal Law, the liability of the husband to maintain a divorced wife is limited to the period of iddat. In support of this proposition, they rely upon the statement of law on the point contained in certain text books. In Mulla's Mahomedan Law (18th Edition, para 279, page 301), there is a statement to the effect that, "After divorce, the wife is entitled to maintenance during the period of iddat". At page 302, the learned author says: -

'Where an order is made for the maintenance of a wife under section 488 of the Criminal Procedure Code and the wife is afterwards divorced, the order ceases to operate on the expiration of the period of iddat. The result is that a Mahomedan may defeat an order made against him under section 488 by divorcing his wife immediately after the order is made. His obligation to maintain his wife will cease in that case on the completion of her iddat,"

Tyabji's Muslim law (4th Edition, para 304, pages 268-

269). contains the statement that:

"On the expiration of the iddat after talaq, the wife's right to maintenance ceases, whether based on the Muslim Law, or on an order under the Criminal Procedure Code-"

According to Dr Paras Diwan:

"When a marriage is dissolved by divorce the wife is entitled to maintenance during the period of iddat.... On the expiration of the period of iddat, the wife is not entitled to any maintenance under any

circumstances. Muslim Law does not recognise any obligation on the part of a man to maintain a wife whom he had divorced."

(Muslim Law in Modern India, 1982 Edition, page 130) These statements in the text book are inadequate to establish the proposition that the Muslim husband is not under an obligation to provide for the maintenance of his divorced wife, who is unable to maintain herself. One must have regard to the entire conspectus of the Muslim Personal Law in order to determine the extent both, in quantum and induration, of the husband's liability to provide for the maintenance of an indigent wife who has been divorced by him. Under that law, the husband is bound to pay Mahr to the wife as a mark of respect to her. True, that he may settle any amount he likes by way of dower upon his wife, which cannot be less than 10 Dir hams, which is equivalent to three or four rupees (Mulla's Mahomedan Law, 18th Edition, para 286, page 308). But, one must have regard to the realities of life Mahr is a mark of respect to the wife. The sum settled by way of Mahr is generally expected to take care of the ordinary requirements of the wife, during the marriage and after. But these provisions of the Muslim Personal Law do not countenance cases in which the wife is unable to maintain herself after the divorce. We consider it not only incorrect but unjust, to extend the scope of the statements extracted above to cases in which a divorced wife is unable to maintain herself. We are of the opinton that the application of those statements of law must be restricted to that class of cases, in which there is no possibility of vagrancy or destitution arising out of the indigence of the divorced wife. We are not concerned here with the broad and general question whether a husband is liable to maintain his wife, which includes a divorced wife, in all circumstances and at all events. That is not the subject matter of section 125. That section deals with cases in which, a person who is possessed of sufficient means neglects or refuses to maintain, amongst others, his wife who is unable to maintain herself. Since the Muslim Personal Law, which limits the husband's liability to provide for the maintenance of the divorced wife to the period of iddat, does not contemplate or countenance the situation envisaged by section 125, it would be wrong to hold that the Muslim husband, according to his personal law, is not under all obligation to provide maintenance, beyond the period of iddat, to his divorced wife who is unable to maintain herself. The argument of the appellant that, according to the Muslim Personal Law, his liability to provide for the maintenance of his divorced wife is limited to the period of iddat, despite the fact she is unable to maintain herself, has therefore to be rejected. The true position is that, if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the expiration of the period of iddat. If she is unable to maintain herself, she is entitled to take recourse to section 125 of the Code. The outcome of this discussion is that there is no conflict between the provisions of section 125 and those of the Muslim Personal Law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself.

There can be no greater authority on this question than the Holy Quran, "The Quran, the Sacred Book of Islam, comprises in its 114 Suras or chapters, the total of revelations believed to have been communicated to Prophet Muhammed, as a final expression of God's will". (The Quran- Interpreted by Arthur J. Arberry). Verses (Aiyats) 241 and 242 . of the Quran show that according to the Prophet, there is an obligation on Muslim husbands to provide for their divorced wives. The Arabic version of those Aiyats and their English translation are reproduced below:

Arabic version	English version
Ayat No. 241	For divorced women
WA LIL MOTALLAQATAY	Maintenance (should be

MATA UN	Provided)
BIL MAAROOFAY	On a reasonable (Scale)
HAQQAN	This is a duty
ALAL MUTTAQEENA	On the righteous.

KAZALEKA YUBAIYYANULLAHO Thus doth God LAKUM AYATEHEE LA ALLAKUM Make clear His Signs TAQELOON To you: in order that ye may understand.

(See 'The Holy Quran' by Yusuf Ali, Page 96). The correctness of the translation of these Aiyats is not in dispute except that, the contention of the appellant is that the word 'Mata' in Aiyat No. 241 means 'provision' and not 'maintenance'. That is a distinction without a difference. Nor are we impressed by the shuffling plea of the All India Muslim Personal Law Board that, in Aiyat 241, the exhortation is to the' Mutta Queena', that is, to the more pious and the more God-fearing, not to the general run of the Muslims, the 'Muslminin'. In Aiyat 242, the Quran says: "It is expected that you will use your commonsense".

The English version of the two Aiyats in Muhammad Zafrullah Khan's 'The Quran' (page 38) reads thus:

"For divorced women also there shall be provision according to what is fair. This is an obligation binding on the righteous. Thus does Allah make His commandments clear to you that you may understand."

The translation of Aiyats 240 to 242 in 'The Meaning of the Quran' (Vol. I, published by the Board of Islamic Publications, Delhi) reads thus .

"240-241.

Those of you, who shall die and leave wives behind them, should make a will to the effect that they should be provided with a year's maintenance and should not be turned out of their homes. But if they leave their homes of their own accord, you shall not be answerable for whatever they choose for themselves in a fair way; Allah is All Powerful, All-wise. Likewise, the divorced women should also be given something in accordance with the known fair standard. This is an obligation upon the God-fearing people.

242. A Thus Allah makes clear His commandments for you: It is expected that you will use your commonsense." In "The Running Commentary of The Holy Quran" (1964 Edition) by Dr. Allamah Khadim Rahmani Nuri, Aiyat No. 241 is translated thus:

"241 And for the divorced woman (also) a provision (should be made) with fairness (in addition to her dower); (This is) a duty (incumbent) on the reverent."

In "The Meaning of the Glorious Quran, Text and Explanatory Translation", by Marmaduke Pickthall, (Taj Company Ltd.,karachi), Aiyat 241 is translated thus:

'-241.

For divorced women a provision in kindness: A duty for those who ward off (evil)."

Finally, in "The Quran Interpreted" by Arthur J.

Arberry. Aiyat 241 is translated thus:

"241.

There shall be for divorced women provision honourable-an obligation on the god fearing." So God makes clear His signs for you: Happily you will understand."

Dr. K.R. Nuri in his book quoted above: 'The Running Commentary of the Holy Quran", says in the preface:

"Belief in Islam does not mean mere confession of the existence of something. It really means the translation of the faith into action. Words without deeds carry no meaning in Islam. Therefore the term "believe and do good" has been used like a phrase all over the Quran. Belief in something means that man should inculcate the qualities or carry out the promptings or guidance of that thing in his action. Belief in Allah means that besides acknowledging the existence of the Author of the Universe, we are to show obedience to His commandments..."

These Aiyats leave no doubt that the Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the teaching of the Quran. As observed by Mr. M. Hidayatullah in his introduction to Mulla's Mahomedan Law, the Quran is Al- furqan' that is one showing truth from falsehood and right from wrong.

The second plank of the appellant's argument is that the respondent's application under section 125 is liable to be dismissed be cause of the provision contained in section 127 (3) (b). That section provides, to the extent material, that the Magistrate shall cancel the order of maintenance, if the wife is divorced by the husband and, she has received "the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce". That raises the question as to whether, under the Muslim Personal law, any sum is payable to the wife 'on divorce'. We do not have to grope in the dark and speculate as to which kind of a sum this can be because, the only argument advanced before us on behalf of the appellant and by the interveners supporting him, is that Mahr is the amount payable by the husband to the wife on divorce. We find it impossible to accept this argument.

In Mulla's principles of Mahomedan Law (18th Edition, page 308), Mahr or Dower is defined in paragraph 285 as "a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage." Dr. Paras Diwan in his book, "Muslim Law in Modern India" (1982 Edition, page 60), criticises this definition on the ground that Mahr is not payable "in consideration of marriage" but is an obligation imposed by law on the husband as a mark of respect for the wife, as is evident from the fact that non-specification of Mahr at the time of marriage does not affect the validity of the marriage. We need not enter into this controversy and indeed, Mulla`s book itself contains the further statement at page 308 that the word 'consideration' is not used in the sense in which it is used in the Contract Act and that under the Mohammedan Law, Dower is an obligation imposed upon the husband as a mark of respect for the wife. We are concerned to find is whether Mahr is an amount payable by the husband to the wife on divorce. Some confusion is caused by the fact that, under the Muslim Personal Law, the amount of Mahr is usually split into two parts, one of which is called "prompt", which is payable on demand, and the other is called "deferred ", which is payable on the dissolution of the marriage by death or by divorce. But, the tact that deferred Mahr is payable at the time of the dissolution of marriage, cannot justify the conclusion that it is payable 'on divorce'. Even assuming that, in a given case, the entire amount of Mahr is of the deferred variety payable on the dissolution of marriage by divorce, it cannot be said that it is an amount which is payable on divorce. Divorce may be a convenient or identifiable point of time at which the deferred amount has to be paid by the husband to the wife. But, the payment of the amount is not occasioned by the divorce, which is what is meant by the expression 'on divorce', which occurs in section 127 (3) (b) of the Code. If Mahr is

an amount which the wife is entitled to receive from the husband hl consideration of the marriage, that is the very opposite of the amount being payable in consideration of divorce. Divorce dissolves the Marriage. Therefore no amount which is payable in consideration of the marriage can possibly be described as an amount payable in consideration of divorce. The alternative premise that Mahr is an obligation imposed upon the husband as a mark of respect for the wife, is wholly detrimental to the stance that it is an amount payable to the wife on divorce.A man may marry a woman for love, looks, learning or nothing at all. And. he may settle a sum upon her as a mark of respect for her. But he does not divorce her as a mark of respect. Therefore, a sum payable to the wife out of respect cannot be a sum payable 'on divorce'.

In an appeal from a Full Bench decision of the Allahabad High Court, the Privy Council in Hamira Bibi v. Zubaide Bibi(1) sum-(1) 43 1. A. 294. med up the nature and character of Mahr in these words:

"Dower is an essential incident under the Muslim Law to the status of marriage; to such an extent that is so that when it is unspecified at the time the marriage is contracted, the law declares that it must be adjudged on definite principles. Regarded as a consideration for the marriage, it is, in theory, payable before consummation; but the law allows its division into two parts, one of which is called "prompt" payable before the wife can be called upon to enter the conjugal domicil; the other " deferred", payable on the dissolution of the contract by the death of either of the parties or by divorce." (p. 300-301) This statement of law was adopted in another decision of the Privy Council in Syed Sabir Husain v. Farzand Hasan.(1) It is not quite appropriate and seems invidious to describe any particular Bench of a court as "strong" but, we cannot resist the temptation of mentioning that Mr. Syed Ameer Ali was a party to the decision in Hamira Bibi while Sir Shadi Lal was a party to the decision in Syed Sabir Husain. These decisions show that the payment of dower may be deferred to a future date as, for example, death or divorce. But, that does not mean that the payment of the deferred dower is occasioned by these events.

It is contended on behalf of the appellant that the proceedings of the Rajya Sabha dated December 18, 1973 (volume 86, column 186), when the bill which led to the Code of 1973 was on the anvil, would show that the intention of the Parliament was to leave the provisions of the Muslim Personal Law untouched. In this behalf, reliance is placed on the following statement made by Shri Ram Niwas Mirdha, the then Minister of State, Home Affairs:

"Dr. Vyas very learnedly made certain observations that a divorced wife under the Muslim law deserves to be treated justly and she should get what is her equitable or legal due. Well, I will not go into this, but say that we would not like to interfere with the customary law of the Muslims through the Criminal Procedure Code. If there is (1) 65 I.A. 119, 127 a demand for change in the Muslim Personal Law, it should actually come from the Muslim Community itself and we should wait for the Muslim public opinion on these matters to crystalise before we try to change this customary right or make changes in their personal law. Above all, this is hardly, the place where we could do so. But as I tried to explain, the provision in the Bill is an advance over the previous situation. Divorced women have been included and brought within the admit of clause 125, but a limitation is being imposed by this amendment to clause 127, namely, that the maintenance orders would ceases to operate after the amounts due to her under the personal law are paid to her. This is a healthy compromise between wh lt has been termed a conservative interpretation of law or a concession to conservative public opinion and liberal approach to the problem. We have made an advance and not tried to transgress what are the personal rights of Muslim women. So this, I think, should satisfy Hon. Members that whatever advance we have made is in the right direction and it should be welcomed."

lt does appear from this speech that the Government did not desire to interfere with the personal law of the Muslim through the Criminal Procedure Code. It wanted the Muslim community to take the lead and the Muslim public opinion to crystalise on the reforms in their personal law. However, we do not concerned with the question whether the Government did not desire to bring about changes in the Muslim Personal Law by enacting sections 125 and 127 of the Code. As we have said earlier and, as admitted by the Minister, the Government did introduce such a change by defining the expression 'wife' to include a divorced wife. It also introduced another significant change by providing that the fact that the husband has contracted marriage with another woman is a just ground for the wife's refusal to live with him. The provision contained in section 127 (3) (b) may have been introduces because of the misconception that dower is an amount payable "on divorce". But, that cannot convert an amount payable as a mark of respect for the wife into an amount payable on divorce.

It must follow from this discussion, unavoidably a little too long, that the judgments of this Court in Bai Tahira (Krishna Iyer J., Tulzapurkar J. and Pathak J.) and Fazlunbi (Krishna Iyer, J.,) one of us, Chinnappa Reddy J. and A. P. Sen J.) are correct. Justice Krishna Iyer who spoke for the Court in both these cases, relied greatly on the teleological and schematic method of interpretation so as to advance the purpose of the law. These constructional techniques have their own importance in the interpretation of statutes meant to ameliorate the conditions of suffering sections of the society. We have attempted to show that taking the language of the statute as one finds it, there is no escape from the conclusion that a divorced Muslim wife is entitled to apply for maintenance under section 125 and that, Mahr is not a sum which, under the Muslim Personal Law, is payable on divorce.

Though Bai Tahira was correctly decided, we would like, respectfully, to draw attention to an error which has crept in the judgement There is a statement at page 80 of the report, in the context of section 127 (3) (b), that "payment of Mahr money, as a customary discharge, is within the cognizance of that provision". We have taken the view that Mahr, not being payable on divorce, does not fall within the meaning of that provision.

It is a matter of deep regret that some of the interveners who supported the appellant, took up an extreme position by displaying an unwarranted zeal to defeat the right to maintenance of women who are unable to maintain themselves. The written submissions of the All India Muslim Personal Law Board have gone to the length of asserting that it is irrelevant to inquire as to how a Muslim divorce should maintain herself. The facile answer of the Board is (that the Personal Law has devised the system of Mahr to meet the requirements of women and if a woman is indigent, she must look to her relations, including nephew and cousins, to support her. This is a most unreasonable view of law as well as life. We appreciate that Begum Temur Jehan, a social worker who has been working in association with the Delhi City Women's Association for the uplift of Muslim women, intervened to support Mr. Daniel Latifi who appeared on behalf of the wife It is also a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India". There is no evidence of any official activity for framing a common civil code for the country.A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law.A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so.A counsel in the case whispered, somewhat

audibly, that legislative competence is one thing, the political courage to use that competence is quite another. We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform But, a beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal Laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.

Dr. Tahir Mahmood in his book 'Muslim Personal Law' (1977 Edition, pages 200-202), has made a powerful plea for framing a uniform Civil Code for all citizens of India. He says: "In pursuance of the goal of secularism, the State must stop administering religion based personal laws". He wants the lead to come from the majority community but, we should have thought that, lead or no lead, the State must act. It would be useful to quote the appeal made by the author to the Muslim community:

"Instead of wasting their energies in exerting theological and political pressure in order to secure an "immunity" for their traditional personal law from the state` legislative jurisdiction, the Muslim will do well to begin exploring and demonstrating how the true Islamic laws, purged of their time-worn and anachronistic interpretations, can enrich the common civil code of India."

At a Seminar held on October 18, 1980 under the auspices of the Department of Islamic and Comparative Law, Indian Institute of Islamic Studies New Delhi? he also made an appeal to theMuslim community to display by their conduct a correct understanding of Islamic concepts on marriage and divorce (See Islam and Comparative Law Quarterly, April-June, 1981, page 146).

Before we conclude, we would like to draw attention to the Report of the Commission on marriage and Family Laws, which was appointed by the Government of Pakistan by a Resolution dated August 4, 1955. The answer of the Commission to Question No.5 (page 1215 of the Report) is that "a large number of middle-aged women who are being divorced without rhyme or reason should not be thrown on the streets without a roof over their heads and without any means of sustaining themselves and their children."

The Report concludes thus:

"In the words of Allama Iqbal, "the question which is likely to confront Muslim countries in the near future, is whether the law of Islam is capable of evolution-a question which will require great intellectual effort, and is sure to he answered in the affirmative "

For these reasons, we dismiss the appeal and confirm the judgment of the High Court. The appellant will pay the costs of the appeal to respondent 1, which we quantify at rupees ten thousand. It is needless to add that it would be open to the respondent to make an application under section 127 (1) of the Code for increasing the allowance of maintenance granted to her on proof of a change in the circumstances as envisaged by that section.

S.R. .Appeal dismissed

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MANISH JAIN VERSUS AKANKSHA JAIN

Supreme Court of India

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

Manish Jain
Versus
Akanksha Jain

CIVIL APPEAL NO. 4615 OF 2017

(Arising out of SLP (C) No.7670 OF 2014)

Decided on 30 March, 2017

- **An order for maintenance pendente lite or for costs of the proceedings is conditional on the circumstance that the wife or husband who makes a claim for the same has no independent income sufficient for her or his support or to meet the necessary expenses of the proceeding. It is no answer to a claim of maintenance that the wife is educated and could support herself. Likewise, the financial position of the wife's parents is also immaterial. The Court must take into consideration the status of the parties and the capacity of the spouse to pay maintenance and whether the applicant has any independent income sufficient for her or his support. Maintenance is always dependent upon factual situation; the Court should, therefore, mould the claim for maintenance determining the quantum based on various factors brought before the Court.**
- **In the present case, at the time of claiming maintenance pendente lite when the respondent-wife had no sufficient income capable of supporting herself, the High Court was justified in ordering maintenance. However, in our view, the maintenance amount of Rs.60,000/- ordered by the High Court (in addition to Rs.10,000/- paid under the proceedings of the D.V. Act) appears to be on the higher side and in the interest of justice, the same is reduced to Rs.25,000/- per month. The maintenance pendente lite of Rs.25,000/- is to be paid to the respondent-wife by the appellant-husband (in addition to Rs.10,000/- paid under the proceedings of the D.V. Act).**

ORDER

Hon'ble Mrs. Justice R. Banumathi

Leave granted.

2. The present appeal has been filed by the appellant-husband against the order dated 21.02.2014 passed by the High Court of Delhi at New Delhi in C.M.(M) No.910 of 2010. In the said judgment, the High Court while setting aside the order dated 15.03.2010 passed by the Additional District Judge-II (West), Tis Hazari, Delhi who declined to award maintenance pendente lite to the respondent-wife under Section 24 of the Hindu Marriage Act, 1955 has granted interim maintenance to the respondent-wife at the rate of Rs.60,000/- per month to be paid by the appellant-husband Manish Jain with effect from 1st February, 2012 till the disposal of divorce petition. The said amount was fixed in addition to Rs.10,000/- which the appellant-husband has

already been paying by way of interim maintenance as per the order passed in Criminal Appeal No.65 of 2008 under Section 23(2) of the Protection of Women from Domestic Violence Act, 2005 [for short the D.V. Act].

3. This is a case of marital discord which has a chequered history. Brief facts leading to this appeal by way of special leave are as under:- Both the appellant and the respondent got married on 16.02.2005 and they were living at V-38, Green Park, New Delhi. The couple shifted to an accommodation at 303, SFS Apartment, Hauz Khas, New Delhi on 15.04.2007. In or about July, 2007 relationship between the parties got strained. In September, 2007 the appellant-husband filed a divorce petition HMA No.553/2007 under the Hindu Marriage Act, 1955 [for short the HM Act] seeking divorce on the grounds of cruelty.

4. In November, 2007 the respondent-wife filed a petition under the D.V. Act along with interim relief i.e., maintenance. She also filed a complaint on 23.11.2007 under Section 498-A and Section 406 IPC with CAW Cell, Amar Colony, Nanakpura, New Delhi against the appellant-husband and his family members which was later on registered as FIR bearing No.190 of 2008, Police Station, Friends Colony, New Delhi on 04.03.2008. In December, 2007, respondent filed yet another Complaint Case No.381 of 2008 under Section 125 Cr.P.C. before the Mahila Court, Patiala House, New Delhi. Her interim application seeking maintenance amongst other reliefs under Section 23(2) of the D.V. Act was dismissed by the Metropolitan Magistrate, Patiala House, New Delhi by order dated 23.04.2008 on the ground that the respondent was employed and was getting a stable income and that no document was placed on record by the respondent to show that respondent had again become jobless as the publication of the Magazine FNL had been stopped. Against the dismissal of application for maintenance, the respondent had filed appeal before Additional Sessions Judge, Patiala House in Criminal Appeal No.65 of 2008. In the said appeal and in Criminal Revision No.66 of 2008, Additional Sessions Judge, Patiala House by an order dated 01.09.2009 granted maintenance of Rs.10,000/- per month to the respondent-wife.

5. The appellant-husband filed an application under Section 438 Cr.P.C. on 22.04.2008 for grant of bail in anticipation of his likely arrest. The High Court granted anticipatory bail to the appellant-husband subject to return of Toyota Corolla and dowry/jewellery articles to the respondent-wife within a week from the date of order till the next date of hearing which is said to have been complied with. Order was also passed directing the respondent to deposit Rs.12,00,000/- towards alleged return of dowry articles.

6. The respondent-wife filed application under Section 24 of the HM Act claiming interim maintenance pendente lite of Rs.4,00,000/- per month and also a sum of Rs.80,000/- to meet litigation expenses during the pendency of the divorce petition. In the said application, the respondent- wife pleaded that she was having no source of income to maintain herself and that she is dependent upon others for her day to day needs and requirements. The said application was resisted by the appellant-husband contending that the respondent-wife is an educated lady and that she had completed her one year course of Fashion Designing from J.D. Institute, Hauz Khas, New Delhi and that she is capable of earning monthly salary of Rs.50,000/. The application filed under Section 24 of the HM Act was dismissed by Additional District Judge-II, Tis Hazari, Delhi by order dated 15.03.2010. Being aggrieved, the respondent-wife filed Crl. M.A. No.17724 of 2012 before the High Court, Delhi. The High Court in its order dated 08.11.2011 in C.M.(M) No.910 of 2010 filed by the wife against the order dated 15.03.2010 directed both the parties to file an affidavit truthfully disclosing their correct income. Both the husband and the wife filed

an affidavit as to their income in compliance of the aforesaid order. After so directing the parties to file affidavit regarding their income and after referring to the income of appellant-husband and the properties which the appellant and his family are owning and also the standard of living of the respondent-wife which she is required to maintain, the High Court by the impugned order directed the appellant-husband to pay interim maintenance of Rs.60,000/- per month in addition to Rs.10,000/- which was directed to be paid to the respondent-wife in the proceedings under the D.V. Act.

7. Aggrieved by the order of the High Court, the appellant-husband came in appeal before this Court by way of special leave. After giving opportunity to the parties to work out a settlement which ultimately failed, the same was dismissed on 15.04.2014. Being aggrieved by the dismissal of the above petition, a review petition was filed on 13.05.2014 in which notice was issued by this Court on 06.08.2014 and on 03.02.2016 the same was allowed and the Special Leave Petition was restored to its original number which is the subject matter before us.

8. Learned counsel for the appellant-husband submitted that the respondent-wife has concealed her employment and independent source of income on several occasions throughout the matrimonial proceedings before the courts below and also that the High Court has committed a grave error in interfering with the well-reasoned order of the trial Court under Section 24 of the HM Act. The learned counsel for the appellant-husband submitted that the trial court after analyzing the evidence that the wife was educated, professionally qualified in the Fashion industry and had sufficient independent income rejected the application of the wife seeking maintenance under Section 24 of the HM Act. It was submitted that the High Court without proper appreciation of the income of the parties had wrongly set aside the order of the trial Court and fixed an abnormal amount of Rs.60,000/- as maintenance to the respondent-wife under Section 24 of the Hindu Marriage Act.

   Learned counsel further submitted that in Criminal Appeal No.65 of 2008 under Section 23(2) of the D.V. Act, the appellant- husband is paying an interim maintenance of Rs.10,000/- per month to the respondent-wife and the appellant-husband has so far made a total payment of Rs.7,50,000/- in the proceedings under D.V. Act, apart from returning a Toyota Corolla car worth Rs.13,00,000/- besides depositing a sum of Rs.12,00,000/- and a sum of Rs.2,75,000/- towards untraced admitted dowry articles in compliance with the order passed by the Court. It was further submitted that the appellant-husbands firms/companies have been either shut down due to heavy loss and/or under the stage of winding up and the appellant-husband is not in a position to pay the exorbitant amount of Rs.60,000/- per month as maintenance pendente lite to the respondent-wife.

9. Learned counsel for the respondent-wife at the outset submitted that the principle of providing maintenance is to ensure the living conditions of respondent-wife similar to that of appellant-husband whereas in the present case the respondent-wife is yet to receive any money.

10. We have heard the matter at considerable length. Parties are entangled in several rounds of litigation making allegations and counter allegations against each other. Since various proceedings are pending between the parties, we are not inclined to go into the merits of the rival contentions advanced by the parties. The only question falling for consideration is whether the respondent-wife is entitled to maintenance pendente lite and whether the amount of Rs.60,000/- awarded by the High Court is on the higher side.

11. The Court exercises a wide discretion in the matter of granting alimony pendente lite but the discretion is judicial and neither arbitrary nor capricious. It is to be guided, on sound principles of matrimonial law and to be exercised within the ambit of the provisions of the Act and having regard to the object of the Act. The Court would not be in a position to judge the merits of the rival contentions of the parties when deciding an application for interim alimony and would not allow its discretion to be fettered by the nature of the allegations made by them and would not examine the merits of the case. Section 24 of the HM Act lays down that in arriving at the quantum of interim maintenance to be paid by one spouse to another, the Court must have regard to the appellants own income and the income of the respondent.

12. At the time of filing application under Section 24 of the HM Act in December, 2007, the respondent-wife was doing her internship in fashion designing in J.D. Institute of Fashion Technology and just completed the course and was not employed at that time. Only in the month of May, 2008, she became a trainee and joined FNL Magazine of Images Group as Junior Fashion Stylist and was earning an approximate/stipend income of Rs.21,315/- per month and due to recession, the same is said to have been reduced to Rs.16,315/- for three months that is July, August and September in the year 2009. It is stated that thereafter the respondent-wife has become jobless and associated with Cosmopolitan Magazine and according to the respondent-wife, she was working as a Stylist and is paid nominal amount of Rs.4,500/- per shoot and the said amount is inclusive of expenses like travelling etc. On a perusal of the judgment of the High Court and also the affidavit of the respondent-wife, it is clear that the respondent-wife has no permanent source of employment and no permanent source of income.

13. Appellant-husband is stated to be a partner in the firms of his family business. It is also stated that the appellant-husband and his family own several valuable properties and has flourishing business. Insofar as the properties/income of appellant-husband, the High Court has made the following observations:-

    38. From the pleading of the respondent before other Courts, it has come on record that the respondents family is having successful and flourishing business of electrical and non-ferrous metals for the last 22 years. They are successful in their business. His mother belongs to a family of journalists and lawyers.

    39. From the material placed on record by the petitioner, prima facie it appears to the Court that even the respondent has not made full disclosure about his income and correct status of the family in the affidavits filed by him. The statements made by him are contrary to the statement made in the bail application. Prima facie, it appears to the Court that the respondent is hiding his income by trying to show himself as a pauper, however, the documents placed on record speak differently. At the same time the family members have a reasonably flourishing business and many properties as admitted by him. It has now become a matter of routine that as and when an application for maintenance is filed, the non-applicant becomes poor displaying that he is not residing with the family members if they have a good business and movable and immovable properties in order to avoid payment of maintenance. Courts cannot under these circumstances close their eyes when tricks are being played in a clever manner.

14. Section 24 of the HM Act empowers the Court in any proceeding under the Act, if it appears to the Court that either the wife or the husband, as the case may be, has no independent income

sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of any one of them order the other party to pay to the petitioner the expenses of the proceeding and monthly maintenance as may seem to be reasonable during the proceeding, having regard to also the income of both the applicant and the respondent. Heading of Section 24 of the Act is Maintenance pendente lite and expenses of proceedings. The Section, however, does not use the word maintenance; but the word support can be interpreted to mean as Section 24 is intended to provide for maintenance pendente lite.

15. An order for maintenance pendente lite or for costs of the proceedings is conditional on the circumstance that the wife or husband who makes a claim for the same has no independent income sufficient for her or his support or to meet the necessary expenses of the proceeding. It is no answer to a claim of maintenance that the wife is educated and could support herself. Likewise, the financial position of the wifes parents is also immaterial. The Court must take into consideration the status of the parties and the capacity of the spouse to pay maintenance and whether the applicant has any independent income sufficient for her or his support. Maintenance is always dependent upon factual situation; the Court should, therefore, mould the claim for maintenance determining the quantum based on various factors brought before the Court.

16. In the present case, at the time of claiming maintenance pendente lite when the respondent-wife had no sufficient income capable of supporting herself, the High Court was justified in ordering maintenance. However, in our view, the maintenance amount of Rs.60,000/- ordered by the High Court (in addition to Rs.10,000/- paid under the proceedings of the D.V. Act) appears to be on the higher side and in the interest of justice, the same is reduced to Rs.25,000/- per month. The maintenance pendente lite of Rs.25,000/- is to be paid to the respondent-wife by the appellanthusband (in addition to Rs.10,000/- paid under the proceedings of the D.V. Act).

17. The order impugned herein is set aside and the appeal is allowed. The amount of Rs.60,000/- awarded as maintenance pendente lite is reduced to Rs.25,000/- per month which is in addition to Rs.10,000/- paid under the proceedings of the D.V. Act. The appellant-husband is directed to pay the arrears w.e.f. 01.02.2012 till the disposal of the divorce petition, within four weeks from today. The appellant-husband shall continue to pay Rs.25,000/- per month in addition to Rs.10,000/- paid under the proceedings of the D.V. Act on or before 10th of every English calendar month till the disposal of the divorce petition. If the appellant-husband has paid or deposited any amount of maintenance pursuant to the order of the High Court dated 21.02.2014, the same shall be set-off against the arrears to be paid by the appellant-husband. The respondent-wife is at liberty to withdraw the amount, if any, deposited by the appellant-husband pursuant to the order dated 21.02.2014. We make it clear that we have not expressed any opinion on the merits of the matter. In case the appellant-husband does not comply with the order, as above, including for payment of arrears, he would be visited with all consequences including action for contempt of Court.

....J.
[KURIAN JOSEPH]

...J.
[R. BANUMATHI]

New Delhi; March 30, 2017

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JAIMINIBEN HIRENBHAI VYAS & ANR VERSUS HIRENBHAI RAMESHCHANDRA VYAS & ANR.

Supreme Court of India

Bench : Hon'ble Mr. Justice J. Chelameswar & Hon'ble Mr. Justice S.A. Bobde

Jaiminiben Hirenbhai Vyas & Anr
Versus
Hirenbhai Rameshchandra Vyas & Anr.

Decided on 19 November, 2014

CRIMINAL APPEAL NO. 2435 OF 2014

(Arising out of SLP (Crl.) No. 3345 of 2013)

- **On the Appellants application for maintenance made for herself and her children, the Family Court granted maintenance in the sum of Rs 5,000/- only to her daughter under Section 125 Cr.P.C. The son was living with the father who was maintaining him and was therefore not granted maintenance. The main ground for denying maintenance to the Appellant was that she was found to have been working before her marriage and the Family Court was of the view that she could earn her living even now after the separation and therefore she was denied maintenance. This view did not find favour with the High Court, which noted that the Appellant had stopped working after her marriage and had given birth to two children. She had been only looking after the family and had therefore stopped working. The High Court thus reversed the Order of the Family Court and granted maintenance in the sum of Rs. 5,000/-. This was however granted from the date of the order.**
- **The High Court has not given any reason why it has not directed maintenance from the date of the application for maintenance . Section 125 of the Cr.P.C., therefore, impliedly requires the Court to consider making the order for maintenance effective from either of the two dates, having regard to the relevant facts. For good reason, evident from its order, the Court may choose either date. It is neither appropriate nor desirable that a Court simply states that maintenance should be paid from either the date of the order or the date of the application in matters of maintenance.**
- **The High Court has not given any reason for not granting maintenance from the date of the application. We are of the view that the circumstances eminently justified grant of maintenance with effect from the date of the application in view of the finding that the Appellant had worked before marriage and had not done so during her marriage. There was no evidence of her income during the period the parties lived as man and wife.**

JUDGMENT

Hon'ble Mr. Justice S.A. Bobde

1. Leave granted.

2. This appeal has been preferred by a wife and a minor daughter. The Family Court directed payment of interim maintenance to wife and minor daughter @ Rs. 6,000/- per month under Section 125 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Cr.P.C.). Interim maintenance was also ordered under Section 24 of the Hindu Marriage Act, 1955 (hereinafter referred to as the H.M. Act) @ 3,000/- per month payable to both. Eventually, the Family Court disposed the maintenance proceedings finally by the Order dated 31.01.2009. By this Order the Family Court granted maintenance in favour of daughter @ Rs. 5,000/- per month from the date of judgment. The Family Court, however, took the view that the appellant wife would not be entitled to receive any amount more than the interim maintenance which she is receiving under the H.M. Act.

3. On the Appellants application for maintenance made for herself and her children, the Family Court granted maintenance in the sum of Rs 5,000/- only to her daughter under Section 125 Cr.P.C. The son was living with the father who was maintaining him and was therefore not granted maintenance. The main ground for denying maintenance to the Appellant was that she was found to have been working before her marriage and the Family Court was of the view that she could earn her living even now after the separation and therefore she was denied maintenance. This view did not find favour with the High Court, which noted that the Appellant had stopped working after her marriage and had given birth to two children. She had been only looking after the family and had therefore stopped working. The High Court thus reversed the Order of the Family Court and granted maintenance in the sum of Rs. 5,000/-. This was however granted from the date of the order.

4. We have given our anxious consideration to the Order of the High Court but find it difficult to uphold the direction that the maintenance should be paid only from the date of the Order. The High Court has not given any reason why it has not directed maintenance from the date of the application for maintenance.

5. The relevant part of Section 125 reads as follows:

125. Order for maintenance of wives, children and parents.

(1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority,

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

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

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

Explanation.- For the purposes of this Chapter,-

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

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

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

6. The provision expressly enables the Court to grant maintenance from the date of the order or from the date of the application. However, Section 125 of the Cr.P.C. must be construed with sub-section (6) of Section 354 of the Cr.P.C. which reads thus:

354 (6) Language and contents of judgment - Every order under Section 117 or sub-section (2) of Section 138 and every final order made under Section 125, Section 145 or Section 147 shall contain the point or points for determination, the decision thereon and the reasons for the decision.

Therefore, every final order under Section 125 of the Cr.P.C. [and other sections referred to in sub-section (c) of Section 354] must contain points for determination, the decision thereon and the reasons for such decision. In other words, Section 125 and Section 354 (6) must be read together.

7. Section 125 of the Cr.P.C., therefore, impliedly requires the Court to consider making the order for maintenance effective from either of the two dates, having regard to the relevant facts. For good reason, evident from its order, the Court may choose either date. It is neither appropriate nor desirable that a Court simply states that maintenance should be paid from either the date of the order or the date of the application in matters of maintenance. Thus, as per Section 354 (6) of the Cr.P.C., the Court should record reasons in support of the order passed by it, in both eventualities.

The purpose of the provision is to prevent vagrancy and destitution in society and the Court must apply its mind to the options having regard to the facts of the particular case.

8. In Shail Kumari Devi v. Krishan Bhagwan Pathak,[1] this Court dealt with the question as to from which date a Magistrate may order payment of maintenance to wife, children or parents. In Shail Kumar Devi, this Court considered a catena of decisions by the various High Courts, before arriving at the conclusion that it was incorrect to hold that, as a normal rule, the Magistrate should grant maintenance only from the date of the order and not from the date of the application for maintenance. It is, therefore, open to the Magistrate to award maintenance from the date of application. The Court held, and we agree, that if the Magistrate intends to pass such an order, he is required to record reasons in support of such Order. Thus, such maintenance can be awarded from the date of the Order, or, if so ordered, from the date of the application for maintenance, as the case may be. For awarding maintenance from the date of the application, express order is necessary.

9. In the case before us, the High Court has not given any reason for not granting maintenance from the date of the application. We are of the view that the circumstances eminently justified grant of maintenance with effect from the date of the application in view of the finding that the Appellant had worked before marriage and had not done so during her marriage. There was no evidence of her income during the period the parties lived as man and wife. We, therefore reverse the Order of the High Court in this regard and direct that the respondent shall pay the amount of maintenance found payable from the date of the application for maintenance. As far as maintenance granted under Section 24 of the H.M. Act by the Courts below is concerned, it shall remain unaltered.

10. Accordingly, the appeal is allowed.

.....J.
[J. CHELAMESWAR]

.....J.
[S.A. BOBDE]

New Delhi, November 19th, 2014

[1] (2008) 9 SCC 632; Paras 39 - 41.

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MISCELLANEOUS

LANDMARK JUDGMENTS

SHREYA VIDYARTHI VERSUS ASHOK VIDYARTHI & ORS.

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

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

CIVIL APPEAL NOS.3162-3163 OF 2010

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

Decided on 16 December, 2015

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

JUDGMENT

Hon'ble Mr. Justice Ranjan Gogoi

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

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

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

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

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

3. The dispute in the present case revolves around the question whether the suit property, as described above, was purchased by sale deed dated 27.9.1961 by Rama Vidyarthi from the joint family funds or out of her own personal funds. The suit property had been involved in several previous litigations between the parties, details of which may now require a close look.

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

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

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

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

   According to the plaintiff, the second wife i.e. Rama Vidyarthi had managed the day to day affairs of the entire family which was living jointly. The plaintiff had further pleaded that Rama Vidyarthi was the nominee of an insurance policy taken out by Hari Shankar Vidyarthi during his life time and that she was also receiving a monthly maintenance of a sum of Rs. 500/- on behalf of the family from the "Pratap Press Trust, Kanpur" of which Hari Shankar Vidyarthi was the managing trustee. In the suit filed, it was further pleaded that Rama Vidyarthi received a sum of Rs. 33,000/- out of the insurance policy and also a sum of Rs. 15,000/- from Pratap Press Trust, Kanpur as advance maintenance allowance. It was claimed that the said amounts were utilized to purchase the suit property on 27.9.1961. It was, therefore, contended that the suit property is joint family property having been purchased out of joint family funds. The plaintiff had further stated that all members of the family including the first wife, the first respondent and his two step sisters i.e. Srilekha and Madhulekha Vidyarthi had lived together in the suit property. As the relationship between the parties had deteriorated/changed subsequently and

the plaintiffrespondent and his mother (Savitri Vidyarthi) were not permitted to enter the suit property and as a suit for eviction was filed against the first respondent (37 of 1969) by Rama Vidyarthi the instant suit for permanent injunction and partition was instituted by the respondent-plaintiff.

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

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

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

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

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

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

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

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

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

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

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

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

1 1984 (1) SCC 424

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

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

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

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

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

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

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

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

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

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

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

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

…….....,J.
(RANJAN GOGOI)

…….....,J.
(N.V. RAMANA)

NEW DELHI

DECEMBER 16, 2015.

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INDEPENDENT THOUGHT VERSUS UNION OF INDIA AND ANR.

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 382 OF 2013

Bench: Hon'ble Mr. Justice Madan B. Lokur & Hon'ble Mr. Justice Deepak Gupta

Independent Thought .....Petitioner
versus
Union of India and Anr. ....Respondents

JUDGMENT

Only important paragraphs of the judgments :

Hon'ble Mr. Justice Madan B. Lokur :—

1. The issue before us is limited but one of considerable public importance – whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age is rape? Exception 2 to Section 375 of the Indian Penal Code, 1860 (the IPC) answers this in the negative, but in our opinion sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not. The exception carved out in the IPC creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distinction is arbitrary and discriminatory and is definitely not in the best interest of the girl child. The artificial distinction is contrary to the philosophy and ethos of Article 15(3) of the Constitution as well as contrary to Article 21 of the Constitution and our commitments in international conventions. It is also contrary to the philosophy behind some statutes, the bodily integrity of the girl child and her reproductive choice. What is equally dreadful, the artificial distinction turns a blind eye to trafficking of the girl child and surely each one of us must discourage trafficking which is such a horrible social evil.

2. We make it clear that we have refrained from making any observation with regard to the marital rape of a woman who is 18 years of age and above since that issue is not before us at all. Therefore we should not be understood to advert to that issue even collaterally.

3. According to the petitioner, Section 375 of the IPC prescribes the age of consent for sexual intercourse as 18 years meaning thereby that any person having sexual intercourse with a girl child below 18 years of age would be statutorily guilty of rape even if the sexual activity was with her consent. Almost every statute in India recognizes that a girl below 18 years of age is a child and it is for this reason that the law penalizes sexual intercourse with a girl who is below 18 years of age. Unfortunately, by virtue of Exception 2 to Section 375 of the IPC, if a girl child between 15 and 18 years of age is married, her husband can have non-consensual sexual intercourse with her, without being penalized under the IPC, only because she is married to him and for no other reason. The right of such a girl child to bodily integrity and to decline to have sexual intercourse

with her husband has been statutorily taken away and non-consensual sexual intercourse with her husband is not an offence under the IPC.

4. Learned counsel for the petitioner drew our attention to the 84th report of the Law Commission of India (LCI) presented on 25th April, 1980 dealing with the rape of a girl child below the prescribed minimum age. The report considered the anomalies in the law relating to rape, particularly in the context of the age of consent for sexual intercourse with a girl child. The view expressed by the LCI is quite explicit and is to be found in paragraph 2.18, 2.19 and 2.20 of the report. The view is that since the Child Marriage Restraint Act, 1929 prohibits the marriage of a girl below 18 years of age, sexual intercourse with a girl child below 18 years of age should also be prohibited and the IPC should reflect that position thereby making sexual intercourse with a girl child below 18 years of age an offence. These paragraphs read as follows:

> 2.18. Section 375, fifth clause. – The discussion in the few preceding paragraphs was concerned with rape constituted by sexual intercourse without consent. The fifth clause of section 375 may now be considered. It is concerned with sexual intercourse with a woman under 16 years of age. Such sexual intercourse is an offence irrespective of the consent of the woman.
>
> 2.19. History. – The age of consent has been subjected to increase more than once in India. The historical development may, for convenience, be indicated in the form of a chart as follows:-

Year	**Age of consent under sec. 375, 5th clause, I.P.C.**	**Age mentioned in the Exception to sec. 375, I.P.C**	**Minimum age of marriage under the Child Marriage Restraint Act, 1929**
1860……	10 years	10 years	—
1891 (Act 10 of 1891) (after the amendment of I.P.C.	12 years	12 years	—
1925 (after the amendment of I.P.C.)	14 years	13 years	—
1929 (after the passing of the Child Marriage Act)	14 years	13 years	14 years
1940 (after the amendment of the Penal Code and the Child Marriage Act)	16 years	15 years	15 years
1978……	16 years	15 years	18 years
[as of 2017]* *The bracketed portion in this row has been inserted by us.	[Age of consent under Sec. 375, Sixthly of the IPC - 18 years]	[15 years]	[Minimum age of marriage under the PCMA, 2006 – 18(F)/21(M) years]

> 2.20. Increase in minimum age. – The question to be considered is whether the age should be increased to 18 years. The minimum age of marriage now laid down by law (after 1978)

is 18 years in the case of females and the relevant clause of Section 375 should reflect this changed attitude. Since marriage with a girl below 18 years is prohibited (though it is not void as a matter of personal law), sexual intercourse with a girl below 18 years should also be prohibited. (Emphasis supplied by us).

5. The issue was re-considered by the LCI in its 172nd report presented on 25th March, 2000. In that report, it is recommended that an exception be added to Section 375 of the IPC to the effect that sexual intercourse by a man with his own wife, the wife not being under 16 years of age, is not sexual assault. In other words, the earlier recommendation made by the LCI was not approved.

National Policy and National Plan

6. What has been the response of the Government of India to studies carried out from time to time and views expressed? The National Charter for Children, 2003 was notified on 9th February, 2004. While it failed to define a child, we assume that it was framed keeping in mind the generally accepted definition of a child as being someone below 18 years of age. Proceeding on this basis, for the present purposes, Clause 11 of the National Charter is of relevance in the context of child marriages. It recognized that child marriage is a crime and an atrocity committed against the girl child. It also provided for taking "serious measures" to speedily abolish the practice of child marriage. Clause 11 reads:

> "11. a. The State and community shall ensure that crimes and atrocities committed against the girl child, including child marriage, discriminatory practices, forcing girls into prostitution and trafficking are speedily eradicated.
>
> b. The State shall in partnership with the community undertake measures, including social, educational and legal, to ensure that there is greater respect for the girl child in the family and society.
>
> c. The State shall take serious measures to ensure that the practice of child marriage is speedily abolished."

7. Further, in terms of our international obligations under Article 1 and Article 34 of the CRC, the Government of India must undertake all appropriate measures to prevent the sexual exploitation or sexual abuse of any person below 18 years of age since such sexual exploitation or sexual abuse is a heinous crime. What has the Government of India done? It has persuaded Parliament to convert what is otherwise universally accepted as a heinous crime into a legitimate activity for the purposes of Section 375 of the IPC if the exploiter or abuser is the husband of the girl child. But, contrarily the rape of a married girl child (called 'aggravated penetrative sexual assault' in the POCSO Act) is made an offence for the purposes of the POCSO Act.

8. Section 3 of the POCSO Act defines "penetrative sexual assault". Clause (n) of Section 5 provides that if a person commits penetrative sexual assault with a child, then that person actually commits aggravated penetrative sexual assault if that person is related to the child, inter alia, through marriage. Therefore, if the husband of a girl child commits penetrative sexual assault on his wife, he actually commits aggravated penetrative sexual assault as defined in Section 5(n) of the POCSO Act which is punishable under Section 6 of the POCSO Act by a term of rigorous imprisonment of not less than ten years and which may extend to imprisonment for life and fine.

9. The duality therefore is that having sexual intercourse with a girl child between 15 and 18 years of age, the husband of the girl child is said to have not committed rape as defined in Section 375 of the IPC but is said to have committed aggravated penetrative sexual assault in terms of Section 5(n) of the POCSO Act.

10. There is no real or material difference between the definition of rape in the terms of Section 375 of the IPC and penetrative sexual assault in the terms of Section 3 of the POCSO Act.[1] The only difference is that the definition of rape is somewhat more elaborate and has two exceptions but the sum and substance of the two definitions is more or less the same and the punishment (under Section 376(1) of the IPC) for being found guilty of committing the offence of rape is the same as for penetrative sexual assault (under Section 4 of the POCSO Act). Similarly, the punishment for 'aggravated' rape under Section 376(2) of the IPC is the same as for aggravated penetrative sexual assault under Section 6 of the POCSO Act. Consequently, it is immaterial if a person is guilty of the same sexual activity under the provisions of the POCSO Act or the provisions of the IPC – the end result is the same and only the forum of trial changes. In a violation of the provisions of the POCSO Act, a Special Court constituted under Section 28 of the said Act would be the Trial Court but the ordinary criminal court would be the Trial Court for an offence under the IPC.

11. At this stage it is necessary to refer to Section 42-A inserted in the POCSO Act by an amendment made on 3rd February, 2013. This section reads:

> 42-A. Act not in derogation of any other law.—The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.

The consequence of this amendment is that the provisions of the POCSO Act will override the provisions of any other law (including the IPC) to the extent of any inconsistency.

12. One of the questions that arises for our consideration is whether there is any incongruity between Exception 2 to Section 375 of the IPC and Section 5(n) of the POCSO Act and which provision overrides the other. To decide this, it would be necessary to keep Section 42-A of the POCSO Act in mind as well as Sections 5 and 41 of the IPC which read:

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1 3. Penetrative sexual assault.—A person is said to commit "penetrative sexual assault" if—
- (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
- (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
- (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
- (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person…….

375. Rape.—A man is said to commit "rape" if he—
- (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
- (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

5. Certain laws not to be affected by this Act.—Nothing in this Act shall affect the provisions of any Act for punishing mutiny and desertion of officers, soldiers, sailors or airmen in the service of the Government of India or the provisions of any special or local law.

41. "Special law".—A "special law" is a law applicable to a particular subject.

13. These two provisions are of considerable importance in resolving the controversy and conflict presented before us.

Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act)

14. The Juvenile Justice (Care and Protection of Children) Act, 2015 (the JJ Act) is also relatable to Article 15(3) of the Constitution. Section 2(12) of the JJ Act defines a child as a person who has not completed 18 years of age. A child in need of care and protection is defined in Section 2(14) of the JJ Act, inter alia, as a child "who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnization of such marriage". Clearly a girl child below 18 years of age and who is sought to be married is a child in need of care and protection. She is therefore, required to be produced before a Child Welfare Committee constituted under Section 27 of the JJ Act so that she could be cared for, protected and appropriately rehabilitated or restored to society.

Brief summary of the existing legislations

15. It is obvious from a brief survey of the various statutes referred to above that a child is a person below 18 years of age who is entitled to the protection of her human rights including the right to live with dignity; if she is unfortunately married while a child, she is protected from domestic violence, both physical and mental, as well as from physical and sexual abuse; if she is unfortunately married while a child, her marriage is in violation of the law and therefore an offence and such a marriage is voidable at her instance and the person marrying her is committing a punishable offence; the husband of the girl child would be committing aggravated penetrative sexual assault when he has sexual intercourse with her and is thereby committing a punishable offence under the POCSO Act. The only jarring note in this scheme of the pro-child legislations is to be found in Exception 2 to Section 375 of the IPC which provides that sexual intercourse with a girl child between 15 and 18 years of age is not rape if the sexual intercourse is between the girl child and her husband. Therefore, the question of punishing the husband simply does not arise. A girl child placed in such circumstances is a child in need of care and protection and needs to be cared for, protected and appropriately rehabilitated or restored to society. All these 'child-friendly statutes' are essential for the well-being of the girl child (whether married or not) and are protected by Article 15(3) of the Constitution. These child-friendly statutes also link child marriages and sexual intercourse with a girl child and draw attention to the adverse consequences of both.

Rape or penetrative sexual assault

16. Whether sexual intercourse that a husband has with his wife who is between 15 and 18 years of age is described as rape (not an offence under Exception 2 to Section 375 of the IPC) or aggravated penetrative sexual assault (an offence under Section 5(n) of the POCSO Act and punishable under Section 6 of the POCSO Act) the fact is that it is rape as conventionally understood, though Parliament in its wisdom has chosen to not recognize it as rape for the purposes of the IPC. That it is a heinous crime which also violates the bodily integrity of a girl

child, causes trauma and sometimes destroys her freedom of reproductive choice is a composite issue that needs serious consideration and deliberation.

17. Merely because child marriages have been performed in different parts of the country as a part of a tradition or custom does not necessarily mean that the tradition is an acceptable one nor should it be sanctified as such. Times change and what was acceptable the few decades ago may not necessarily be acceptable today. This was noted by a Constitution Bench of this Court (though in a different context) in State of Madhya Pradesh v. Bhopal Sugar Industries Ltd.[2] that:

"But, by the passage of time, considerations of necessity and expediency would be obliterated, and the grounds which justified classification of geographical regions for historical reasons may cease to be valid."

18. Looked at from another perspective, the PCMA actually makes child marriages voidable and makes the parties to a child marriage (other than the girl child) punishable for an offence under the said Act. For someone who supports the institution of marriage, nothing could be more destructive of the institution of marriage than the PCMA which makes a child marriage voidable and punishable on the one hand and on the other, it otherwise collaterally legitimizes the pernicious practice of child marriages. It is doubtful if the Parliamentary Standing Committee intended such a situation along with its attendant adverse and detrimental impacts and so we leave it at that.

Application of special laws

19. Whatever be the explanation, given the context and purpose of their enactment, primacy must be given to pro-child statutes over the IPC as provided for in Sections 5 and 41 of the IPC. There are several reasons for this including the absence of any rationale in creating an artificial distinction, in relation to sexual offences, between a married girl child and an unmarried girl child. Statutes concerning the rights of children are special laws concerning a special subject of legislation and therefore the provisions of such subject-specific legislations must prevail and take precedence over the provisions of a general law such as the IPC. It must also be remembered that the provisions of the JJ Act as well as the provisions of the POCSO Act are traceable to Article 15(3) of the Constitution which enables Parliament to make special provisions for the benefit of children. We have already adverted to some decisions relating to the interpretation of Article 15(3) of the Constitution in a manner that is affirmative, in favour of children and for children and we have also adverted to the discussion in the Constituent Assembly in this regard. There can therefore be no other opinion regarding the pro-child slant of the JJ Act as well as the POCSO Act.

(i) The JJ Act

20. A cursory reading of the JJ Act gives a clear indication that a girl child who is in imminent risk of marriage before attaining the age of 18 years of age is a child in need of care and protection (Section 2 (14) (xii) of the JJ Act). In our opinion, it cannot be said with any degree of rationality that such a girl child loses her status as a child in need of care and protection soon after she gets married. The JJ Act provides that efforts must be made to ensure the care, protection, appropriate rehabilitation or restoration of a girl child who is at imminent risk of marriage and therefore a child in need of care and protection. If this provision is ignored or given a go by, it would put the girl child in a worse off situation because after marriage she could be subjected

2 [1964] 6 SCR 846

to aggravated penetrative sexual assault for which she might not be physically, mentally or psychologically ready. The intention of the JJ Act is to benefit a child rather than place her in difficult circumstances. A contrary view would not only destroy the purpose and spirit of the JJ Act but would also take away the importance of Article 15(3) of the Constitution. Surely, such an interpretation and understanding cannot be given to the provisions of the JJ Act.

(ii) The POCSO Act

21. Similarly, the provisions of the POCSO Act make it quite explicit that the dignity and rights of a child below 18 years of age must be recognized and respected. For this purpose, special provisions have been made in the POCSO Act as for example Section 28 thereof which provides for the establishment of a Special Court to try offences under the Act. Section 29 of the POCSO Act provides that where a person is prosecuted for committing or abetting or attempting to commit an offence under Section 3 (penetrative sexual assault) or under Section 5 (aggravated penetrative sexual assault) then the Special Court shall presume that such a person has committed or abetted or attempted to commit the offence unless the contrary is proved. Similarly, the procedure and powers of a Special Court have been delineated in Section 33 of the POCSO Act and this section provides for not only a child friendly atmosphere in the Special Court but also child friendly procedures, some of which are given in subsequent sections of the statute. Once again the legislative slant is in favour of a child thereby giving substantive meaning to Article 15(3) of the Constitution.

22. However, of much greater importance and significance is Section 42-A of the POCSO Act. This section provides that the provisions of the POCSO Act are in addition to and not in derogation of the provisions of any other law in force which includes the IPC. Moreover, the section provides that in the event of any inconsistency between the provisions of the POCSO Act and any other law, the provisions of the POCSO Act shall have overriding effect. It follows from this that even though the IPC decriminalizes the marital rape of a girl child, the husband of the girl child would nevertheless be liable for punishment under the provisions of the POCSO Act for aggravated penetrative sexual assault.

23. Prima facie it might appear that since rape is an offence under the IPC (subject to Exception 2 to Section 375) while penetrative sexual assault or aggravated penetrative sexual assault is an offence under the POCSO Act and both are distinct and separate statutes, therefore there is no inconsistency between the provisions of the IPC and the provisions of the POCSO Act. However the fact is that there is no real distinction between the definition of rape under the IPC and the definition of penetrative sexual assault under the POCSO Act. There is also no real distinction between the rape of a married girl child and aggravated penetrative sexual assault punishable under Section 6 of the POCSO Act. Additionally, the punishment for the respective offences is the same, except that the marital rape of a girl child between 15 and 18 years of age is not rape in view of Exception 2 to Section 375 of the IPC. In sum, marital rape of a girl child is effectively nothing but aggravated penetrative sexual assault and there is no reason why it should not be punishable under the provisions of the IPC. Therefore, it does appear that only a notional or linguistic distinction is sought to be made between rape and penetrative sexual assault and rape of a married girl child and aggravated penetrative sexual assault. There is no rationale for this distinction and it is nothing but a completely arbitrary and discriminatory distinction.

Harmonious and purposive interpretation

24. The entire issue of the interpretation of the JJ Act, the POCSO Act, the PCMA and Exception 2 to Section 375 of the IPC can be looked at from yet another perspective, the perspective of purposive and harmonious construction of statutes relating to the same subject matter. Long ago, it was said by Lord Denning that when a defect appears, a judge cannot fold his hands and blame the draftsman but must also consider the social conditions and give force and life to the intention of the Legislature. It was said in Seaford Court Estates Ltd. v. Asher[3] that:

"A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature."

Implementation of laws

25. The Preamble to our Constitution brings out our commitment to social justice, but unfortunately, this petition clearly brings out that social justice laws are not implemented in the spirit in which they are enacted by Parliament. Young girls are married in thousands in the country, and as Section 13 of the PCMA indicates, there is an auspicious day – Akshaya Trutiya - when mass child marriages are performed. Such young girls are subjected to sexual intercourse regardless of their health, their ability to bear children and other adverse social, economic and psychological consequences. Civil society can do just so much for preventing such child marriages but eventually it is for the Government of India and the State Governments to take proactive steps to prevent child marriages so that young girls in our country can aspire to a better and healthier life. We hope the State realizes and appreciates this.

Conclusion

26. On a complete assessment of the law and the documentary material, it appears that there are really five options before us: (i) To let the incongruity remain as it is – this does not seem a viable option to us, given that the lives of thousands of young girls are at stake; (ii) To strike down as unconstitutional Exception 2 to Section 375 of the IPC – in the present case this is also not a viable option since this relief was given up and no such issue was raised; (iii) To reduce the age of consent from 18 years to 15 years – this too is not a viable option and would ultimately be for Parliament to decide; (iv) To bring the POCSO Act in consonance with Exception 2 to Section 375 of the IPC – this is also not a viable option since it would require not only a retrograde amendment to the POCSO Act but also to several other pro-child statutes; (v) To read Exception 2 to Section 375 of the IPC in a purposive manner to make it in consonance with the POCSO Act, the spirit of other pro-child legislations and the human rights of a married girl child. Being purposive and harmonious constructionists, we are of opinion that this is the only pragmatic option available. Therefore, we are left with absolutely no other option but to harmonize the system of laws relating to children and require Exception 2 to Section 375 of the IPC to now be meaningfully read as: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape." It is only through this reading that the intent

3 [1949] 2 K.B. 481 affirmed in [1950] A.C. 508

of social justice to the married girl child and the constitutional vision of the framers of our Constitution can be preserved and protected and perhaps given impetus.

27. We make it clear that we have not at all dealt with the larger issue of marital rape of adult women since that issue was not raised before us by the petitioner or the intervener.

28. We express our gratitude to Mr. Gaurav Agrawal, Advocate and Ms. Jayna Kothari, Advocate for the effort that they have put in and the able assistance that they have given us for the purpose of deciding this case.

Hon'ble Mr. Justice Deepak Gupta :—

1. I have gone through the extremely erudite and well written judgment of my learned brother Lokur, J.. I fully agree with both the reasoning given by him and the conclusions arrived at. However, I am expressing my own views in this separate concurring judgment wherein I have given some other reasons while reaching the same conclusion.

WHETHER EXCEPTION 2 TO SECTION 375 IPC IS ARBITRARY?

62. Before dealing with this issue, it would be necessary to point out that earlier there was divergence of opinion as to whether a law could be struck down only on the ground that it was arbitrary. In Indira Nehru Gandhi v. Raj Narain[4] the Court struck down clauses 4 and 5 of Article 329A of the Constitution on the ground of arbitrariness. Reliance was placed on the celebrated judgment of this Court passed in the case of Keshavananda Bharati v. State of Kerala[5]. In Para 681 of Raj Narain (supra), Chandrachud J., held as follows:

"681. It follows that clauses (4) and (5) of Article 329A are arbitrary and are calculated to damage or destroy the rule of law. Imperfections of language hinder a precise definition of the rule of law as of the definition of 'law' itself. And the Constitutional Law of 1975 has undergone many changes since A.V. Dicey, the great expounder of the rule of law, delivered his lectures as Vinerian Professor of English Law at Oxford, which were published in 1885 under the title, "Introduction to the Study of the Law of the Constitution". But so much, I suppose, can be said with reasonable certainty that the rule of law means that the exercise of powers of government shall be conditioned by law and that subject to the exceptions to the doctrine of equality, no one shall be exposed to the arbitrary will of the Government. Dicey gave three meanings to rule of law: Absence of arbitrary power, equality before the law or the equal subjection of all classes to the ordinary law of the land administered by ordinary law courts and that the Constitution is not the source but the consequence of the rights of individuals, as defined and enforced by the courts……."

63. The aforesaid case was one of the first cases in which a law was set aside on the ground of being arbitrary. In E.P. Royappa v. State of Tamil Nadu[6] the doctrine of arbitrariness was further expanded. Bhagwati, J., eruditely explained the principle in the following terms.

"85.....From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that

4 1975 (Supp.) SCC 1
5 (1973) 4 SCC 225.
6 (1974) 4 SCC 3

it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16."

64. The doctrine developed in Royappa's case (supra) was further advanced in the case of Maneka Gandhi v. Union of India[7]. In this case, the test of reasonableness was introduced and it was held that a law which is not "right, just and fair" is arbitrary. The following observations are apposite:-

"7.....The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied."

65. This principle was followed in the cases of A.L. Kalra v. Project and Equipment Corpn.[8], Babita Prasad v. State of Bihar[9], Ajay Hasia v. Khalid Mujib Sehravardi[10] and Dr. K.R. Lakshmanan v. State of Tamil Nadu[11]. In the case of Ajay Hasia (supra), a Constitution Bench of this Court held as follows:

"16.....Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an 'authority' under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution."

66. In State of A.P. v. McDowell & Co.[12], a three-Judge Bench of this Court struck a discordant note and rejected the plea of the Amending Act being arbitrary. The Court held that an enactment could be struck down if it is being challenged as violative of Article 14 only if it is found that it is violative of equality clause, equal protection clause or violative of fundamental rights. The Court went on to hold that an enactment cannot be stuck down only on the ground that the Court thinks that it is unjustified. This judgment need not detain us for long because in Shayara Bano v. Union of India & Ors.[13] popularly known as the "Triple Talaq case", this Court held that this judgment did not take note of binding judgments of this Court passed by a Constitution Bench, in the case of Ajay Hasia (supra) and a three-Judge Bench in the case of Dr.K.R. Lakshmanan

7 (1978) 1 SCC 248
8 (1984) 3 SCC 316,
9 1993 Supp (3) SCC 268
10 (1981) 1 SCC 722
11 (1996) 2 SCC 226
12 (1996) 3 SCC 709
13 WP(C) No.118/2016 and connected matters [(2017) Vol. 8 SCALE 178]

(supra). After discussing the entire law on the subject, Nariman, J., in his judgment held as follows:

> *"It is, therefore, clear from a reading of even the aforesaid two Constitution Bench judgments that Article 14 has been referred to in the context of the constitutional invalidity of statutory law to show that such statutory law will be struck down if it is found to be "arbitrary".*
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> *xxx xxx xxx*
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> *"55.....The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."*

Therefore, there can be no dispute that a law can be struck down if the Court find it is arbitrary and falls foul of Article 14 and other fundamental rights.

67. In this case, we are concerned mainly with Article 14 and 21 of the Constitution of India. The legislative history given above clearly indicates that a child has universally been defined as a person below 18 years of age in all the enactments. This has been done for the reason that it is perceived that a person below the age of 18 years is not fully developed and does not know the consequences of his/her actions. Not only is a person below the age of 18 years treated to be a child, but is also not even entitled to deal with his property, enter into a contract or even vote.

68. The fact that child marriage is an abhorrent practice and is violative of human rights of the child is not seriously disputed by the Union of India. The only justification given is that since a large number of child marriages are taking place, it would not be proper to criminalize the consummation of such child marriages. It is urged that, keeping in view age old traditions and evolving social norms, the practice of child marriage cannot be wished away and, therefore, legislature in its wisdom has thought it fit not to criminalize the consummation of such child marriages.

69. I am not impressed with the arguments raised by the Union of India. Merely because something is going on for a long time is no ground to legitimise and legalise an activity which is per se illegal and a criminal offence. No doubt, it is totally within the realm of Parliament to decide what should be the age of consent under clause Sixthly of Section 375 IPC. It is also within the domain of the Parliament to decide what should be the minimum age of marriage. The Parliament has decided in both the enactments that a girl below 18 years is not capable of giving consent to have sex and legally she cannot marry. Parliament has also, in no uncertain terms, prohibited child marriage and come to the conclusion that child marriage is an activity which must come to an end. If that be so, can the practice of child marriage which is admittedly "an evil", and is also a criminal offence be set up as an exception in a case of a girl child, who is subjected to sexual intercourse by her so called husband. Shockingly, even if this sexual intercourse is forcible and

without the consent of the girl child, then also the husband is not liable for any offence. This law is definitely not right, just and fair and is, therefore, arbitrary.

70. There can be no dispute that every citizen of this country has the right to get good healthcare. Every citizen can expect that the State shall make best endeavours for ensuring that the health of the citizen is not adversely affected. By now it is well settled by a catena of judgments of this Court that the "right to life" envisaged in Article 21 of the Constitution of India is not merely a right to live an animal existence. This Court has repeatedly held that right to life means a right to live with human dignity. Life should be meaningful and worth living. Life has many shades. Good health is the raison d'etre of a good life. Without good health there cannot be a good life. In the case of a minor girl child good health would mean her right to develop as a healthy woman. This not only requires good physical health but also good mental health. The girl child must be encouraged to bloom into a healthy woman. The girl child must not be deprived of her right of choice. The girl child must not be deprived of her right to study further. When the girl child is deprived of her right to study further, she is actually deprived of her right to develop into a mature woman, who can earn independently and live as a self sufficient independent woman. In the modern age, when we talk of gender equality, the girl child must be given equal opportunity to develop like a male child. In fact, in my view, because of the patriarchal nature of our society, some extra benefit must be showered upon the girl child to ensure that she is not deprived of her right to life, which would include her right to grow and develop physically, mentally and economically as an independent self sufficient female adult.

71. It is true that at times the State, because of paucity of funds, or other reasons beyond its control, cannot live up to the expectations of the people. At the same time, it is not expected that the State should frame a law, which adversely affects the health of a citizen, that too a minor girl child. The State, under Article 15 of the Constitution, is in fact, empowered to make laws favouring women. Reservation for women is envisaged under Article 15 of the Constitution. In Vishakha v. State of Rajasthan[14], this Court held that sexual harassment of working women amounts to violation of the rights guaranteed by Articles 14, 15 and 23 of the Constitution.

72. When a girl is compelled to marry before she attains the age of 18 years, her health is put in serious jeopardy. As is evident from various reports referred to above, girls who were married before the age of 19 years are likely to suffer medical and psychological problems. A 15 or 16 year old girl, when forcibly subjected to sexual intercourse by her "husband", undergoes a trauma, which her body and mind is not ready to face. The girl child is also twice as more likely to die in child birth than a grown up woman. The least, that one would expect in such a situation, is that the State would not take the defence of tradition and sanctity of marriage in respect of girl child, which would be totally violative of Article 14, 15 and 21 of the Constitution. Therefore, this Court is of the view that Exception 2 to Section 375 IPC is arbitrary since it is violative of the principles enshrined in Article 14, 15 and 21 of the Constitution of India.

73. Approaching this aspect from another angle. As is evident from various reports filed in this case, child marriages are not restricted to girls aged above 15 years. Even as per the National Plan of Action for Children, 2016 prepared by the Ministry of Women and Child Development, Government of India, 30.3% marriages i.e. almost 1 in every 3 marriage takes place in violation of the PCMA. Many of these relate to child brides aged less than 15 years. A girl may be married when she is 3-4 years or may be 10-11 years old. She may be sent to her matrimonial home on

14 (1997) 6 SCC 241

attaining the age of puberty, which may be well before she attains the age of 15 years. In such an eventuality, what is the reason for fixing the magic figure of 15 years. This figure had relevance when under the criminal law and the marriage laws the age was similar. In the year 1940, the age of consent was 16 years, the age of marriage was 15 years and the age under the exception was also 15 years; in 1975, the age of consent was 16 years, the age of marriage was 18 years, but the age under the exception remained 15 years. That may have been there because there was no change in the age of consent under Clause Sixthly. Now when the age of consent is changed to 18 years, the minimum age of marriage is also 18 years and, therefore, fixing a lower age under Exception 2 is totally irrational. It strikes against the concept of equality. It violates the right of fair treatment of the girl child, who is unable to look after herself. The magic figure of 15 years is not based on any scientific evaluation, but is based on the mere fact that it has been existing for a long time. The age of 15 years in Exception 2 was fixed in the year 1940 when the minimum age for marriage was also 15 and the age of consent under clause Sixthly was 16. In the present context when the age for marriage has been fixed at 18 years and when the age of consent is also fixed at 18 years, keeping the age under Exception 2 at 15 years, cannot be said to be right, just and fair. In fact, it is arbitrary and oppressive to the girl child.

74. Law cannot be hidebound and static. It has to evolve and change with the needs of the society. Recognising these factors, the Parliament increased the minimum age for marriage. The Parliament also increased the minimum age of consent but the inaction in raising the age in Exception 2 is by itself an arbitrary non-exercise of power. When the age was being raised in all other laws, the age under Exception 2 should also have been raised to bring it in line with the evolving laws especially the laws to protect women and the girl child aged below 18 years. Therefore, I have no hesitation in holding that the Exception 2, in so far as it relates to the girl child below eighteen years, is unreasonable, unjust, unfair and violative of the rights of the girl child. To that extent the same is arbitrary and liable to be set aside.

WHETHER EXCEPTION 2 TO SECTION 375 IPC IS DISCRIMINATORY?

75. There can be no dispute that a law can be set aside if it is discriminatory. Some elements of discrimination have already been dealt with while dealing with the issue of arbitrariness. However, there are certain other aspects which make Exception 2 to Section 375 IPC in so far as it deals with the girl child totally discriminatory. The law discriminates between a girl child aged less than 18 years, who may be educated and has sexual intercourse with her consent and a girl child who may be married even before the age of 15 years, but her marriage has been consummated after 15 years even against her consent. This is invidious discrimination which is writ large. The discrimination is between a consenting girl child, who is almost an adult and non-consenting child bride. To give an example, if a girl aged 15 years is married off by her parents without her consent and the marriage is consummated against her consent, then also this girl child cannot file a criminal case against her husband. The State is talking of the reality of the child marriages. What about the reality of the rights of the girl child? Can this helpless, underprivileged girl be deprived of her rights to say 'yes' or 'no' to marriage? Can she be deprived of her right to say 'yes' or 'no' to having sex with her husband, even if she has consented for the marriage? In my view, there is only one answer to this and the answer must be a resounding "NO". While interpreting such a law the interpretation which must be preferred is the one which protects the human rights of the child, which protects the fundamental rights of the child, the one which ensures the

good health of the child and not the one which tries to say that though the practice is "evil" but since it is going on for a long time, such "criminal" acts should be decriminalised.

76. The State is entitled and empowered to fix the age of consent. The State can make reasonable classification but while making any classification it must show that the classification has been made with the object of achieving a certain end. The classification must have a reasonable nexus with the object sought to be achieved. In this case the justification given by the State is only that it does not want to punish those who consummate their marriage. The stand of the State is that keeping in view the sanctity attached to the institution of marriage, it has decided to make a provision in the nature of Exception 2 to Section 375 IPC. This begs the question as to why in this exception the age has been fixed as 15 years and not 18 years. As pointed out earlier, a girl can legally consent to have sex only after she attains the age of 18 years. She can legally enter into marriage only after attaining the age of 18 years. When a girl gets married below the age of 18 years, the persons who contract such a marriage or abet in contracting such child marriage, commit a criminal offence and are liable for punishment under the PCMA. In view of this position there is no rationale for fixing the age at 15 years. This age has no nexus with the object sought to be achieved viz., maintaining the sanctity of marriage because by law such a marriage is not legal. It may be true that this marriage is voidable and not void ab initio (except in the State of Karnataka) but the fact remains that if the girl has got married before the age of 18 years, she has right to get her marriage annulled. Irrespective of the fact that the right of the girl child to get her marriage annulled, it is indisputable that a criminal offence has been committed and other than the girl child, all other persons including her husband, and those persons who were involved in getting her married are guilty of having committed a criminal act. In my opinion, when the State on the one hand, has, by legislation, laid down that abetting child marriage is a criminal offence, it cannot, on the other hand defend this classification of girls below 18 years on the ground of sanctity of marriage because such classification has no nexus with the object sought to be achieved. Therefore, also Exception 2 in so far as it relates to girls below 18 years is discriminatory and violative of Article 14 of the Constitution.

77. One more ground for holding that Exception 2 to Section 375 IPC is discriminatory is that this is the only provision in various penal laws which gives immunity to the husband. The husband is not immune from prosecution as far as other offences are concerned. Therefore, if the husband beats a girl child and has forcible sexual intercourse with her, he may be charged for offences under Sections 323, 324, 325 IPC etc. but he cannot be charged with rape. This leads to an anomalous and astounding situation where the husband can be charged with lesser offences, but not with the more serious offence of rape. As far as sexual crimes against women are concerned, these are covered by Sections 354, 354A, 354B, 354C, 354D of the IPC. These relate to assault or use of criminal force against a woman with intent to outrage her modesty; sexual harassment and punishment for sexual harassment; assault or use of criminal force to woman with W.P. (C) No. 382 of 2013 Page 120 intent to disrobe; voyeurism; and stalking respectively. There is no exception clause giving immunity to the husband for such offences. The Domestic Violence Act will also apply in such cases and the husband does not get immunity. There are many other offences where the husband is either specifically liable or may be one of the accused. The husband is not given the immunity in any other penal provision except in Exception 2 to Section 375 IPC. It does not stand to reason that only for the offence of rape the husband should be granted such an immunity especially where the "victim wife" is aged below 18 years i.e. below the legal age of

marriage and is also not legally capable of giving consent to have sexual intercourse. Exception 2 to Section 375 IPC is, therefore, discriminatory and violative of Article 14 of the Constitution of India, on this count also.

78. The discrimination is absolutely patent and, therefore, in my view, Exception 2, in so far as it relates to the girl child between 15 to 18 years is not only arbitrary but also discriminatory, against the girl child.

LAW IN CONFLICT WITH POCSO

79. Another aspect of the matter is that the POSCO was enacted by Parliament in the year 2012 and it came into force on 14th November, 2012. Certain amendments were made by Criminal Law Amendment Act of 2013, whereby Section 42 and Section 42A, which have been enumerated above, were added. It would be pertinent to note that these amendments in POCSO were brought by the same Amendment Act by which Section 375, Section 376 and other sections of IPC relating to crimes against women were amended. The definition of rape was enlarged and the punishment under Section 375 IPC was made much more severe. Section 42 of POCSO, as mentioned above, makes it clear that where an offence is punishable, both under POCSO and also under IPC, then the offender, if found guilty of such offence, is liable to be punished under that Act, which provides for more severe punishment. This is against the traditional concept of criminal jurisprudence that if two punishments are provided, then the benefit of the lower punishment should be given to the offender. The legislature knowingly introduced Section 42 of POCSO to protect the interests of the child. As the objects and reasons of the POCSO show, this Act was enacted as a special provision for protection of children, with a view to ensure that children of tender age are not abused during their childhood and youth. These children were to be protected from exploitation and given facilities to develop in a healthy manner. When a girl is married at the age of 15 years, it is not only her human right of choice, which is violated. She is also deprived of having an education; she is deprived of leading a youthful life. Early marriage and consummation of child marriage affects the health of the girl child. All these ill effects of early marriage have been recognised by the Government of India in its own documents, referred to hereinabove.

80. Section 42A of POCSO has two parts. The first part of the Section provides that the Act is in addition to and not in derogation of any other law. Therefore, the provisions of POCSO are in addition to and not above any other law. However, the second part of Section 42A provides that in case of any inconsistency between the provisions of POCSO and any other law, then it is the provisions of POCSO, which will have an overriding effect to the extent of inconsistency. POCSO defines a child to be a person below the age of 18 years. Penetrative sexual assault and aggravated penetrative sexual assault have been defined in Section 3 and Section 5 of POCSO. Provisions of Section 3 and 5 are by and large similar to Section 375 and Section 376 of IPC. Section 3 of the POCSO is identical to the opening portion of Section 375 of IPC whereas Section 5 of POCSO is similar to Section 376(2) of the IPC. Exception 2 to Section 375 of IPC, which makes sexual intercourse or acts of consensual sex of a man with his own "wife" not being under 15 years of age, not an offence, is not found in any provision of POCSO. Therefore, this is a major inconsistency between POCSO and IPC. As provided in Section 42A, in case of such an inconsistency, POCSO will prevail. Moreover, POCSO is a special Act, dealing with the children whereas IPC is the general criminal law. Therefore, POCSO will prevail over IPC and Exception 2 in so far as it relates to children, is inconsistent with POCSO.

IS THE COURT CREATING A NEW OFFENCE?

81. One of the doubts raised was if this Court strikes down, partially or fully, Exception 2 to Section 375 IPC, is the Court creating a new offence. There can be no cavil of doubt that the Courts cannot create an offence. However, there can be no manner of doubt that by partly striking down Section 375 IPC, no new offence is being created. The offence already exists in the main part of Section 375 IPC as well as in Section 3 and 5 of POCSO. What has been done is only to read down Exception 2 to Section 375 IPC to bring it in consonance with the Constitution and POCSO.

82. In this behalf, reference may be made to some English decisions. In England, there was never any such statutory exception granting immunity to the husband from the offence of marital rape. However, Sir Mathew Hale, who was Chief Justice of England for five years prior to his death in 1676, was credited with having laid down the following principle:

> *"But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract."*

83. The aforesaid principle, commonly known as Hale's principle, was recorded in the History of the Pleas of the Crown[15] and was followed in England for many years. Under Hale's principle a husband could not be held guilty of raping his wife. This principle was based on the proposition that the wife gives up her body to her husband at the time of marriage. Women, at that time, were considered to be chattel. It was also presumed that on marriage, a woman had given her irrevocable consent to have sexual intercourse with her husband.

84. The aforesaid principle was followed in England for more than two centuries. For the first time in Reg v. Clarence[16], some doubts were raised by Justice Wills with regard to this proposition. In Rex v. Clarke[17], Hale's principle was given the burial it deserved and it was held that the husband's immunity as expounded by Hale, no longer exists. Dealing with the creation of new offence, the House of Lords held as follows:

> *"The remaining and no less difficult question is whether, despite that view, this is an area where the court should step aside to leave the matter to the Parliamentary process. This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it."*

85. In my view, as far as this case is concerned, this Court is not creating any new offence but only removing what was unconstitutional and offensive.

THE PRIVACY DEBATE

86. Ms. Jayna Kothari, learned counsel for the Intervener, had raised the issue of privacy and made reference to the judgment of this Court in the case of Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India and Ors.[18] to urge that the right of privacy of the girl child is also violated by Exception 2 to Section 375 IPC. I have purposely not gone into this aspect of the matter because anything said or urged in this behalf would affect any case being argued on "marital rape" even

15 (1736), Vol. 1, Ch. 58, P. 629
16 (1888) 22 Q.B.D. 23
17 (1949) 2 All E.R. 448
18 (2017) 10 SCALE 1

in relation to "women over 18 years of age". In this case, the issue raised is only with regard to the girl child and, therefore, I do not think it proper to deal with this issue which may have wider ramifications especially when the case of girl child can be decided without dealing with the issue of privacy.

RELIEF

87. Since this Court has not dealt with the wider issue of "marital rape", Exception 2 to Section 375 IPC should be read down to bring it within the four corners of law and make it consistent with the Constitution of India.

88. In view of the above discussion, I am clearly of the opinion that Exception 2 to Section 375 IPC in so far as it relates to a girl child below 18 years is liable to be struck down on the following grounds:–

(i) it is arbitrary, capricious, whimsical and violative of the rights of the girl child and not fair, just and reasonable and, therefore, violative of Article 14, 15 and 21 of the Constitution of India;

(ii) it is discriminatory and violative of Article 14 of the Constitution of India and;

(iii) it is inconsistent with the provisions of POCSO, which must prevail.

Therefore, Exception 2 to Section 375 IPC is read down as follows:

"Sexual intercourse or sexual acts by a man with his own wife, the wife not being 18 years, is not rape".

It is, however, made clear that this judgment will have prospective effect.

89. It is also clarified that Section 198(6) of the Code will apply to cases of rape of "wives" below 18 years, and cognizance can be taken only in accordance with the provisions of Section 198(6) of the Code.

90. At the cost of repetition, it is reiterated that nothing said in this judgement shall be taken to be an observation one way or the other with regard to the issue of "marital rape".

91. Extremely valuable assistance was rendered to this Court by Mr. Gaurav Agarwal, learned counsel appearing for the petitioner and Ms. Jayna Kothari, learned counsel appearing for the intervener and I place on record my appreciation and gratitude for the same.

.....J.
(DEEPAK GUPTA)

New Delhi, October 11, 2017

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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

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